LIST OF EXHIBITS

Exhibit No.	Description
EXHIBITS	
C-89	ICANN Annual Report for FY2019
C-90	ICANN, Remuneration Practices - FY2020 (as of 1 July 2019)
C-91	CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016)
C-92	ICANN Documentary Information Disclosure Policy (25 Feb. 2012), *available at* https://www.icann.org/resources/pages/didp-2012-02-25-en (last accessed 4 May 2020)
C-93	Verisign, "The Verisign Domain Report," 17(1) *Domain Name Industry Brief* (Mar. 2020)
C-94	Domain Name Stat, Domain name registrations in Country TLDs, *available at* https://domainnamestat.com/statistics/tldtype/country (last accessed 1 May 2020)
C-95	*Webster's New Universal Unabridged Dictionary* (2d ed. 1983)
C-96	Emails from J. Erwin (ICANN) to J. Rasco (NDC) (27 June 2016)
C-97	Letter from P. Livesay (Verisign) to J. Rasco (NDC) (26 July 2016)
C-98	Email from Domain Name Wire to ICANN Ombudsman (28 July 2016)
C-99	Email from Google Alerts to C. Willett (ICANN) (28 July 2016)
C-100	Emails from J. Rasco (NDC) to C. Willett (ICANN) (*various dates*)
C-101	Email from H. Waye (ICANN Ombudsman) to S. Hemphill (Afilias) (19 Sep. 2016)
C-102	Letter from R. Johnston (Arnold & Porter) to E. Enson (Jones Day) (23 Aug. 2016)
C-103	Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (9 Sep. 2016)
C-104	*Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Complaint (22 July 2016)
C-105	*Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Amended Complaint (8 Aug. 2016)
C-106	*Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Civil Minutes Supporting Judgment on Motion to Dismiss (28 Nov. 2016)
C-107	*Ruby Glen, LLC v. ICANN*, Case No. 16-56890 (9th Cir. 2018), Memorandum Order
C-108	ICANN, Cooperative Engagement and Independent Review Processes, Status Update (8 Aug. 2016)
C-109	Letter from Ronald Johnston (Counsel for Verisign) to Christine Willett (ICANN) (7 Oct. 2016)
C-110	Email and attachment from Jose Ignacio Rasco (Nu Dotcom LLC) to Christine Willett (ICANN) (10 Oct. 2016)
C-111	Letter from A. Ali (Counsel for Afilias) to ICANN Board (21 Dec. 2018)

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C-112	Letter from A. Ali (Counsel for Afilias) to ICANN (1 Apr. 2019)
C-113	Letter from A. Ali (Counsel for Afilias) to ICANN Board (16 Apr. 2018)
C-114	Letter from A. Ali (Counsel for Afilias) to J. LeVee (Counsel for ICANN) (1 May 20018)
C-115	Email J. Hooper (Verisign) to K. Hakansson (ICANN) (17 Jan. 2018)
C-116	Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988)
C-117	U.S. Department of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Law Section Fall Forum (Washington, DC, 16 Nov. 2017), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar (last accessed 28 Apr. 2020)
C-118	*Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 19-1397 (4th Cir. 2019), Brief for the United States of America as Amicus Curiae in Support of Appellee Steves and Sons, Inc. (23 Aug. 2019)
C-119	*Steves & Sons, Inc. v. JELD-WEN, Inc.*, Case 3:16-cv-00545-REP (E.D. VA.), Statement of Interest of the United States of America Regarding Equitable Relief (6 June 2018)
C-120	Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afilias) (18 Dec. 2018)
C-121	ICANN, Cooperative Engagement Process - Request for Independent Review (11 Apr. 2013)
C-122	CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016)
C-123	P. Livesay, "Afilias' Cynical Attempt to Secure a Windfall at Community Expense," *CircleID Blog* (7 Nov. 2016), *available at* http://www.circleid.com/posts/20161107_afilias_cynical_attempt_to_secure_a_windfall_at_community_e (last accessed 12 July 2018)
C-124	A. Allemann, "Afilias plans to file IRP to halt .Web," *Domain Name Wire* (24 Apr. 2018), *available at* https://domainnamewire.com/2018/04/24/afilias-plans-to-file-irp-to-halt-web/ (last accessed 13 Apr. 2020)
LEGAL AUTHORITIES	
CA-15	*DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50 2013 001083, Final Declaration (9 July 2015)
CA-16	*Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-0002-9938, Final Declaration (17 Oct. 2016)
CA-17	*Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Partial Final Declaration of the Independent Review Process Panel (19 Oct. 2016)
CA-18	*Dot Sport Ltd. v. ICANN*, ICDR Case No. 01-15-0002-9483, Final Declaration (31 Jan. 2017)
CA-19	*De Haviland v. Warner Bros. Pictures*, 67 Cal. App. 2d 225 (1944)
CA-20	*Woolls v. Superior Court*, 127 Cal. App. 4th 197 (2005)

Exhibit No.	Description
CA-21	*Sustainability, Parks, Recycling & Wildlife Def. Fund v. Dep't of Res. Recycling & Recovery*, 34 Cal. App. 5th 676 (Ct. App. 2019), as modified (Apr. 22, 2019)
CA-22	Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 18232
CA-23	U.N. Conference on the Law of Treaties, 13th Plenary Meeting, U.N. Doc. A/CONF.39/SR.13 (6 May 1969)
CA-24	*Fisheries Case (United Kingdom v. Norway)*, Judgment, 1951 ICJ Rep. 116 (*excerpt*)
CA-25	*Nottebohm Case (Liechtenstein v. Guatemala) (Preliminary Objections)*, Judgement, 1953 I.C.J. Rep. 111 (*excerpt*)
CA-26	*Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, 1988 I.C.J. Rep. 12 (*excerpt*)

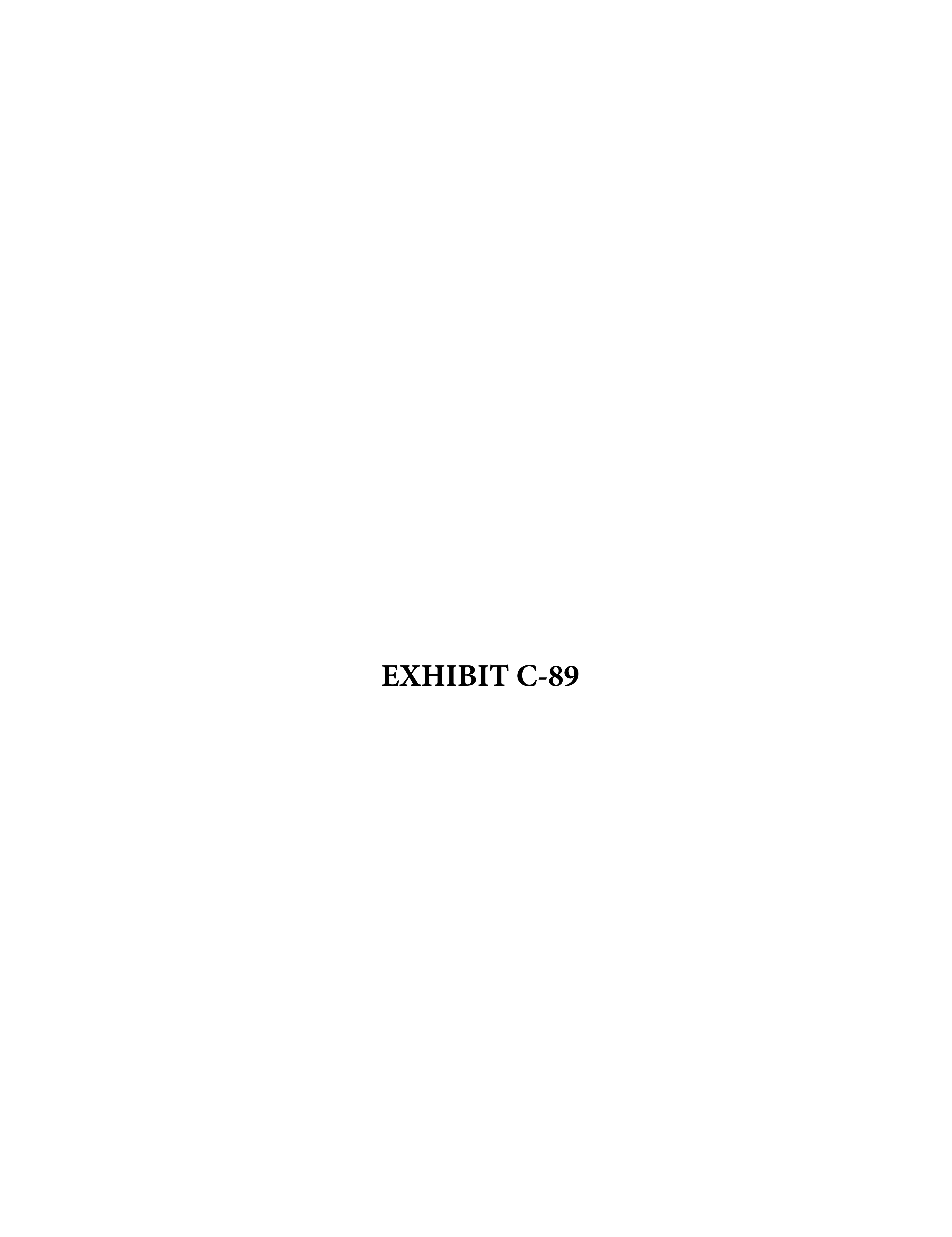

EXHIBIT C-89

Ex. C-89

ANNUAL REPORT

1 JULY 2018-30 JUNE 2019

ONE WORLD, ONE INTERNET

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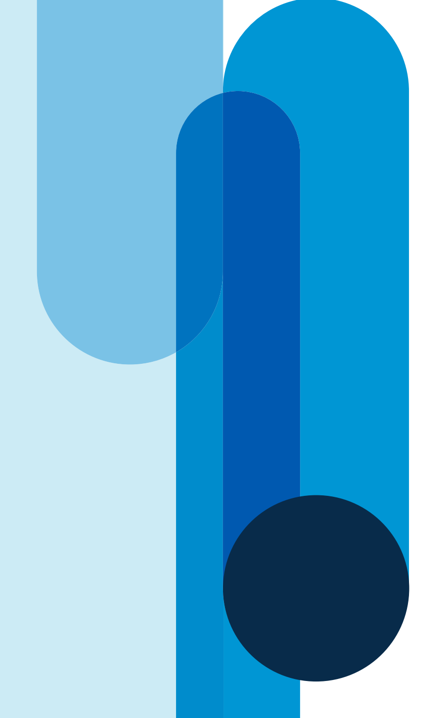


ABOUT ICANN

ICANN's MISSION is to help ensure a stable, secure, and unified global Internet. To reach another person on the Internet, you need to type an address – a name or a number – into your computer or other device. That address must be unique so computers know where to find each other. ICANN helps coordinate and support these unique identifiers across the world. ICANN was formed in 1998 as a not-for-profit public-benefit corporation with a community of participants from all over the world.

ICANN's VISION is that of an independent, global organization trusted worldwide to coordinate the global Internet's systems of unique identifiers to support a single, open globally interoperable Internet. ICANN builds trust through serving the public interest, and incorporating the transparent and effective cooperation among stakeholders worldwide to facilitate its coordination role.

COMMITMENTS AND CORE VALUES

In performing its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, each as described below.

From the Bylaws for the Internet Corporation for Assigned Names and Numbers

As amended 22 July 2017

(a) COMMITMENTS

In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN commits to do the following (each, a "Commitment," and collectively, the "Commitments").

i. Preserve and enhance the administration of the DNS and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.

ii. Maintain the capacity and ability to coordinate the DNS at the overall level and work for the maintenance of a single, interoperable Internet.

iii. Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination.

iv. Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process.

v. Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties).

vi. Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.

(b) CORE VALUES

In performing its Mission, the following "Core Values" should also guide the decisions and actions of ICANN:

i. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies.

ii. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.

iii. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market.

iv. Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.

v. Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community.

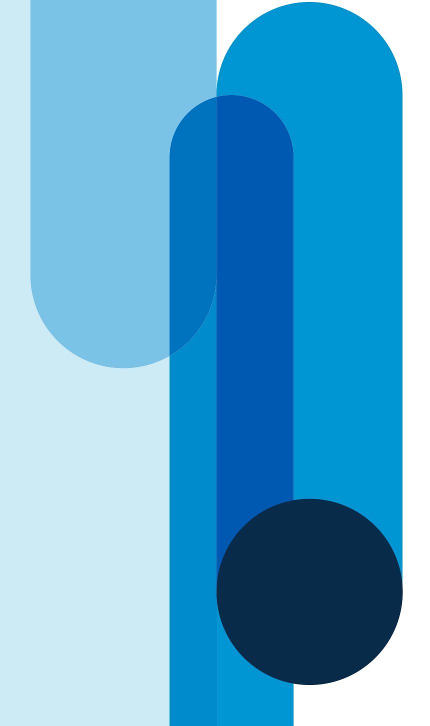
vi. While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities.

vii. Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture.

viii. Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.

The Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities. The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission.

READ MORE about ICANN Bylaws.



ANNUAL REPORT REQUIREMENT FROM ICANN BYLAWS

The Board shall publish, at least annually, a report describing its activities, including an audited financial statement, a description of any payments made by ICANN to Directors (including reimbursements of expenses) and a description of ICANN's progress toward the obligations imposed under the Bylaws as revised on 1 October 2016 and the Operating Plan and Strategic Plan. ICANN shall cause the annual report and the annual statement of certain transactions as required by the California Corporations Code (CCC) to be prepared and sent to each member of the Board and to such other persons as the Board may designate, no later than one hundred twenty (120) days after the close of ICANN's fiscal year.

READ MORE about ICANN Bylaw Section 22.3 concerning the Annual Report.

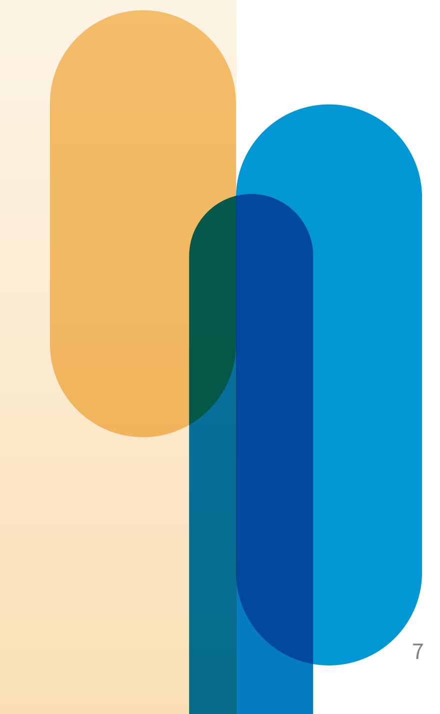
LETTER FROM THE PRESIDENT AND CEO

The ICANN organization supports the ICANN community by facilitating discussions, implementing the community's recommendations at the direction of the ICANN Board, and protecting ICANN as an institution, all in the service of ICANN's Mission and Bylaws. This collaborative, problem-solving approach has been the key to finding the best path forward on many issues over ICANN's 20-year history.

In FY19, I put forward 12 performance goals. All of my goals aimed to improve either the accountability, efficiency, or transparency of ICANN's internal and external operations. These goals include:

- Supporting community efforts to build consensus around a **unified access model** and obtaining guidance from the European Data Protection Board to determine whether such a model would be permissible and compliant with the General Data Protection Regulation.
- With community consultation, creating **an improved process for budget development** that provides more time for real discussions and transparency, and maps to the five-year operating planning and strategic planning process.
- Developing a plan to **anticipate, evaluate, and interact with governments about legislative proposals** that could have an effect on ICANN's ability to set policy.
- Supporting the ICANN community and Board in **the development of the Strategic Plan for fiscal years 2021 to 2025**.
- Developing **Five-Year Operating and Financial Plans** to support the implementation of the strategic plan and ICANN org's ongoing work.
- **Ongoing efforts around the security, stability, and resiliency of the Internet**, including finalizing the strategy for the root server operated by ICANN, recommending an implementation plan for root server governance to the ICANN Board, ensuring a successful Key Signing Key rollover in October 2018, and increasing cooperation with the technical community on the evolution of the Domain Name System (DNS) and improving the security.
- Supporting community and ICANN Board discussions regarding the development and agreement on an **effective and sustainable model for both organizational and specific reviews**.
- Enabling facilitation of a community discussion about **the future of ICANN's multistakeholder model**.

I want to ensure the successful implementation of the strategic plan by evaluating the work we do today, assessing the need and the value of the result, and reprioritizing our efforts where necessary.



Several of my goals focused on internal efficiencies and management. These included:

- Development of an ongoing **human resource plan for the future structure of ICANN org** that addresses issues such as the type of competencies ICANN will need in the future, where should they be located, and how to recruit and retain these competencies.
- Ongoing and continued improvement of the delegation of authority models within ICANN org to **allow internal efficiency gains**, with an eye toward enhancing the effectiveness of ICANN's regional offices.
- Continued efforts to **simplify our portfolio of systems**, including retiring and consolidating systems to increase efficiency and potential cost savings.
- Ensure that **ICANN costs did not exceed funding in FY19**, including a contribution to the reserve fund that was in-line with the Reserve Fund Replenishment Strategy.

For FY20, I have set goals that focus on refining the progress we have made over the last few years: I want to ensure the successful implementation of the strategic plan by evaluating the work we do today, assessing the need and the value of the result, and reprioritizing our efforts where necessary. We must better address DNS ecosystem security risks by establishing and promoting best practices and facilitating communication between ecosystem participants. To prepare for the next round of new gTLDs, we must have the behind-the-scenes processes and management structure in place to be successful. We must improve our processes and seek more community input to better engage with governments.

Internally, ICANN org must continue to simplify our IT systems through platform consolidation, while connecting many of the web services we support for a consistent community experience. We also need to improve our career pathing and collaboration by developing shared best-practice approaches to roles and work practices, which will improve our outcomes and our employees' career satisfaction.

As I look ahead to my fourth year at ICANN, I intend to move from the planning stage to the implementation stage in several of the areas where we have made significant progress toward planning for ICANN's future. Each year, I seek to focus ICANN org on strategic opportunities for improvement. A key element of this process is working with the ICANN Board to set my goals for the next fiscal year. As part of our commitment to accountability and transparency, my goals are public.

ICANN provides a service to the world, and ICANN org has a very specific set of technical jobs that we perform in support of that service. We consistently seek to improve and evolve, to ensure we have one single, secure, stable, and interoperable Internet.

Sincerely,

Göran Marby
President and CEO

READ MORE about the Office of the President & CEO.

READ MORE about Göran Marby's FY20 Goals.

LETTER FROM THE BOARD CHAIR

In the next five years, ICANN will face more external challenges than ever before, such as the rise in cyber sovereignty, the exponential growth in security threats, the rapid evolution of disruptive technologies, and the increasing risks of Internet fragmentation.

The community, the Board, and ICANN org have recognized that these challenges could have a significant impact on ICANN.

Over the past year, we have worked hand-in-hand developing plans to address these challenges and shape ICANN's future.

This Annual Report for fiscal year 2019 is a summary of our performance meeting the objectives outlined in the Strategic Plan for fiscal years 2016 to 2020. A new Strategic Plan for fiscal years 2021 to 2025 was adopted by the Board in June 2019. All of us provided extensive input to this effort, resulting in a renewed vision for ICANN and five new strategic objectives. Our mission remains unchanged.

Our vision for ICANN is to be a champion of the single, open, and globally interoperable Internet, and the trusted steward of its unique identifiers.

Our five strategic objectives are to:

- Strengthen the security of the DNS and the DNS Root Server System.
- Improve the effectiveness of ICANN's multistakeholder model of governance.
- Evolve the unique identifier systems in coordination and collaboration with relevant parties to continue to serve the needs of the global Internet user base.
- Address geopolitical issues impacting ICANN's mission to ensure a single and globally interoperable Internet.
- Ensure ICANN's long-term financial sustainability.

A new Operating and Financial Plan for the same fiscal years is under development. It will contain a work plan for implementing each of the five strategic objectives. ICANN org is leading the development of four of these work plans and the community is leading the development of the fifth work plan "to improve the effectiveness of ICANN's multistakeholder model of governance". All five work plans will come together and form an integral and costed Operating and Financial Plan in December 2019.

Our vision for ICANN is to be a champion of the single, open, and globally interoperable Internet, and the trusted steward of its unique identifiers.

The Operating and Financial Plan will itself be put out for Public Comment by December 2019 and should be adopted by the Board before June 2020. Implementation of these work plans will commence on 1 July 2020, as mandated by our Bylaws.

This holistic approach to strategic, operational, and financial planning will help ensure we have a clear, achievable path to success.

In addition to developing these plans, the ICANN community spent significant time this year addressing the impact of the European Union's General Data Protection Regulation (GDPR) on the WHOIS system. In February 2019, the Expedited Policy Development Process (EPDP) Team on the Temporary Specification for generic top-level domain (gTLD) Registration Data finalized and submitted its Final Report to the Generic Names Supporting Organization (GNSO) Council. The community delivered its consensus policy recommendations under tight and unprecedented deadlines. The community continues to make significant progress on Phase 2 of the EPDP charter. We appreciate the ongoing dedication by everyone in the community working on the EPDP, and on GDPR issues overall, for their efforts to provide a process for how parties with a legitimate interest would access non-public registration data. The Board looks forward to the next steps, consistent with the ICANN Bylaws and ICANN's contractual agreements with contracted parties.

As most of you know, I will retire from the Board at the end of the AGM in Montréal. I was truly privileged and honored to serve on the ICANN Board for the maximum nine years allowed by our Bylaws and I would like to thank profusely everyone that supported me throughout those years.

On behalf of the Board, I want to thank the ICANN community for your participation and hard work. Many of you face a relentless demand on your time. We sincerely appreciate the sacrifices you make and value your dedication and contribution.

Sincerely,

Cherine Chalaby
Chair, Board of Directors

READ MORE about the Board.

HIGHLIGHTS OF THE YEAR

1 July 2018-30 June 2019

HIGHLIGHTS FROM THE ICANN BOARD OF DIRECTORS

WELCOMING NEW ICANN BOARD MEMBERS

In November 2018, the Board seated five new members.

Nigel Roberts was nominated to serve by the Country Code Names Supporting Organization (ccNSO).

The Nominating Committee (NomCom) nominated **Danko Jevtović (left)** and **Tripti Sinha (right)**.

Harald Alvestrand returned to the ICANN Board as non-voting technical liaison to the ICANN Board from the Internet Engineering Task Force (IETF).

Merike Käo was appointed to serve as the non-voting liaison from the Security and Stability Advisory Committee (SSAC).

The ICANN Board also thanked departing members Ram Mohan, George Sadowsky, Mike Silber, Jonne Soininen, and Lousewies van der Laan for their service to the ICANN Board.

In September 2019, the ICANN Board selected **Maarten Botterman (left)** as the next Chair of the ICANN Board following the process outlined in the **Board Governance Committee Practice for Board Engagement in Developing Slate for Board Leadership**. **León Sánchez (right)** was selected as Vice Chair. They will be seated after the formal election, which will take place on 7 November 2019 at ICANN66. These events pertain to FY20, but as in past Annual Reports, we include significant developments that occur after the close of the fiscal and the period before the publication of the Annual Report.

FY19 BOARD PRIORITIES

The ICANN Board

The Board divided its priorities and activities for FY19 into five key areas of responsibilities. The Board used these five "blocks" to organize and think about its work and identified operational priorities for itself, with associated deliverables, timelines, and measurement within each. Within these blocks of responsibilities, the Board's substantive activities are most often community-driven. The Board has also identified operational priorities for itself, with associated deliverables, timelines, and measurements within each block.

Block 1: Oversight over Policy Development and Community Initiatives

- Being well informed of the content, priority, and timing of all policies being developed by the community in order to be prepared to approve these policies when submitted to the Board.
- Responding to Supporting Organization/Advisory Committee (SO/AC) advice on a timely basis.
- Providing timely Board comments to community activities (e.g., PDPs, CCWGs, and Reviews).

Block 2: ICANN Org Oversight

- Ensuring that community-approved policies are implemented in a manner consistent with the adopted policies.
- Overseeing the implementation of significant engineering projects undertaken by the ICANN org.
- Overseeing that ICANN org is delivering operational services to the community both effectively and efficiently.
- Overseeing the development of the annual Operating Plan & Budget.

Block 3: Strategic and Forward Thinking

- Leading the development of ICANN's Five-Year ICANN Strategic Plan and monitoring its implementation.
- Being aware of external forces and trends at work and anticipating how these may affect ICANN and the community.
- Thinking ahead about structural or organizational issues and assessing their impact on ICANN.
- Ensuring that the ICANN org's globalization strategy evolves in furtherance of ICANN's Mission.

Block 4: Governance, Fiduciary and Accountability Responsibilities

- Proficiently handling ICANN's governance and accountability issues.
- Discharging ICANN's fiduciary (legal and financial) responsibilities.
- Monitoring ICANN's risks and mitigation actions.
- Progressing the implementation (and understanding) of changes to the Bylaws.
- Improving Board transparency and effectiveness.
- Working on continuous improvements of both organizational and specific reviews.

Block 5: Community Engagement and External Relationships

- Reaching out and being present in the community during the ICANN Public Meetings as well as in between ICANN Public Meetings.
- Supporting ICANN org in meeting four strategic objectives:
  - **a.** Serving ICANN's stakeholders effectively so that they participate more actively and meaningfully at ICANN.
  - **b.** Attracting new stakeholders globally to meet the needs of a globalized ICANN.
  - **c.** Developing effective relationships with key actors within the global Internet ecosystem, based on an insightful mapping of the roles they play, the dynamic between them, and the type of rapport ICANN wishes to have with each one of them.
  - **d.** Advocating ICANN's Mission and its multistakeholder model of governance within the Internet governance ecosystem.

READ MORE about the 2018 Board Meetings.

READ MORE about the 2019 Board Meetings.

HIGHLIGHTS FROM THE COMMUNITY

EMPOWERED COMMUNITY CONSIDER BUDGETS AND OPERATING PLANS

In March 2019 and May 2019, the Empowered Community had the opportunity to exercise the power to reject the FY20 IANA Budget and the ICANN FY20 Annual Budget and Operating Plan, respectively. No rejection petitions were received and the approved budgets and plans were adopted and went into effect.

READ MORE.

The Empowered Community remains an effective and important part of ICANN's post-IANA stewardship transition commitments to accountability and transparency.

READ MORE about the Empowered Community.

SUPPORTING ORGANIZATIONS AND ADVISORY COMMITTEE (SO/AC) HIGHLIGHTS

ADDRESS SUPPORTING ORGANIZATION (ASO)

ICANN | ASO
Address Supporting Organization

The ASO Address Council (AC) met at ICANN64 where it conducted a joint information session with the IANA Services team, implemented recommendations from its **second Organizational Review**, and completed the selection process for ICANN Board Seat 10. The AC renominated Akinori Maemura to the Board for a three-year term beginning at ICANN66.

READ MORE.

COUNTRY CODE NAMES SUPPORTING ORGANIZATION (ccNSO)

ICANN | ccNSO
Country Code Names Supporting Organization

The ccNSO continued work on recommendations for the retirement of country code top-level domains (ccTLDs) and on Internationalized Domain Name (IDN) ccTLDs. Together with the Security and Stability Advisory Committee (SSAC), the ccNSO provided input and guidance on the introduction of the risk mitigation procedure under the Fast Track process and initiated work to update the proposed overall policy for the selection of IDN ccTLD strings, which will eventually replace the Fast Track process.

During FY19, the ccNSO conducted a review of its meeting strategy that concluded with no change recommendations and initiated its second Organizational Review, with more work scheduled for FY20.

READ MORE.

GENERIC NAMES SUPPORTING ORGANIZATION (GNSO)

ICANN | GNSO
Generic Names Supporting Organization

The GNSO Council's FY19 work resulted in 27 passed resolutions, including:

- Initiation of the Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD Registration Data, adoption of the EPDP Team's Charter, and adoption of the EPDP Phase 1 Final Report and Recommendations.
- Approval of the Final Report and Recommendations 1-4 from the International Governmental Organization and International Non-Governmental Organization (IGO-INGO) Access to Curative Rights Mechanisms Policy Development Process (PDP).
- Referral of Recommendation 5 from the IGO-INGO PDP to the Review of All Rights Protection Mechanisms (RPM) in All gTLDs PDP to consider, as part of its Phase 2 work, whether an appropriate policy solution can be developed that is generally consistent with Recommendations 1-4.
- Approval of the Final Recommendations of the reconvened Protection of IGO-INGO Names in All gTLDs PDP Working Group.
- Termination of the PDP on Next Generation gTLD Registration Directory Service (RDS) to Replace WHOIS.
- Adoption of the GNSO Review Working Group Implementation Final Report.
- Adoption of the PDP 3.0 Final Report and Recommendations to enhance the efficiency and effectiveness of GNSO PDP.

- Adoption of the charter for the GNSO Standing Committee on Budget and Operations on a permanent basis.
- Adoption of the GNSO Council Review of the ICANN62, ICANN63, and ICANN64 Communiqués of the Governmental Advisory Committee (GAC).
- Adoption of the Final Report and Recommendations from the Cross-Community Working Group on Enhancing ICANN Accountability Work Stream 2.
- Confirmation of GNSO Representative to the Empowered Community Administration (ECA).
- Renomination of Becky Burr to Seat 13 on the ICANN Board.
- Reappointment of a GNSO Liaison to the Governmental Advisory Committee (GAC).
- Approval of the revised nomination of GNSO candidates for the third Accountability and Transparency Review (ATRT3).
- Approval of the suggested amendments to the GNSO's Fellowship Selection criteria and nomination of a mentor for the ICANN Fellowship Program.

READ MORE about GNSO achievements.

AT-LARGE ADVISORY COMMITTEE (ALAC)

During FY19, ALAC submitted statements to 34 Public Comment proceedings and consultations related to ICANN policies and issues.

EXPLORE the ALAC Policy Advice Statements.

The At-Large community began development of an updated **ALAC Hot Policy Topics document** in advance of the third At-Large Summit (ATLAS III). The Regional At-Large Organizations (RALOs) will use this to update their respective RALO Hot Policy Topics documents. The At-Large community also organized a series of At-Large policy workshops during ICANN Public Meetings.

READ MORE about ALAC achievements.

GOVERNMENTAL ADVISORY COMMITTEE (GAC)

ICANN | GAC
Governmental Advisory Committee

With the addition of the Lao People's Democratic Republic as an official member, GAC membership reached 178 members and 36 observers. Outreach efforts continue with additional countries and territories.

New GAC Members in FY19

READ MORE.

ROOT SERVER SYSTEM ADVISORY COMMITTEE (RSSAC)

ICANN | RSSAC
Root Server System Advisory Committee

The RSSAC continued its work on evolving the governance of the Root Server System. A key deliverable focused on coming to a consensus on Root Server Operator independence and work continued on defining various metrics that will play a part in future governance mechanisms. Concurrently, the RSSAC implemented recommendations from its second Organizational Review.

READ MORE.

SECURITY AND STABILITY ADVISORY COMMITTEE (SSAC)

ICANN | SSAC
Security and Stability Advisory Committee

The SSAC published several documents related to the security and stability of the Domain Name System (DNS), including: the DNS and the Internet of Things, access to domain name registration data, and the Root Key Signing Key (KSK) Rollover. In FY19, the SSAC completed its second Organizational Review.

READ MORE.

STRATEGIC PLAN

To prepare for the development of its next strategic plan, ICANN org initiated a process to identify internal and external trends that impact its future, mission, or operations. The ICANN community, Board, and ICANN org provided extensive input to this effort. Significant similarities naturally converged into five primary trends: security, ICANN's governance, unique identifier systems, geopolitics, and financials. The impacts of these five primary trends in relation to overarching strategic goals served as input for the development of the new plan. After additional community dialogue, public consultation, and revision of the draft, the Board **adopted** the **ICANN Strategic Plan for fiscal years 2021-2025** in June 2019.

A five-year operating and financial plan detailing how ICANN org will implement the five strategic objectives is now under development. The **development roadmap** was released for Public Comment in June 2019. The draft FY21-25 Operating and Financial Plan will be available for Public Comment in December 2019.

HIGHLIGHTS FROM THE ICANN ORG

RESERVE FUND REPLENISHMENT

The ICANN Reserve Fund is a crucial component in ensuring ICANN's long-term financial accountability, stability, and sustainability. The Reserve Fund was depleted in recent years to cover for exceptional expenses incurred during the IANA stewardship transition (from 2014 to 2018).

Over the past year, ICANN org collaborated with the Board and community to develop a strategy to replenish the Reserve Fund. At ICANN63, the Board approved an eight-year plan to replenish the Reserve Fund to an amount that would equal approximately one year of Operating Expenses.

During this fiscal year, the org has made significant progress in replenishing the Reserve Fund and is tracking ahead of the replenishment plan approved by the Board. At the end of the fiscal year (30 June 2019), the balance in the Reserve Fund was USD $116 million which is an increase of $47 million as compared with the prior year, primarily resulting from a transfer of $36 million from Auction Proceeds and a contribution from operational surpluses. ICANN org plans to continue increasing the Reserve Fund on an annual basis.

INFORMATION TRANSPARENCY INITIATIVE (ITI) AND OPEN DATA PROGRAM (ODP)

Information Transparency Initiative (ITI)

ITI is an operational activity that will improve ICANN's content governance and infrastructure, beginning with content on icann.org. Since the launch of ITI in January 2018, the org has made significant progress. During FY19, the ITI team posted six different content types for community feedback on **feedback.icann.org** and conducted several requirements gathering and usability sessions with the community on Registry Agreements and Public Comment.

The org is aiming for a soft launch of the improved icann.org website in FY20 Q4. The enhancements will include:

- Improved search and features for content types like Board Materials, Public Comment, Announcements, Blogs, and Reviews.
- 75% of all **https://icann.org** files and pages migrated and searchable.

The existing **https://icann.org** will remain the definitive site until it is retired and replaced with the new site. This period after the soft launch will provide ICANN org with the opportunity to gather community feedback about the content findability enhancements and make subsequent updates, before the org officially retires the current site in FY21 Q1.

READ MORE about ITI.

Read the ITI Board Resolution.

Open Data Program

ICANN org worked in collaboration with stakeholders across ICANN to launch the Open Data Program during FY19.

Progress in FY19 included:

- Following **a transparent and competitive process**, ICANN org licensed OpenDataSoft, an open data platform (SaaS) in September 2018.
- Open Data transitioned from a research and development initiative to an operational program in December 2018.
- The Open Data Program team developed an operational framework and supporting processes from January to June 2019 and **presented an update to the community** at ICANN64 in Kobe, Japan.

READ MORE about ICANN's Open Data Program.

CHANGES AT ICANN ORG AND IANA

Sally Newell Cohen joined ICANN org in October 2018 as the Senior Vice President of Global Communications and Language Services. Cohen leads the strategic communications effort to build greater awareness of ICANN's global mission. Prior to her appointment, Cohen was the Chief Operations Officer at Toastmasters International, a nonprofit organization that provides communication and leadership skills development for over 350,000 members across 16,000 clubs in 143 countries and territories. In addition to this, she has held leadership roles at public relations and high-tech companies.

In October 2018, ICANN's President and CEO, Göran Marby, also appointed **John Jeffrey**, General Counsel and Secretary, and **Theresa Swinehart**, Senior Vice President, Multistakeholder Strategy and Strategic Initiatives, to serve as his deputies.

In February 2019, **David Conrad** was appointed to oversee Internet Assigned Names Authority (IANA) Services on behalf of ICANN org.

Conrad also maintains his role as Senior Vice President and Chief Technology Officer (CTO) and remains a member of the ICANN Executive Team. Conrad first joined ICANN in 2005 and returned as the CTO in 2014. He previously served as the General Manager of IANA Services.

Cyrus Namazi was named to the newly created position of Senior Vice President of the Global Domains Division (GDD), and a member of the ICANN Executive Team. Since joining ICANN in 2013, Namazi has served as Vice President of the group's Domain Name Services and Industry Engagement activities. He has served as deputy for GDD since 2016 and most recently as interim head of GDD. Prior to joining ICANN, Namazi served in a number of executive and management roles in the technology sector.

FY19 ICANN PUBLIC MEETINGS

ICANN | PUBLIC MEETINGS

In order to support the work of ICANN's multistakeholder model, ICANN Public Meetings are held three times a year in different regions of the world. These meetings allow members of the community to meet and work together in person, along with members of the Board and ICANN org. One meeting serves as the Annual General Meeting (AGM) where new Board members are seated.

READ MORE about the upcoming meeting calendar dates and locations.

ICANN63 BARCELONA Annual General

ICANN|63
BARCELONA

20–25 October 2018

ICANN org celebrated its 20th anniversary in Barcelona, Spain at the ICANN63 Annual General Meeting (AGM) with a special "ICANN@20 Years" session and a cocktail celebration. The AGM also was host to a High-Level Government Meeting, the fourth in ICANN's history, where senior government leaders from around the world met to discuss their important role in maintaining the safety, security, and resiliency of the global Internet. There were more than 300 sessions, including a high-interest session from the Expedited Policy Development Process (EPDP) Team on the Temporary Specification for gTLD Registration Data.

ICANN64 KOBE Community Forum

ICANN|64
KOBE

9–14 March 2019

More than 1,700 participants attended the ICANN64 Community Forum. Top sessions included the ICANN Public Forums, Next Steps in ICANN's Response to the GDPR, and a question-and-answer session with ICANN's Executive Team.

ICANN65 MARRAKECH Policy Forum

ICANN|65
MARRAKECH

24–27 June 2019

ICANN65 was the third ICANN Public Meeting held in Marrakech and the twelfth held in Africa. At the meeting, the 2019 Multistakeholder Ethos Award was awarded to Kurt Pritz for his outstanding contributions to the ICANN community. He recently chaired Phase 1 of the Expedited Policy Development Process (EPDP) on Temporary Specification for gTLD Registration Data.

FY19 Public Meeting Attendance

ICANN|63
BARCELONA

TOTAL ATTENDEES	FIRST-TIME PARTICIPANTS	SESSIONS
2,639	1,085	338

ICANN|64
KOBE

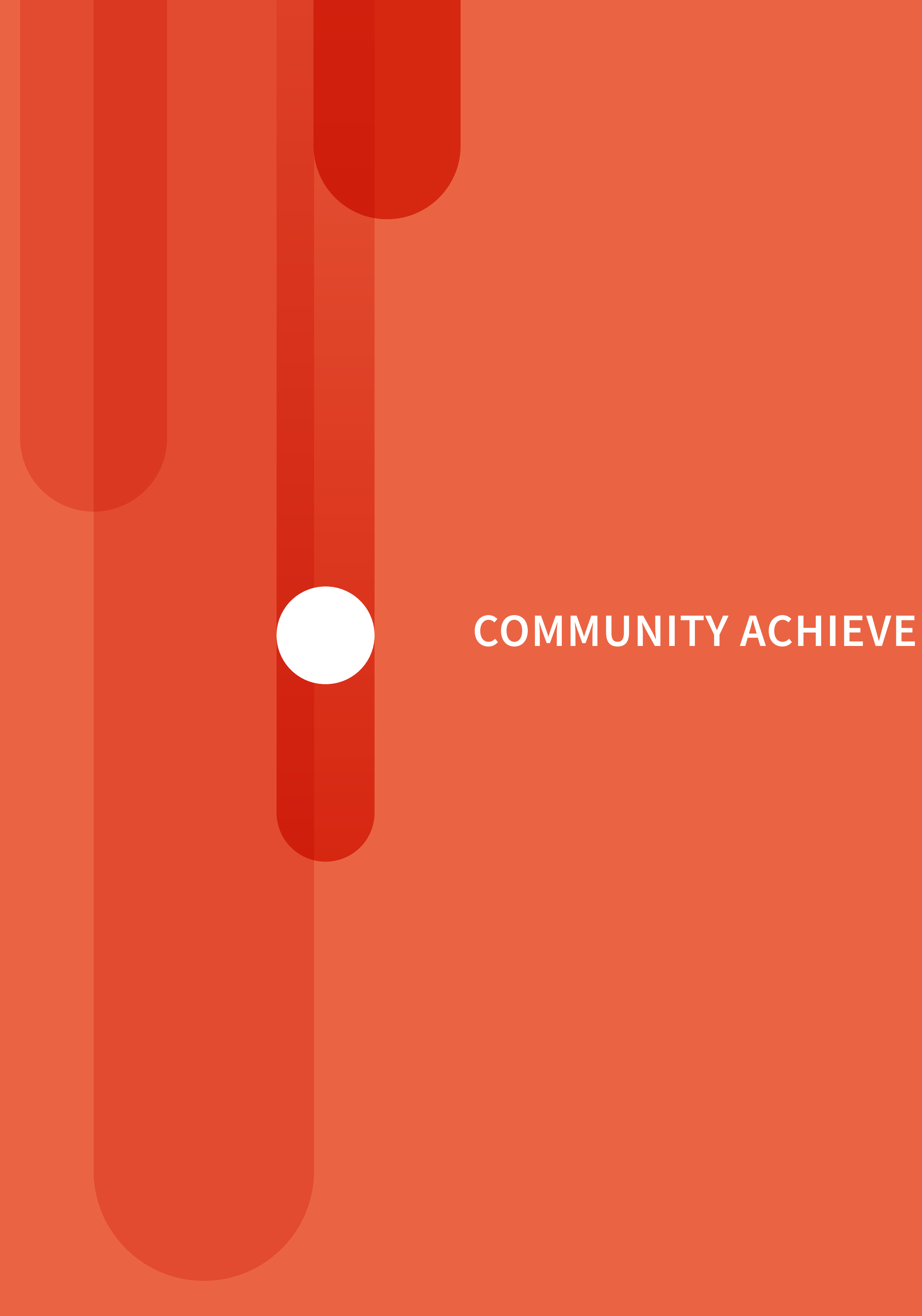
TOTAL ATTENDEES	FIRST-TIME PARTICIPANTS	SESSIONS
1,759	614	275

ICANN|65
MARRAKECH

TOTAL ATTENDEES	FIRST-TIME PARTICIPANTS	SESSIONS
1,186	370	155

Barcelona, Spain
Kobe, Japan
Marrakech, Morocco

READ MORE about ICANN Public Meetings.



COMMUNITY ACHIEVEMENTS

COMMUNITY ACHIEVEMENTS

Supporting Organizations and Advisory Committees (SO/ACs)

ADDRESS SUPPORTING ORGANIZATION (ASO)

ICANN | ASO
Address Supporting Organization

ASO REVIEW IMPLEMENTATION

The ASO Address Council (ASO AC) and the Number Resource Organization Executive Council (NRO EC) began implementing the 18 recommendations from the final report of the **second Organizational Review** of the ASO. The review was carried out in 2017 by ITEMS International. In February 2018, the NRO EC and the ASO AC issued a joint response to the recommendations.

READ the NRO EC and the ASO AC Joint Response to the second ASO Organizational Review.

The recommendations called for a public consultation in each of the five Regional Internet Registry (RIR) communities to determine the future structure of the ASO. These took place in FY18 and FY19 and were accompanied by discussions in each region.

The NRO EC considered the output of this work and outlined a proposed way forward and provided these points to the RIR communities to aid in their consideration of the future structure of the ASO.

READ the NRO EC's input.

ASO AC LEADERSHIP AND MEMBERSHIP CHANGES

Three new members joined the ASO AC in FY19:

- **Wafa Dahmani Zaafouri**, appointed by the African Network Information Centre (AFRINIC) Board of Directors.
- **Esteban Lescano**, appointed by the Latin American and Caribbean Internet Addresses Registry (LACNIC) Board of Directors.
- **Simon Sohel Baroi**, appointed by the Asia Pacific Network Information Centre (APNIC) Executive Council.

The ASO Address Council elected a new leadership team:

Aftab Siddiqui from APNIC as Chair

Kevin Blumberg from the American Registry for Internet Numbers (ARIN) as Vice Chair

Jorge Villa from LACNIC as Vice Chair

COUNTRY CODE NAMES SUPPORTING ORGANIZATION (ccNSO)

ICANN | ccNSO
Country Code Names Supporting Organization

ccNSO POLICY DEVELOPMENT

The ccNSO Council initiated the third ccNSO Policy Development Process (PDP) in March 2017 and in FY19, the PDP Working Group continued work on recommendations for the retirement of country code top-level domains (ccTLDs) and introduced its designed process to the community. Work on the second part of the PDP involves developing a review mechanism for decisions on delegation, transfer, revocation, and retirement.

READ MORE on the Retirement PDP.

Following the introduction of the risk mitigation procedure under the Internationalized Domain Names (IDN) ccTLD Fast Track Process, the ccNSO Council initiated the review of its 2013 draft proposals for the selection of IDN ccTLD strings and the proposal to enable IDN ccTLD managers to become members of the ccNSO through the creation of a review working team. Upon completion of the review, the ccNSO Council will decide on next steps.

READ MORE on IDN Preliminary Review.

The ccNSO continues its work related to geographic names at the top-level. After the closure of the Cross-Community Working Group on the Use of Country and Territory Names as TLDs (CCWG-UCTN), the ccNSO remains active in Work Track 5 on Geographic Names at the Top-Level of the GNSO New gTLD Subsequent Procedures PDP Working Group.

READ MORE on Work Track 5.

SECOND ccNSO ORGANIZATIONAL REVIEW

The second ccNSO Organizational Review was launched in March 2018 by the ICANN Board after being previously deferred for a year at the request of the ccNSO. In FY19, the ccNSO Review Work Party continued its work. It assisted Meridian Institute, the independent examiner, in presenting its findings during ICANN64 and draft recommendations during ICANN65.

In FY19, the ccNSO embarked on a review of its meeting strategy. Work focused specifically on whether to change or maintain the structure of its meetings at the Policy Forum. As a result of the internal review, the ccNSO meeting structure will not change.

ccNSO OUTREACH AND ENGAGEMENT

During FY19, the ccNSO continued its involvement in organizing meeting days and workshops to share information and best practices on managerial, technical, and operational aspects of running a ccTLD. These efforts included ccNSO Members Meeting days during ICANN Public Meetings, the ICANN Public Meeting Tech Day, and an annual workshop for people responsible for the operational security and stability of ccTLDs.

ccNSO FY19 Snapshot

MEMBERSHIP GREW TO
172
ccTLD MANAGERS.

THE ccNSO COUNCIL PASSED
51
RESOLUTIONS.

THE ccNSO RECEIVED
61
REQUESTS TO PROVIDE INPUT OR REQUESTS TO PARTICIPATE IN WORK.

PARTICIPATED IN
3
CROSS-COMMUNITY WORKING GROUPS AS A CHARTERING ORGANIZATION.

BY THE END OF FY19,
2
ccNSO COUNCIL COMMITTEES, AND
9
COMMUNITY WORKING GROUPS WERE ACTIVE.

DURING FY19,
3
COMMUNITY WORKING GROUPS WERE CLOSED UPON ACHIEVING THEIR GOAL, AND TWO NEW GROUPS WERE ESTABLISHED.

GENERIC NAMES SUPPORTING ORGANIZATION (GNSO)

ICANN | GNSO
Generic Names Supporting Organization

WORK ON EPDP ON TEMPORARY SPECIFICATION FOR GTLD REGISTRATION DATA PHASE 1 AND 2

On 17 May 2018, the ICANN Board adopted the proposed Temporary Specification for gTLD Registration Data. The Board took this action to establish temporary requirements for how ICANN and its contracted parties would continue to comply with existing ICANN contractual requirements and community-developed policies related to WHOIS, while also complying with the European Union's General Data Protection Regulation (GDPR). This triggered an obligation for the GNSO Council to undertake a Policy Development Process (PDP) to consider confirmation of the Temporary Specification as a consensus policy within 12 months of the effective date of 25 May 2018.

On 19 July 2018, the GNSO Council initiated the Expedited PDP (EPDP) on the Temporary Specification for gTLD Registration Data. Under the leadership of the EPDP Team Phase 1 Chair Kurt Pritz, the EPDP Team held teleconferences at least twice a week and held meetings on a number of occasions. In addition, input from the external legal counsel provided needed clarity and helped inform the EPDP Team's deliberations.

The EPDP Team published the Phase 1 Initial Report for Public Comment on 21 November 2018. The EPDP Team delivered its Final Report to the GNSO Council on 20 February 2019, which incorporated changes following the EPDP Team's review of all the public comments received on the Initial Report. On 4 March 2019, the GNSO Council approved all 29 policy recommendations in the EPDP Team's Final Report.

On 2 May 2019, the EPDP Team started its work on Phase 2 of its charter, which includes: 1) a system for standardized access/disclosure to non-public registration data; 2) issues identified in the Annex to the Temporary Specification; and 3) items deferred from Phase 1 deliberations. Janis Karklins serves as Chair of the EPDP Team's Phase 2 work.

On 15 May 2019, the Board adopted 27 of the 29 EPDP Phase 1 policy recommendations. The Board did not adopt parts of two of the recommendations that it identified as not in the best interests of the community or ICANN org. The Board is engaged in a consultation process with the GNSO Council on these. For a number of other recommendations, the Board noted specific issues that it expects to be addressed during implementation of the EPDP Phase 1 recommendations or the Phase 2 work of the EPDP Team.

READ MORE about the EPDP.

ADDITIONAL GNSO PDP PROGRESS

In FY19, the GNSO continued making progress on four other policy development processes:

- Protections of International Governmental Organization and International Non-Governmental Organization (IGO-INGO) Names in All gTLDs
  - On 27 January 2019, the Board adopted all consensus policy recommendations from the reconvened PDP working group on the Protection of IGO-INGO Names in All gTLDs. ICANN org is planning for the implementation of these recommendations.
- IGO-INGO Access to Curative Rights Protection Mechanisms (RPMs)
  - On 18 April 2019, the GNSO Council approved Recommendations 1-4 from the IGO-INGO Access to Curative RPMs PDP and referred Recommendation 5 to be considered by the Review of All RPMs in all gTLDs PDP Working Group as part of its Phase 2 work. As this topic is also subject to Governmental Advisory Committee (GAC) advice, the GNSO Council and the GAC met at ICANN65 to discuss possible next steps.
- Future Rounds of New gTLDs
  - During FY19, the New gTLD Subsequent Procedures PDP Working Group published its Initial Report and Supplemental Initial Report. Work Track 5 also published its Supplemental Initial Report.
- Review of All RPMs in All gTLDs
  - The Review of All RPMs in All gTLDs PDP Working Group completed its review of the Uniform Rapid Suspension (URS) dispute resolution procedure; its subteams also completed developing preliminary recommendations regarding Sunrise and Trademark Claims services based on their review of data collected.

READ MORE about the work of the GNSO.

GNSO MEETINGS AND SESSIONS

During ICANN Public Meetings in FY19, the GNSO met in 179 combined sessions. In addition to many working group meetings, the GNSO led several cross-community sessions on key policy topics to expand the opportunities for interaction and understanding. These key topics centered on GDPR and EPDP, including next steps in ICANN's response to the GDPR and impact of EPDP Phase 1 recommendations on other ICANN policies and procedures.

The GNSO Council held its second strategic planning session in Los Angeles in January 2019. The goal of the meeting was for the GNSO Council to develop plans for carrying out its obligations as the manager of PDPs more efficiently, effectively, and collaboratively. One of the days focused on the implementation of the PDP 3.0 initiative, which aims to further enhance the PDP model.

GNSO FY19 Snapshot

PARTICIPATION IN

8 PROJECTS

INCLUDING WORKING GROUPS, IMPLEMENTATION REVIEW TEAMS, AND CROSS-COMMUNITY PROJECTS.

THE GNSO CHARTERED

14 PROJECTS

AND CO-CHARTERED THE REMAINING 4.

THE GNSO COMMUNITY MET IN A COMBINED

179 SESSIONS.

THE GNSO COUNCIL PASSED

27 RESOLUTIONS.

THE GNSO COUNCIL MET

15 TIMES.

AT-LARGE ADVISORY COMMITTEE (ALAC)

The At-Large Advisory Committee and broader At-Large community, consisting of Regional At-Large Organizations (RALOs), At-Large Structures (ALSes), and individual members, focused on the development of policy advice, the At-Large Organizational Review, and RALO activities during FY19.

POLICY ADVICE DEVELOPMENT

As part of its participation in policy advice activity, the ALAC submitted 23 policy advice statements in response to Public Comment proceedings.

READ the Policy Advice Statements.

RALO ACTIVITIES

In FY19, the five RALOs worked on several key issues of importance for each of their regions and continued updating their Hot Policy Topics documents to highlight the current policy priorities of each region. These documents are used for outreach and engagement activities, including capacity-building sessions. The RALOs now work in a coordinated manner with the ALAC to identify common topics that are relevant for the entire At-Large community.

During ICANN64, the five RALOs, ICANN org's Global Stakeholder Engagement (GSE) teams and regional partners held a workshop to facilitate greater collaboration. A breakout session divided by region allowed participants to discuss issues pertinent to their region.

Asian, Australasian, and Pacific Islands Regional At-Large Organization (APRALO) members participated in a number of regional events in collaboration with the Singapore regional office. These events included a reception at ICANN64.

The **European RALO (EURALO)** held a General Assembly at ICANN63. Discussions included: internal organizational priorities, capacity-building initiatives, external partnerships, and other projects. EURALO updated the EURALO Hot Topics 2019 and finalized revisions to its bylaws.

The **North American RALO (NARALO)** held a readout session after ICANN64 in Puerto Rico in collaboration with ICANN org, ISOC Puerto Rico, and dotPR. NARALO held a briefing in Ontario, Canada ahead of ICANN65.

The **Latin America and Caribbean Islands RALO (LACRALO)** Operating Principles were finalized and approved by consensus in December 2018. The rules include a new governance structure with a board, four new leadership positions, and five new subregions to allow for rotation of positions among all subregions and to ensure that all subregions are represented.

The **African RALO (AFRALO)** held AFRALO-AfrICANN meetings at each ICANN Public Meeting. Participants approved three AFRALO-AfrICANN statements: “New gTLD Subsequent Procedures Policy Development Process Working Group” at ICANN63, “New gTLD Subsequent Procedures: Proposal of Neustar regarding the upcoming round of New gTLDs” at ICANN64, and “ICANN’s Multistakeholder Governance Model” at ICANN65. During ICANN65, members of AFRALO organized several activities, including hosting 35 university students from Rabat, Morocco, an AFRALO Networking Event, and the Joint AFRALO-AfrICANN meeting where they presented the AFRALO Hot Policy Topics document.

AT-LARGE FY19 Snapshot

THE ALAC SUBMITTED **23** PUBLIC COMMENTS AND CONSULTATIONS RELATED TO ICANN POLICIES AND ISSUES.

8 NEW GROUPS WERE CERTIFIED AS AT-LARGE STRUCTURES.

42 INDIVIDUAL MEMBERS WERE FORMALLY WELCOMED INTO THE AT-LARGE COMMUNITY.

THE ALAC HELD **11** TELECONFERENCES AND THE ALAC LEADERSHIP TEAM HELD **10** TELECONFERENCES.

DURING THE THREE ICANN PUBLIC MEETINGS, AT-LARGE MET IN **63** DIFFERENT SESSIONS.

At-Large Review Implementation continued. The initial **At-Large Review Implementation Plan** was presented to the ICANN Board Organizational Effectiveness Committee (OEC) in December 2018. The Board approved the Implementation Plan on 26 January 2019. In June 2019, an **At-Large Review 2 Implementation (ARI) Status Report 1 to the ICANN Board OEC** was submitted.

MAUREEN HILYARD WAS ELECTED CHAIR OF THE ALAC AND BEGAN HER SERVICE AT THE END OF ICANN63.

A NEW AT-LARGE ORGANIZATIONAL STRUCTURE WAS DEVELOPED THAT ALLOWS FOR A MORE BOTTOM-UP DECISION-MAKING PROCESS.

Plans for the **third At-Large Summit (ATLAS III)** started in FY19. A series of webinars and ICANN Learn courses were created as mandatory requirements for travel support eligibility. The program will include a case study on Phase 1 of the EPDP on the Temporary Specification for new gTLD Registration Data.

GOVERNMENTAL ADVISORY COMMITTEE (GAC)

ICANN | GAC
Governmental Advisory Committee

FY19 GAC AGENDA

GAC priorities in FY19 included:

- Substantial engagement in cross-community efforts on WHOIS and registration data issues, community accountability, and subsequent procedures for potential future rounds of new gTLDs.
- Active engagement on ICANN implementation of and compliance with the European Union's General Data Protection Regulation (GDPR), including the development of a Unified Access Model for non-public WHOIS data.
- Implementation of the GAC's role in the Empowered Community and improving internal processes to reflect those new responsibilities.
- Renewed commitments to stakeholder outreach and engagement, including continued support for government and community capacity-development activities.
- Efforts to combat domain abuse.

FY19 GAC COMMUNIQUÉS

Through its three ICANN Public Meeting communiqués, GAC advice to the ICANN Board addressed issues related to ICANN policy and operations, including:

- ICANN compliance with GDPR and WHOIS.
- Protection of International Governmental Organization (IGO) identifiers, as well as protection of the Red Cross and Red Crescent designations and identifiers.
- Board consideration of the Competition, Consumer Trust, and Consumer Choice (CCT) Review Team Recommendations.
- The new gTLD applications for .AMAZON and related strings.
- Use of two-character country codes at the second level.
- Future rounds of new gTLDs.

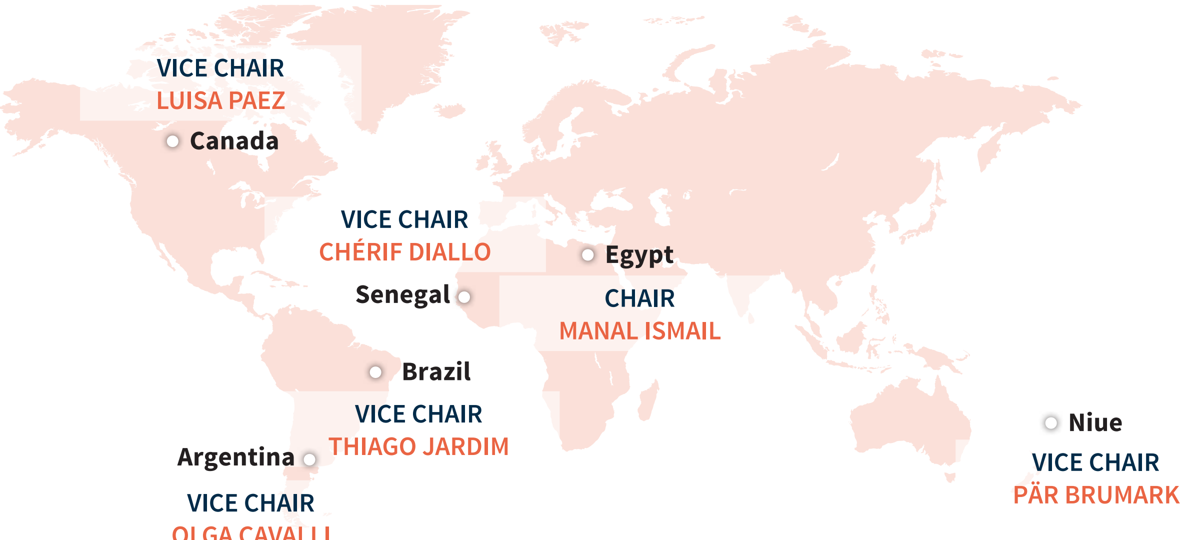
HIGH-LEVEL GOVERNMENT MEETING (HLGM)

The Spanish government collaborated closely with GAC members to conduct a successful HLGM in Barcelona at ICANN63. Nearly 200 ministers and senior officials from governments and various intergovernmental organizations attended the HLGM, representing 124 delegations from around the world. Delegates discussed technical, legal, and geopolitical challenges that ICANN faces as it works to fulfill its mission in an ever-changing Internet ecosystem. They addressed a range of issues including: opportunities for government participation in ICANN post-IANA Stewardship Transition; cybercrime, data protection, and privacy; the role and impact of Internet technological evolution on ICANN; and the global digital agenda and Internet policies.

GAC LEADERSHIP TEAM

NEW GAC LEADERSHIP TEAM

A new GAC leadership team began its term after ICANN64.



GAC PUBLIC COMMENT SUBMISSIONS

The GAC participated in Public Comment proceedings in FY19 and submitted comments on a number of topics including:

- Geographic Names at the Top-Level.
- ICANN Draft FY20 Operating Plan and Budget and Five-Year Operating Plan.
- ICANN Strategic Plan for Fiscal Years 2021–2025.
- Evolving ICANN's Multistakeholder Model of Governance.

GAC WORKING GROUPS

GAC working groups continued to advance matters between ICANN Public Meetings. Topic areas included: new gTLD subsequent procedures (including geographical names), public safety, underserved regions, human rights and international law, and GAC operating principles. These working groups explored internal matters including: GAC relations with the Nominating Committee, evolution of GAC travel support guidelines, transition from an independent secretariat support model to an ICANN org support model, and the development of new and improved processes, tools, and infrastructure to support the work of the GAC and its working groups.

Through the Underserved Regions Working Group, the GAC worked with ICANN org to strengthen the resources available for its regional capacity-building workshop program. This approach critically assessed the program and developed a plan for longer term engagement and capacity building among GAC members across the globe.

ROOT SERVER SYSTEM ADVISORY COMMITTEE (RSSAC)

ICANN | RSSAC
Root Server System Advisory Committee

The RSSAC advises the ICANN Board and community on matters relating to the operation, administration, security, and integrity of the Root Server System. The RSSAC consists of representatives from the organizations responsible for operating global root service and liaisons from the organizations responsible for the management of the root zone and other partners in the Internet community.

FY19 RSSAC ACCOMPLISHMENTS

In FY19, the RSSAC published five documents:

RSSAC039	**Statement Regarding ICANN's Updated KSK Rollover Plan**
RSSAC040	**Recommendations on Anonymization Processes for Source IP Addresses Submitted for Future Analysis**
RSSAC041	**Advisory on Organizational Reviews**
RSSAC042	**RSSAC Statement on Root Server Operator Independence**
RSSAC043	**Report from the RSSAC April 2019 Workshop**

RSSAC CAUCUS

There are over 100 members of the RSSAC Caucus from more than 20 countries and territories. Currently, there are two work parties studying metrics for the Root Server System and modern resolver behavior.

READ MORE about the RSSAC Caucus, its purpose, principles, and procedures.

SECURITY AND STABILITY ADVISORY COMMITTEE (SSAC)

ICANN | SSAC
Security and Stability Advisory Committee

The SSAC produces reports, advisories, and comments for the ICANN Board and community on matters relating to the security and integrity of the Internet's naming and address allocation systems.

The SSAC considers matters pertaining to the correct and reliable operation of the root name system, address allocation and Internet number assignment, and registry and registrar services such as WHOIS. The SSAC also tracks and assesses threats and risks to Internet naming and address allocation services.

FY19 SSAC ACCOMPLISHMENTS

In FY19, the SSAC published the following documents relating to the security and stability of the Domain Name System:

SAC102	**Comment on the Updated Plan for Continuing the Root KSK Rollover**
SAC103	**Response to the new gTLD Subsequent Procedures Policy Development Process Working Group Initial Report**
SAC104	**Comment on Initial Report of the Temporary Specification for gTLD Registration Data Expedited Policy Development Process**
SAC105	**The DNS and the Internet of Things: Opportunities, Risks, and Challenges**

In addition, the SSAC held workshops, in coordination with the Internet Society, on DNS Security Extensions (DNSSEC) at ICANN63, ICANN64, and ICANN65. The DNSSEC Workshop has been a part of ICANN Public Meetings for several years and has provided a forum for both experienced and new people to meet, present, and discuss current and future DNSSEC deployments.

CUSTOMER STANDING COMMITTEE (CSC)

The Customer Standing Committee (CSC) was established in 2016 as a new accountability mechanism, tasked to ensure continued satisfactory performance of the IANA Naming Function for its customers. The CSC monitors the performance of the IANA Naming Function of Public Technical Identifiers (PTI) against the Service Level Agreements (SLAs) in the IANA Naming Function Contract. When needed, the CSC is authorized to undertake remedial action to address poor performance. The CSC analyzes performance reports provided by PTI and publishes its findings every month.

READ the monthly reports.

The CSC is comprised of four members – two appointed by the ccNSO and two by the Registry Stakeholder Group (RySG). Liaisons are appointed by other groups with a direct interest in the performance of the IANA naming function. Byron Holland, from the Canadian Internet Registration Authority (CIRA), serves as the Chair.

EXPLORE more information about the work of the CSC.

During FY19, the CSC adopted procedures to allow a differentiated approach for changes to the SLAs in the IANA Naming Function Contract. Experience has shown that a different consultation procedure needs to be followed for different types of change, ranging from small changes which do not impact direct customers, up to the introduction of a new SLA.

Also during FY19, the ccNSO and GNSO Councils appointed representatives to review the effectiveness of the CSC. The general finding was that the CSC performed its various tasks effectively. To ensure continued strong performance in future, the Councils adopted the four recommendations from the reviewers in the areas of onboarding, attendance, and ensuring that adequate skill sets remain on the CSC. The recommendations have been fully implemented.

ROOT ZONE EVOLUTION REVIEW COMMITTEE (RZERC)

The RZERC reviews proposed architectural changes to the content of the Domain Name System (DNS) root zone, the systems – both hardware and software components – used in executing changes to the DNS root zone, and the mechanisms used for distribution of the DNS root zone. The RZERC was formed as a result of the IANA Stewardship Transition.

In FY19, the RZERC published its first document relating to proposed architectural changes:

- RZERC001: Feedback on the Updated Plan for Continuing the Root Key Signing Key Rollover

WORKING TOWARD NEXT STEPS FOR NEW GTLD AUCTION PROCEEDS

The Cross-Community Working Group on New gTLD Auction Proceeds (CCWG-AP) is working on developing a recommendation to the ICANN Board for a mechanism to disburse the auction proceeds resulting from ICANN-authorized service provider auctions held as a method of last resort in the New gTLD Program. During FY19, the group published its Initial Report for Public Comment. A total of 37 community submissions were received. The CCWG is reviewing this input and working towards producing a draft Final Report.

READ MORE about the work of the CCWG-AP.

MULTISTAKEHOLDER ETHOS AWARD 2019

Ethos Award winner Kurt Pritz with ICANN CEO Göran Marby

The Multistakeholder Ethos Award recognizes ICANN community members who have deeply invested in consensus-based solutions and in the importance of the multistakeholder governance model. This year, the community selection panel recognized **Kurt Pritz** for his unique contributions, including as Chair of the EPDP on the Temporary Specification for gTLD Registration Data Phase 1. Pritz received the award at ICANN65.

FY19 FINANCIAL OVERVIEW

1 July 2018-30 June 2019

REVIEW the ICANN Consolidated Audited Financial Report.

Note: Arithmetical inconsistencies and discrepancies in the figures in the FY19 Annual Report compared to the FY19 Audited Financial Report are the result of rounding to the next million.

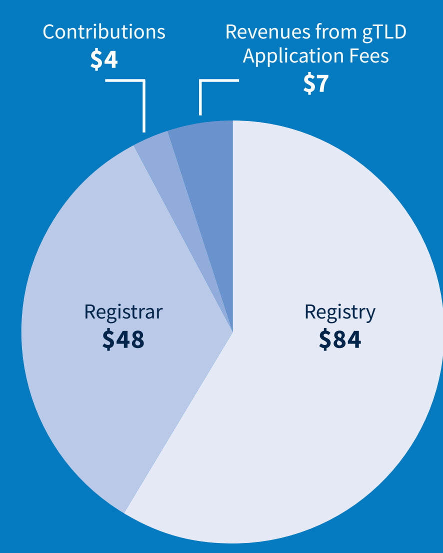
FY19 CONSOLIDATED FINANCIAL HIGHLIGHTS

(in millions USD) (Unaudited)

Funding (Support and Revenue)

$143

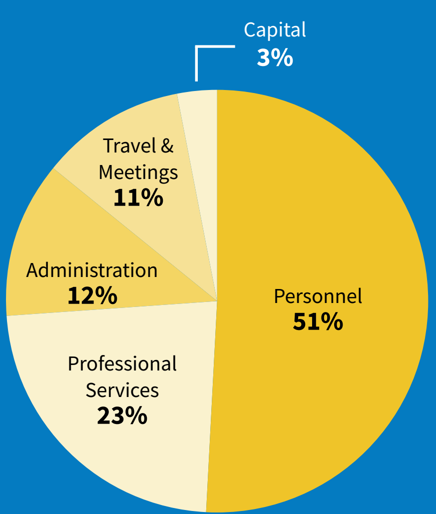
Funding for ICANN org operations is $143 million and consists of funding from registries, registrars, and contributions. ICANN org collects funding for domain registrations collected from registrants through registries and registrars, and annual fixed fees collected from the number of parties under contract with ICANN org. About three percent of ICANN org operations funding consists of contributions and sponsorships. New gTLD Program Application Fees account for five percent of total ICANN funding. The New gTLD Program is a $360 million, multiyear program to create new top-level domains. The program is fully funded through application fees collected in 2012, for which funding is recognized as the application evaluation work progresses and fees become nonrefundable.



Total Cash Expenses (excludes depreciation and bad debt)

$139

ICANN org's main expense is personnel costs, corresponding to an average of 390 employees during the course of FY19 and representing 51 percent of cash expenses. Travel and meeting costs include the costs of travel, lodging, and venue rental for various meetings, and represent 11 percent of cash expenses. Professional services represent 23 percent of cash expenses and primarily include contractor services, legal fees, and language services for transcription, translation, and interpretation. Administration costs represent 12 percent of cash expenses and primarily include rent and other facilities costs for all ICANN org locations, and network and telecommunication costs. Capital costs represent three percent of cash expenses and primarily include IT infrastructure and security improvements.



Consolidated Funds Under Management

(in millions USD) (Unaudited)

As of June 2019, ICANN org managed a total of $464 million in funds. The Operating Fund is the cash on hand used to fund ICANN org's day-to-day operations. The Operating Fund is used to collect revenues and to fund the payment of employees, suppliers, and other third parties. The Operating Fund contains enough funds to cover ICANN's expected expenditures for three months. Periodically, any funds in excess of three months are transferred to the Reserve Fund.

The Reserve Fund is held by ICANN for contingent expenses resulting from any unexpected events or economic uncertainties. It supports the financial stability of the organization.

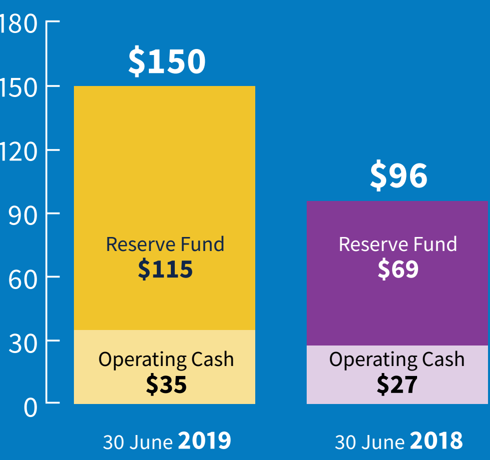
The Reserve Fund is invested as per the ICANN Investment Policy, and is under the custody and management of State Street Global Advisors. The returns generated through the investment of the funds are fully reinvested within the Reserve Fund. Between June 2018 and June 2019, the Reserve Fund increased by $47 million. In 2019, the ICANN Board approved an eight-year plan to replenish the Reserve Fund to an amount that would equal approximately one year of Operating Expense. In FY19, funds were transferred into the Reserve Fund from the New gTLD Program Auction Proceeds, operational surpluses relating to FY18, and mandated annual contributions.

The New gTLD Program funds result from the unspent funds collected from the program applicants. These funds were collected mainly between January and June 2012 and are used exclusively to pay for expenses related to the New gTLD Program. The New gTLD unspent funds are invested as per the New gTLD Investment Policy, and are under the shared custody and management of Northern Trust, US Bank, and Deutsche Bank. The New gTLD Program funds have decreased since June 2015 as a result of the expenses incurred to perform the evaluation of the New gTLD applications and of the refund of fees for applications withdrawn.

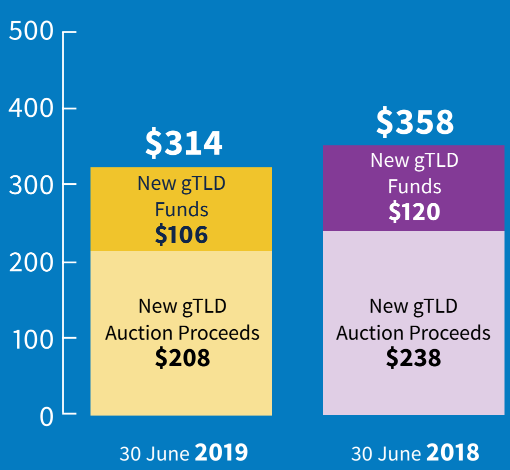
ICANN org held Net Auction Proceeds of $208 million by 30 June 2019. This figure excludes the amount transferred to the ICANN Reserve Fund outlined above and includes return on investment. The proceeds result from the auctions that ICANN offers as a last-resort mechanism for resolving string contention under the New gTLD Program.

$464

ICANN Operations
Cash / Operating Reserve Funds



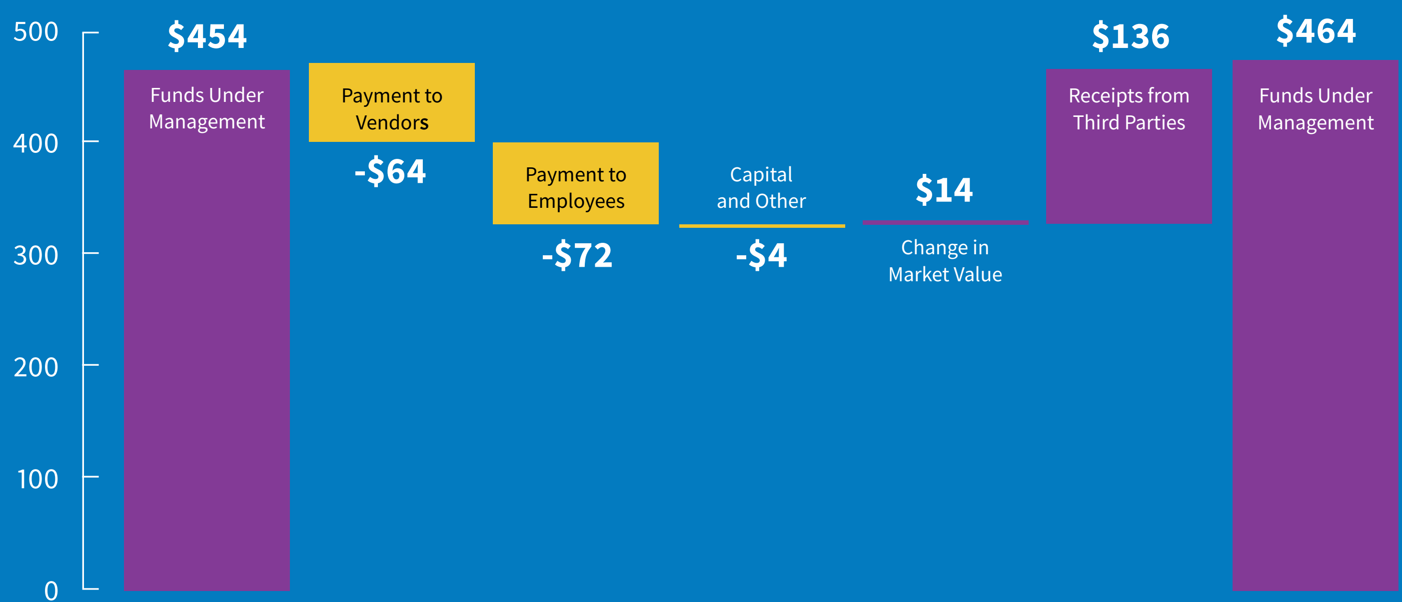
New Auction Proceeds
New gTLD Funds



Cash Flow Synopsis

(in millions USD) (Unaudited)

30 June **2018** 30 June **2019**



Cash flow for ICANN org operations on a recurring basis consist of the collection of fees and contributions from contracted parties and other contributors, payroll payments, and payments to vendors for operating and capital expenses. During its fiscal year 2019, ICANN org continued with the Initial and Extended Evaluation, Predelegation testing, and contracting phases of the New gTLD Program. The disbursements to vendors during this fiscal year of $64 million include those related to the New gTLD Program for approximately $4 million and refunds to applicants of $1 million.

CONSOLIDATED STATEMENT OF FINANCIAL POSITION

(in millions USD) (Extract) (Unaudited)

Assets	30 June 2019	30 June 2018
Cash & Cash Equivalents	$38	$32
Investments	426	422
Receivables	35	34
Capital & Other Assets	15	18
Total Assets	**$514**	**$506**

Liabilities	30 June 2019	30 June 2018
Accrued Payable & Accrued Liabilities	$16	$18
Deferred Revenue	28	37
Total Liabilities	44	55
Unrestricted Net Assets	470	451
Total Liabilities & Net Assets	**$514**	**$506**

The increase of total assets reflects a reduction of expenses in FY19.

The decrease in Deferred Revenue from June 2018 to June 2019 is driven by the New gTLD revenue recognized during the period, and by the fees refunded for applications withdrawn. The application fees collected are recognized as revenue as the program evaluation progresses and fees become nonrefundable.

CONSOLIDATED STATEMENT OF ACTIVITIES

(in millions USD) (Extract) (Unaudited)

Unrestricted Support & Revenue (Funding)	30 June **2019**	30 June **2018**
Registry	$84	$83
Registrar	48	47
Contributions	4	4
Revenues from gTLD Application Fees	7	-
New gTLD Application Fees Cumulative Adjustment	-	(13)
Total Support & Revenue	**$143**	**$121**
Expenses		
Personnel	$72	$72
Travel & Meetings	16	16
Professional Services	31	32
Administration	23	26
Total Expenses	**$142**	**$146**
Other Income		
Total Other Income	$18	$1
Change in Net Assets		
Change in Net Assets	$19	$(24)
Unrestricted Net Assets		
Beginning of Year	$451	$475
End of Year	470	451

During FY19, the Total Support and Revenue increased as compared to the previous year mainly as a result of Revenues from New gTLD Applications fees. The prior year included a ($13) million cumulative adjustment to the New gTLD application fees. In accordance with the revenue recognition policy of the New gTLD Program, ICANN org periodically reviews the total estimated costs of the program. Revenues for the New gTLD Program are recognized as the application evaluation work has progressed and fees become nonrefundable.

The Total Expenses have decreased year-on-year as a result of the of ICANN org taking action to reduce costs.

DELIVERING FY19 STRATEGIC OBJECTIVES AND GOALS

READ MORE

1 Evolve and Further Globalize ICANN

1.1 Further Globalize and Regionalize ICANN Functions

1.2 Bring ICANN to the World by Creating a Balanced and Proactive Approach to Regional Engagement with Stakeholders

1.3 Evolve Policy Development and Governance Processes, Structures, and Meetings to be More Accountable, Inclusive, Efficient, Effective, and Responsive

2 Support a Healthy, Stable, and Resilient Unique Identifier Ecosystem

2.1 Foster and Coordinate a Healthy, Secure, Stable, and Resilient Identifier Ecosystem

2.2 Proactively Plan for Changes in the Use of Unique Identifiers, and Develop Technology Roadmaps to Help Guide ICANN Activities

2.3 Support the Evolution of the Domain Name Marketplace to be Robust, Stable, and Trusted

3 Advance Organizational, Technological, and Operational Excellence

3.1 Ensure ICANN's Long-Term Financial Accountability, Stability, and Sustainability

3.2 Ensure Structured Coordination of ICANN's Technical Resources

3.3 Develop a Globally Diverse Culture of Knowledge and Expertise Available to ICANN's Board, Organization, and Stakeholders

4 Promote ICANN's Role and Multistakeholder Approach

4.1 Encourage Engagement with the Existing Internet Governance Ecosystem at National, Regional, and Global Levels

4.2 Clarify the Role of Governments in ICANN and Work with Them to Strengthen Their Commitment to Supporting the Global Internet Ecosystem

4.3 Participate in the Evolution of a Global, Trusted, Inclusive Multistakeholder Internet Governance Ecosystem That Addresses Internet Issues

4.4 Promote Role Clarity and Establish Mechanisms to Increase Trust Within the Ecosystem Rooted in the Public Interest

5 Develop and Implement a Global Public Interest Framework Bounded by ICANN's Mission

5.1 Act as a Steward of the Public Interest

5.2 Promote Ethics, Transparency, and Accountability Across the ICANN Community

5.3 Empower Current and New Stakeholders to Fully Participate in ICANN Activities

STRATEGIC OBJECTIVE 1

Evolve and Further Globalize ICANN

1.1 Further Globalize and Regionalize ICANN Functions

1.2 Bring ICANN to the World by Creating a Balanced and Proactive Approach to Regional Engagement with Stakeholders

1.3 Evolve Policy Development and Governance Processes, Structures, and Meetings to be More Accountable, Inclusive, Efficient, Effective, and Responsive

1.1
FURTHER GLOBALIZE AND REGIONALIZE ICANN FUNCTIONS

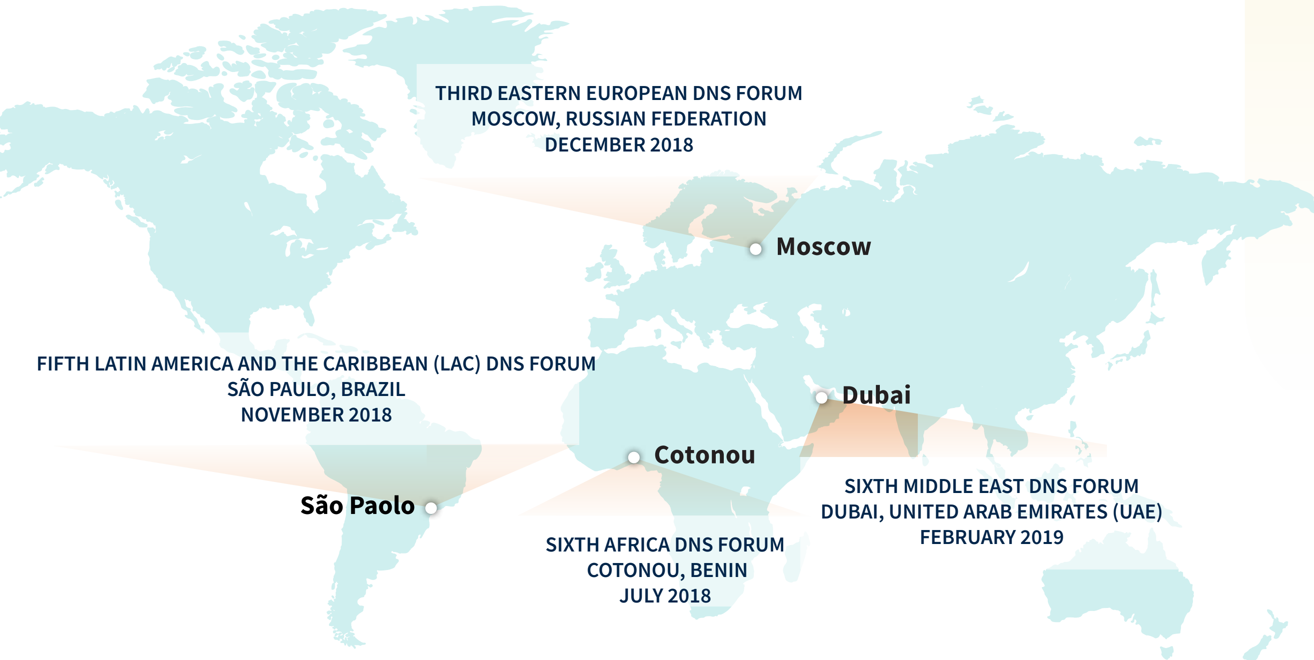
RAISING GLOBAL STAKEHOLDER AWARENESS OF ICANN

ICANN is committed to fostering broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet. Regional teams serve as a point of contact in:

- Raising awareness of and providing an understanding of ICANN's role and remit.
- Encouraging participation in ICANN policy development and technical activities.

As part of ICANN org's work to raise global stakeholder awareness, ICANN org delivers regional Domain Name System (DNS) Forum events. These regional events bring in hundreds of participants, many who do not participate locally at ICANN Public Meetings. Each of these events is hosted in partnership with a range of stakeholders including regional partners, global registries and registrars, regional top-level domain organizations, and telecom providers. In FY19, these included:

FY19 Global DNS Forums



At the LAC DNS Forum and Middle East DNS Forum, specialized training was delivered for community participants by several ICANN org teams. In Brazil, this was the first LAC registry-registrar training. In Dubai, this was the first GNSO policy training for Middle East participants. ICANN org teams also delivered registrar training in FY19 in Central Europe, China, Portugal, Russia, and Uganda. This training improves the knowledge for contracted parties and helps support informed participation in ICANN work.

ICANN functions regularly collaborate on cross-organizational activities to support each other on shared goals. In FY19, this collaborative work included:

- GDD's GDD Summit immediately followed by OCTO's ICANN DNS Symposium in Bangkok, Thailand during May 2019.
- GSE Asia Pacific (APAC) team's work with OCTO to assist with technical outreach in Asia. including the 2019 IDS/DNS-OARC workshops in May 2019.
- The study of Domain Name System Security Extensions (DNSSEC) and object identifier technology in India and Latin America and the Caribbean.
- Capacity-development training with ICANN partner the Network Startup Resource Centre (NSRC) at the University of Oregon.
- Train-the-trainer capacity development on DNSSEC in the Middle East and APAC regions.

For more information about ICANN org's engagement activities around the world, read the org's regional reports:

FY19 Regional Reports

READ the Africa Report.
READ the Asia Pacific Report.
READ the Europe Report.
READ the Eastern Europe and Central Asia Report.
READ the Latin America and Caribbean Report.
READ the Middle East Report.

LANGUAGE SERVICES

In FY19, ICANN org's Language Services team provided new live project tracking tools for ICANN org translation requests, teleconference and interpretation requests, and transcription requests. This new support enables users to check project status of support requests in real time. The team also supported a process change for Board Resource files that reduces manual processing and time required for publishing.

ICANN org continues to work on extending support for languages beyond the six United Nations (UN) official languages through the "ICANN in Your Language" initiative. This joint effort with the community is guided through Memorandums of Understanding (MoUs) with partnering entities who work to translate materials in their respective languages.

1.2
BRING ICANN TO THE WORLD BY CREATING A BALANCED AND PROACTIVE APPROACH TO REGIONAL ENGAGEMENT WITH STAKEHOLDERS

REGIONAL ENGAGEMENT PROGRESS

ICANN org utilizes regional engagement strategies, which are built, informed, and constantly improved through community involvement. This is in effort of ICANN's internationalization strategy.

In order to document progress against this Strategic Objective, each region outside North America created regional reports that highlight the significant achievements accomplished in FY19. North American regional accomplishments are featured below.

FY19 was the first year of the North America (NA) Stakeholder Engagement Strategy. The strategy was developed with input from all stakeholder groups in the region. The strategy's goals are to:

- Build awareness to grow and diversify the ICANN multistakeholder base and volunteer pipeline.
- Grow the knowledge base of current and potential ICANN stakeholders.
- Grow stakeholder support and active participation in ICANN.

In support of these goals, the North America engagement team hosted or participated in 70 events during FY19 that covered all stakeholder categories including business, civil society, academia, government, and the technical community. One notable event in January 2019 was the registrar workshop held in Las Vegas, Nevada, USA. This event, organized by ICANN org's Global Domains Division (GDD) team, hosted more than 20 participants from 10 countries and territories for a day of knowledge sharing and learning about registrar engagement at ICANN.

The team uses blogs, social media, and newsletters to keep stakeholders in the region updated on engagement activities. The regional newsletter gained more than 500 subscribers this year.

The GSE NA team supports building communities through partnerships with At-Large Structures (ALSes). The team co-hosted seven ICANN meeting readout sessions, both online and in person. These sessions give those unable to attend an ICANN Public Meeting in person an opportunity to connect with the community's policy work.

READ MORE about the new NA Engagement Strategy and work.

As mentioned on the previous page, each region produced reports covering FY19 progress.

FY19 Regional Reports

READ the Africa Report.
READ the Asia Pacific Report.
READ the Europe Report.
READ the Eastern Europe and Central Asia Report.
READ the Latin America and Caribbean Report.
READ the Middle East Report.

ENGAGEMENT TRAININGS

In FY19, ICANN org conducted trainings for staff members on DNS fundamentals, root server operations, DNSSEC, and other technical developments. The aim of this work is to expand knowledge across more teams within ICANN org. Training supports ICANN org team members in:

- Explaining ICANN's role and remit to stakeholders including regulators, decision makers, and others in a more effective manner.
- Engaging new stakeholders on ICANN's mission.
- Bringing active participants into ICANN's technical and policy work.

In FY19, collaborative training led by ICANN org's GSE and OCTO teams in the Singapore and Brussels regional offices covered 47 ICANN org staff members from 9 functions. These trainings raised the level of knowledge in community-facing teams, enabling them to be better able to interact on key topics relevant to ICANN's work.

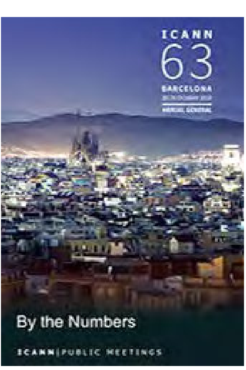
During FY19, ICANN org teams also delivered capacity-development workshops, train-the-trainer sessions, technical briefings, education, and awareness-raising activities. These internal and external trainings support cross-organizational collaboration, the delivery of ICANN org-wide objectives, strengthen ICANN's regional collaboration with partners, and support active participation in ICANN's work.

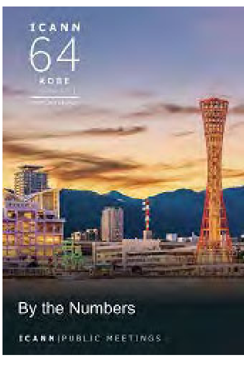
DATA DRIVEN EVOLUTION OF ICANN PUBLIC MEETINGS

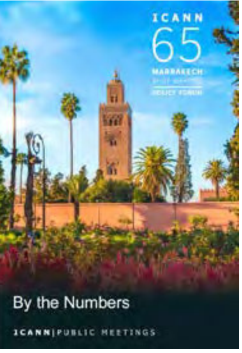
The org's Meetings Team plays an essential leadership role in the development and implementation of strategic planning for the structure, purpose, timing, and regional rotation of ICANN Public Meetings. The team ensures that the selected cities, venues, meeting facilities, and services provide an environment conducive to achieving an effective meeting and are in line with cost planning.

ICANN Public Meetings must innovate, adapt, and evolve to meet their purpose, the needs of the community, and the ever changing global landscape. One of the challenges that conference organizers face is to improve the conference, meeting after meeting, and maximize attendees' engagement and satisfaction. Meeting data is essential for this process. ICANN org publishes By the Numbers Reports, summarizing the metrics and data of each Public Meeting. This data provides reliable information on what attendees want, what ICANN org is doing well, and where it has opportunities to improve. By leveraging this data, ICANN org can continue to be responsive to the needs of its community with a stable and transparent approach.

EXPLORE the By the Numbers Reports.







1.3
EVOLVE POLICY DEVELOPMENT AND GOVERNANCE PROCESSES, STRUCTURES, AND MEETINGS TO BE MORE ACCOUNTABLE, INCLUSIVE, EFFICIENT, EFFECTIVE, AND RESPONSIVE

SUPPORTING OPEN AND TRANSPARENT POLICY MAKING SUPPORT

A fundamental part of ICANN's mission is to coordinate policy development related to the Internet's system of unique identifiers.

ICANN's Bylaws mandate that policies are developed through a bottom-up, consensus-based, multistakeholder process. Community policy work takes place through an open consultative process where policies are developed and refined by ICANN's Supporting Organizations (SOs) with input from its Advisory Committees (ACs), comprised of volunteers from all around the world.

The policy development process takes into account expert advice, public input, and operational issues. ICANN employs open and transparent tools and mechanisms that support community consensus and facilitate collaboration with global entities most affected by ICANN policies.

FACILITATING ICANN'S FOURTH POLICY FORUM

ICANN's fourth Policy Forum took place at ICANN65 in Marrakech, Morocco. The focus of the Policy Forum is to facilitate ongoing policy development and advisory work and further cross-community engagement. The Policy Forum was created as part of the ICANN Meeting Strategy implemented in 2016. The SOs and ACs took the lead in organizing the program. In Marrakech, ICANN org's Policy Development Support team facilitated 173 sessions.

SUPPORTING THE EMPOWERED COMMUNITY

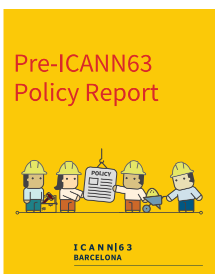
The Policy Development Support team continues to assist with the work of the Empowered Community (EC). This includes supporting the community's efforts to update and streamline the EC's operating procedures to ensure that its mechanisms are as effective and transparent as possible. The EC is comprised of the ASO, ccNSO, GNSO, ALAC, and GAC, which can enforce specific community powers described in the ICANN Bylaws.

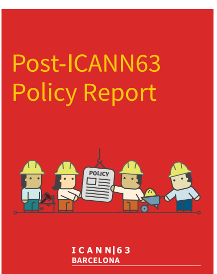
READ MORE about Empowered Community.

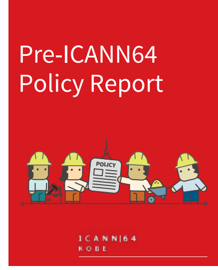
STREAMLINING POLICY COMMUNICATIONS

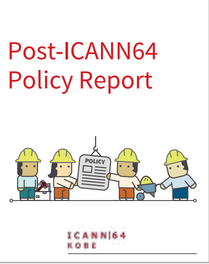
The Policy Development Support team creates and disseminates information about policy development work to the community and other stakeholders to ensure that ICANN work remains open and inclusive. Among these communications tools are the Pre- and Post-ICANN Public Meeting Policy Reports. These reports offer high-level updates from the SOs and ACs and provide participants with a summary of new developments both before and after ICANN Public Meetings.

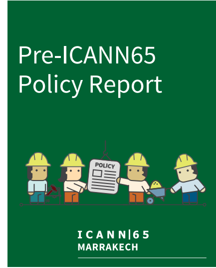
Public Meeting Policy Reports

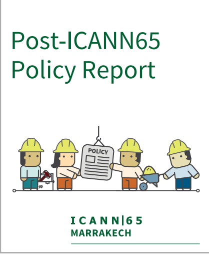












In FY19, the Policy Development Support team initiated an effort to streamline communication with the community. The team consolidated the pre-ICANN Public Meeting webinars into one event called Prep Week. The team also publishes the ICANN Community Leadership Digest twice weekly to capture updates and requests from ICANN org for community leaders.

READ the ICANN Community Leadership Digest archive.

STRATEGIC OBJECTIVE 2

Support a Healthy, Stable, and Resilient Unique Identifier Ecosystem

2.1 Foster and Coordinate a Healthy, Secure, Stable, and Resilient Identifier Ecosystem

2.2 Proactively Plan for Changes in the Use of Unique Identifiers, and Develop Technology Roadmaps to Help Guide ICANN Activities

2.3 Support the Evolution of the Domain Name Marketplace to be Robust, Stable, and Trusted

2.1
FOSTER AND COORDINATE A HEALTHY, SECURE, STABLE, AND RESILIENT IDENTIFIER ECOSYSTEM

CONTINUED DELIVERY OF IANA FUNCTIONS THROUGH PUBLIC TECHNICAL IDENTIFIERS (PTI)

PTI | An ICANN Affiliate

Throughout FY19, the IANA functions continued to be delivered dependably and reliably. ICANN org, through its affiliate Public Technical Identifiers (PTI), drew high levels of customer satisfaction from all customer groups, and earned its highest overall satisfaction ratings to date on its annual customer survey.

Highlights of the period include:

- 100 percent adherence to all Service Level Agreements (SLAs) for protocol parameter management, as defined by the Internet Engineering Task Force (IETF).
- Successful annual review by the numbering community by its IANA Review Committee, with no issues identified.
- Consistent performance of the naming functions, with 100 percent adherence in the majority of months, and satisfactory ratings by the Customer Standing Committee (CSC) for all other periods. All instances of unmet SLAs resulted from benchmarks the CSC agreed needed to be recalibrated, and were not the result of areas of concern with PTI's performance.
- Implementation of the first rollover of the Root Zone Key Signing Key. This key, managed as part of the IANA functions, is the trust anchor for DNSSEC. Its replacement was the culmination of a multiyear collaborative effort, both within ICANN org as well as with the community, that ultimately exceeded expectations in preserving Internet stability.
- Successfully completing the 2018 audit year without exceptions. This is the first evaluation period under a new external audit firm since the control audit program began in 2010.
- In the annual customer satisfaction survey, 96 percent of respondents were either satisfied or very satisfied with all measures of performance (accuracy, timeliness, transparency, process and documentation quality, reporting, and courtesy).

PTI IMPROVEMENT ACTIVITES

ICANN org and PTI continue to evolve and enhance service delivery to meet community expectations and adapt to new developments.

Key FY19 activities included:

- In-house software development activity continued to focus on workflow management systems to support the IANA functions. FY19 accomplishments included internal-facing improvements and building a strong foundation for customer-facing functionality improvements targeted for 2020.
- Refining approaches to performing bulk changes for customers with large portfolios of top-level domains under management.
- The circulation of customer satisfaction surveys in response to requests for immediate feedback opportunities and ways to support identifying and remedying issues quickly.
- Expanding internal controls for additional compliance with the Committee of Sponsoring Organizations of the Treadway Commission **COSO 2013 audit framework** for the 2019 audit year. COSO is "dedicated to providing thought leadership through the development of frameworks and guidance on enterprise risk management, internal control, and fraud deterrence."
- Work with the CSC to redefine and expand SLAs for the naming function, including implementing a streamlined change process for SLA revisions.

FY19 GLOBAL DOMAINS DIVISION (GDD) OPERATIONS

THE GDD OPERATIONS TEAM COMPLETED

3,449

SERVICE REQUESTS IN FY19.

REGISTRAR REQUESTS INCLUDED

502

REGISTRAR ACCREDITATION AGREEMENT (RAA) RENEWALS

28

RAA TERMINATIONS AND

19

NEW REGISTRAR ACCREDITATIONS.

RAA RENEWAL PROCESSING TIME DECREASED BY ALMOST

20%

THROUGHOUT FY19.

THE AVERAGE TURNAROUND TIME FOR THE ACCREDITATION EVALUATION PROCESS DECREASED BY OVER

10%.

REGISTRY REQUESTS INCLUDED ASSIGNMENTS FOR

10

TOP-LEVEL DOMAINS (TLDS)

REGISTRY SERVICE EVALUATION POLICY (RSEP) ACTIONS FOR

66

TOP-LEVEL DOMAINS.

MATERIAL SUBCONTRACTING ARRANGEMENT (MSA) CHANGES FOR

64

TOP-LEVEL DOMAINS.

THE SPECIFICATION

12

CHANGE REQUEST SERVICE WAS IMPLEMENTED AND MADE AVAILABLE IN THE NAMING SERVICE PORTAL (NSP). THE RSEP WAS ALSO UPDATED IN THE NSP TO INCORPORATE PROCESS UPDATES AND SIMPLIFIED FAST TRACK REQUESTS.

DEVELOPMENTS TO REGISTRATION DIRECTORY SERVICES (RDS)

Several important developments related to RDS (also known as WHOIS) and compliance with data protection and privacy regulations occurred in FY19.

The **Temporary Specification for gTLD Registration Data** was replaced with the **Interim Registration Data Policy for gTLDs** when it expired on 20 May 2019. This consensus policy was the result of work done during Phase 1 of the EPDP for gTLD Registration Data. This work was initiated by the GNSO in July 2018.

Subsequently, ICANN org began working with an Implementation Review Team (IRT) on the implementation of Phase 1 consensus policy. This work will continue in FY20 alongside discussions on related topics, including a system for standardized access and disclosure of data in Phase 2 of the EPDP.

The completion of implementation work from EPDP Phase 1 will inform the operationalization of other related policies and services that were paused in FY19 due to changes in data protection and privacy regulations. These included the implementation of the Privacy and Proxy Service Provider Accreditation Program policy, Across Field Address Validation, and WHOIS Accuracy Reporting System (ARS).

Additional policy implementation work that was paused in FY19 includes:

- Translation and Transliteration of Contact Information: Delayed due to dependence on the Registration Data Access Protocol (RDAP) implementation, which is to be deployed in August 2019.
- Transition to Thick WHOIS: Suspended due to an ICANN Board resolution deferring contractual compliance enforcement of the transition from Thin to Thick Registration Data Directory Services (RDDS) Transition Policy for .com, .net, and .jobs. This allows registrars and the registry operator additional time to reach agreement on amendments to applicable Registry-Registrar Agreements.

Additional work in FY19 included ICANN org's continued support for the Registration Directory Services Review Team (RDS-WHOIS2) and to complete the gTLD Registration Data Access Profile (RDAP) ahead of its implementation date of 26 August 2019.

WORKING TOWARDS FUTURE ROUNDS NEW GTLDS

ICANN org continued to support the GNSO New gTLD Subsequent Procedures (SubPro) Policy Development Process (PDP) Working Group for the introduction of future rounds of gTLDs. At the request of the Board, ICANN org provided a briefing on the requirements and dependencies to support future rounds of new gTLDs. This overview included the status of the SubPro PDP, reviews related to the New gTLD Program, and lessons learned during the 2012 New gTLD Program round.

ICANN org compiled a list of assumptions to help with preliminary policy implementation and operational planning efforts related to procedural changes that may be required for subsequent rounds of gTLDs. These recommendations were shared with the community and the Board. Discussions on this topic are expected to extend into FY20.

READ MORE about the work of the SubPro PDP.

MAINTAINING GLOBAL SUPPORT CENTER (GSC) SATISFACTION LEVELS

The GSC fielded 17,963 general inquiries from ICANN's contracted parties, registrants, and the global Internet community. The GSC continued to solicit qualitative feedback on its services using an event-driven survey, which is sent to the requestor upon closure of an inquiry. The GSC maintained an average satisfaction score of 3.9 on a 5-point scale in response to the question: "How satisfied are you with the service you received from ICANN?"

2.2
PROACTIVELY PLAN FOR CHANGES IN THE USE OF UNIQUE IDENTIFIERS, AND DEVELOP TECHNOLOGY ROADMAPS TO HELP GUIDE ICANN ACTIVITIES

SUPPORTING ICANN POSITION ON TECHNICAL THREADS

Throughout FY19, the Office of the Chief Technology Officer (OCTO) developed several internal briefing documents to define and explain ICANN org positions on emerging technical trends such as 5G, Hyperlocal Root Service, DNS over HTTP (DoH), DNS over TLS (DoT), DNSSEC, and DNS Abuse. Focus was placed on ensuring that these technical terms are explained in a way that anyone within ICANN org can accurately represent ICANN's role and position while talking about related topics.

OCTO FY19 TECHNICAL OUTREACH AND CAPACITY BUILDING

OCTO continued to support capacity-building activities and engagement with the technical community in FY19. In collaboration with regional teams, OCTO supported more than 40 technical engagement events globally, including GAC technical workshops and Train the Trainers sessions for the GSE team. Engagement topics ranged from an introduction to the DNS to DNSSEC operational trainings. OCTO also provided high-level workshops to the legal and public safety communities. ICANN org continued support to United States Telecommunications Training Institute (USTTI) initiative, led a session on DNS ecosystem, and contributed to other sessions, representing and explaining ICANN's role within the overall Internet technical coordination ecosystem.

DOMAIN ABUSE ACTIVITY REPORTING (DAAR) TOOL PROGRESSES

The DAAR Tool project continued to move forward in FY19. Independent reviews of the methodology took place and comments were solicited on the program. As a result of this work, ICANN org began publishing monthly reports from the system in February 2019 and retroactively published reports back to January 2018. TLD operators were given access to their own data through the ICANN Monitoring System API (MoSAPI) in May 2019.

The DAAR project has stimulated discussion within the community on the measurement of DNS Abuse. This continues to be a high interest topic and the project is expected to continue to evolve with the community's ongoing input.

READ MORE about the project.

HOSTING THE THIRD ICANN DNS SYMPOSIUM (IDS)

The third annual IDS took place in May 2019 in Bangkok, Thailand. This two-day event focused on all aspects of DNS operations with 164 attendees from across the world. The theme for the Bangkok IDS was "Understanding the Security, Stability, and Resiliency of the DNS."

Attendees reported a high level of satisfaction with the quality of the agenda and valued the excellent opportunity to spend a few days networking and problem solving with DNS experts and operators.

READ MORE about IDS 2019.

IDENTIFIER TECHNOLOGY HEALTH INITIATIVE (ITHI) CONTINUES

ITHI continued in FY19 and made progress in a number of areas including the publication of a website at **ithi.research.icann.org** that describes the project and makes summary metrics available. ITHI relies on community participation in the form of contributed data. To date, the operators of the .kz and .tw TLDs are contributing data.

OCTO is constantly seeking new contributions from any DNS operator, whether authoritative or recursive. A one-page concise description of ITHI is available in multiple languages to aid in finding partners to contribute data.

READ MORE about ITHI.

2.3
SUPPORT THE EVOLUTION OF THE DOMAIN NAME MARKETPLACE TO BE ROBUST, STABLE, AND TRUSTED

GDD TECHNICAL SERVICES DEVELOPMENTS

In FY19, ICANN org released a new version of the Monitoring System API (MoSAPI) that extends the result codes provided to registries regarding incidents detected by the Service Level Agreement Monitoring (SLAM) System. The extended result codes allow registries to obtain precise information regarding issues identified by the SLAM. Additionally, registries can get daily Domain Abuse Activity Reporting (DAAR) aggregated statistics through functionality implemented in the new version of MoSAPI.

The Registration Reporting Interface (RRI) 2.0 launched in September 2018. It allows for data escrow agents to provide ICANN org with reports of data escrow deposits made by registrars. This is similar to the existing process for registries. The new functionality also gives registrars the option to use the RRI to learn real-time status of data escrow compliance. This development is in response to Registrar requests.

A new Uniform Rapid Suspension (URS) website was released. The new website aims to provide a standardized management tool for URS suspended domains integrating DNSSEC, IPv6, and HTTPS. Additionally, it enables URS providers to manage suspended domain names leveraging a simple and centralized management tool.

NEW GTLD PROGRAM WORK CONTINUES

Work on the New gTLD Program continued in FY19 and key achievements included:

- The completion of four string contention resolutions: CPA, GAY, MUSIC, and SPA. As of 30 June 2019, the total number of contention sets resolved is 230 out of 234.
- The number of withdrawals processed was 21, with 44 applications representing 26 strings remaining in the 2012 New gTLD Program.
- The Board adopted resolutions to provide additional clarity related to the progress of the applications for .AMAZON, アマゾン, 亚马逊, .PERSIANGULF, .HALAL, and .ISLAM.

<table>
<tr><th>New gTLD Program</th><th>Completed in FY19</th><th>Cumulative Total</th><th>These figures are intended to highlight the work performed through the New gTLD Program</th></tr>
<tr><td>Executed Registry Agreements</td><td>2</td><td>1,248</td><td rowspan="2">These two figures include TLDs that have terminated registry agreements prior to or after delegation.</td></tr>
<tr><td>Delegations</td><td>1</td><td>1,232</td></tr>
<tr><td>Specification 13</td><td>1</td><td>491</td><td rowspan="2">These two categories may be used to describe “brand” TLDs.</td></tr>
<tr><td>Code of Conduct Exemptions</td><td>1</td><td>80</td></tr>
<tr><td>Remaining Applications</td><td>–</td><td>44</td><td>Remaining applications are those that have not yet delegated, withdrawn, or terminated their registry agreement.</td></tr>
<tr><td>Remaining Strings</td><td>–</td><td>26</td><td>Remaining strings are unique applied-for strings either not yet delegated, withdrawn, or terminated registry agreements.</td></tr>
</table>

FY19 REGISTRY SERVICES DEVELOPMENTS

In FY19, ICANN org published the first update of the Domain Name Marketplace Indicators report, which presents statistics related to gTLDs and ccTLDs. This work tracks progress against ICANN org's goal of supporting the evolution of the domain name marketplace to be robust, stable, and trusted. The report is an evolution of the previous gTLD Marketplace Health Index report (Beta) first published in July 2016. ICANN org plans to further expand its coverage of shortlisted indicators and continue to publish these statistics twice a year.

The Continued Operations Instrument (COI) Obligation Release Service was launched on 13 June 2019. The COI Obligation Release Service allows ICANN to release COIs that have passed their six-year obligation to be maintained. This is stipulated in **Section 8 of the Registry Agreement**. Registry operators will be notified if their COI is impacted but will not be required to take action. Additional information is published on the **COI page**.

FY19 REGISTRAR SERVICES ACTIVITIES

In FY19, the org's Registrar Services team carried out a number of important activities in support of registrars. Representing 21.2 percent of the total accreditations renewed in FY19, 522 of the 2,459 2013 Registrar Accreditation Agreement renewals were completed.

FY19 REGISTRANT PROGRAM WORK

ICANN org continued to focus on three primary objectives during FY19:

- Informing registrants about their rights and responsibilities, the domain name ecosystem and how to navigate it, and the ICANN policies that impact them.
- Identifying and raising awareness about issues and challenges that registrants face.
- Ensuring that registrant perspectives are reflected in ongoing ICANN org work, services, and reviews.

New **educational resources** for registrants were published on a variety of topics ranging from domain name **renewals and expiration** to the **DNS ecosystem**. ICANN org published **Volume 1** and **Volume 2** of a new series of semi-annual reports on issues and challenges impacting domain name registrants. These findings were discussed during registrant-focused sessions at ICANN63, ICANN64, and the 2019 GDD Summit.

VISIT the Registrant page.

SUPPORTING DOMAIN NAME SERVICES

The Domain Name Services and Industry Engagement team continued to support ICANN org's Domain Name Services in FY19. Highlights for the fiscal year include:

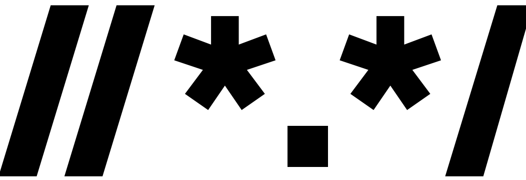
- The development of the policy status report on the **Transfer Policy**. The report covers the transfer of domain name registrations between registrars and changes of registrant. A draft report was published for Public Comment and an updated report was provided to the GNSO Council in April 2019. The GNSO Council will discuss next steps in FY20.
- In consultation with stakeholders, ICANN org drafted and published an updated **Consensus Policy Implementation Framework** (CPIF) in January 2019. This framework includes greater detail regarding the roles of ICANN org and the community in preparing for implementation and supporting feasibility discussions during the policy development phase. The framework provides that ICANN org will "continually review the implementation framework and related materials to encapsulate additional best-practices or to adjust the steps as a result of lessons learned with previous Consensus Policy projects." ICANN org will continue to work with the GNSO to refine the CPIF, including a standardized process to propose and consider amendments.

- ICANN org provided subject matter and data support for community efforts including the GNSO's **Rights Protection Mechanisms (RPM) PDP Working Group** and implementation planning and analysis for the **35 recommendations** of the Competition, Consumer Trust, and Consumer Choice Review Team.
- ICANN org provided subject matter, research, analysis, drafting, and editing support for work on Internationalized Domain Names (IDN) variant TLD recommendations, contracted party notices and communications, Information Transparency Initiative (ITI), Subsequent Procedures planning, and implementation of the Temporary Specification.

INTERNATIONALIZED DOMAIN NAMES (IDN) AND UNIVERSAL ACCEPTANCE (UA) MAKE PROGRESS

In FY19, implementation of the **Root Zone Label Generation Rules (RZ-LGR) Procedure** began, and the **RZ-LGR** was developed. This tool is used to determine IDN TLDs and their variant labels. An additional 10 script **proposals** were finalized in FY19. This completes work on 18 of the 28 scripts identified, 16 of which are integrated into the **third version of RZ-LGR**.

To determine IDN variant TLD management mechanisms, ICANN org undertook a detailed examination to develop a set of recommendations. In March 2019, the Board **adopted** these recommendations and requested that the GNSO and ccNSO consider them in their policy development process.



ICANN org continued to support the Universal Acceptance Steering Group (UASG), a community-based initiative, to promote the Universal Acceptance of domain names and email addresses. UA is essential for the continued expansion of the Internet, as it will ensure that all domain names and email addresses can be used by all Internet-enabled applications, devices, and systems. The UASG updated its technical documents and engaged in multiple outreach activities globally to raise awareness.

STRATEGIC OBJECTIVE 3

Advance Organizational, Technological, and Operational Excellence

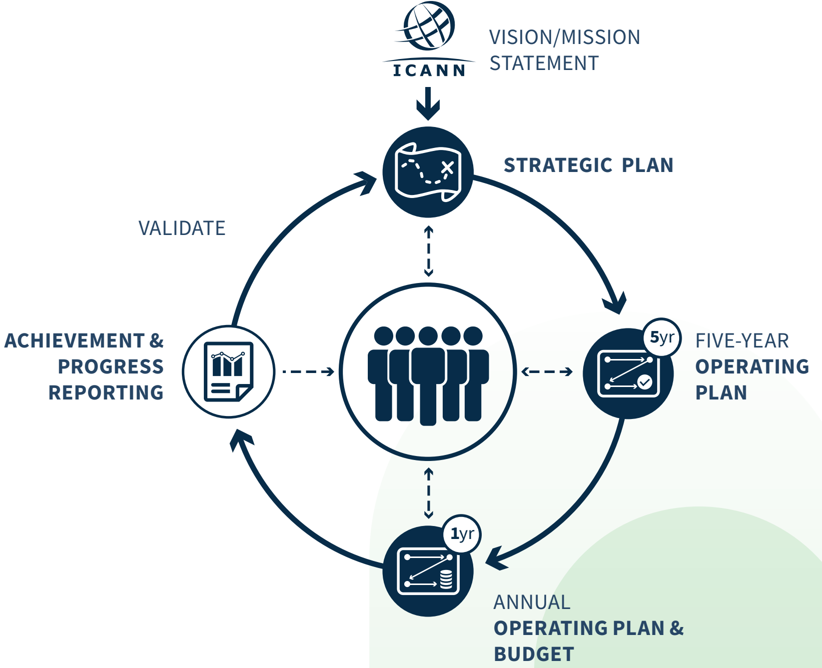
3.1 Ensure ICANN's Long-Term Financial Accountability, Stability, and Sustainability

3.2 Ensure Structured Coordination of ICANN's Technical Resources

3.3 Develop a Globally Diverse Culture of Knowledge and Expertise Available to ICANN's Board, Organization, and Stakeholders

3.1
ENSURE ICANN'S LONG-TERM FINANCIAL ACCOUNTABILITY, STABILITY, AND SUSTAINABILITY

UPDATING THE FIVE-YEAR OPERATING PLAN



The Five-Year Operating Plan FY16–FY20 was developed with community input and is updated annually to include: a five-year planning calendar, strategic goals with corresponding key performance indicators, dependencies, five-year phasing, and a list of portfolios. The FY20 update to the Five-Year Operating Plan for FY16–FY20 was approved by the Board in April 2019.

In addition to the updates for the FY16-FY20 Operating Plan, a cross-functional planning team within ICANN org has initiated the process of developing the next five-year Operating Plan FY21-FY25 supporting the achievement of the Strategic Plan for the same period adopted by the ICANN Board in May 2019.

READ the Five-Year Operating Plan for FY16-FY20.

BOARD APPROVAL FOR FY20 ANNUAL OPERATING PLAN AND BUDGET

The Board approved the FY20 Operating Plans and Budgets for both ICANN and the IANA functions. Board approval and other key milestones were achieved approximately one month earlier than the previous year. As a result of the collaborative work by the Board, community, and ICANN org, the Plan and Budget document supports the goals and objectives set forth in the ICANN Strategic Operating Plan.

- **READ the FY20 Budget.**
- **READ the FY20 Operating Plan.**

As mentioned earlier, in March 2019 and May 2019, the Empowered Community had the opportunity to exercise the power to reject the FY20 IANA Budget and the ICANN FY20 Annual Budget and Operating Plan, respectively. No rejection petitions were received and the approved budgets and plans were adopted and went into effect.

- **READ the FY20 IANA Annual Budget.**
- **READ the FY20 ICANN Annual Budget and Operating Plan.**

ICANN STRATEGIC AND OPERATIONAL PLANNING FOR FY21–25

The Board adopted the ICANN Strategic Plan for fiscal years 2021-2025 in June 2019. A five-year operating and financial plan detailing how ICANN org will implement the strategic objectives is now under development and work has commenced to prepare for changes to the Accountability Indicators to align with and report upon this new plan.

- **READ MORE about this work.**

IMPLEMENTING THE RESERVE FUND REPLENISHMENT STRATEGY

In FY19, ICANN org collaborated with the Board and community to develop a strategy to replenish the Reserve Fund. At ICANN63, the Board approved an eight-year plan to replenish the Reserve Fund to an amount that would equal approximately one year of Operating Expenses.

READ MORE about the Reserve Fund Replenishment.

ADVANCING ICANN'S FISCAL RESPONSIBILITY

To ensure ICANN's expenses remain safely below static funding levels, the org has identified and successfully implemented opportunities for cost control and optimization across the entire organization. The Board, community, and ICANN org demonstrated strong fiscal responsibility by carrying out an increasing volume of work while containing expenses to the same level as in the previous year and six percent below the total expenses budgeted.

ICANN org carefully managed resources and operated with an average headcount of 388, despite having a budgeted headcount of approximately 424. During FY19, the average headcount was 3 lower than FY18. This is the result of natural turnover and strict and careful consideration given to adding or replacing employees.

Additionally, there have been several strategies to reduce and optimize cost within ICANN org. ICANN org generated savings stemming from a range of efforts, including effective and competitive procurement processes, system consolidations and eliminations, and careful control of staff travel. Another key driver in ICANN org's ability to reduce and optimize costs is the exemplary behavior that community groups demonstrated in managing their work within the allocated budget, supported by the Project Cost Support Team.

ACCOUNTABLE AND TRANSPARENT PROCUREMENT

The Procurement team helped support ICANN org's accountability and transparency using public funds by overseeing the procurement practices of ICANN org. This includes selecting suppliers and service providers in an ethical, transparent, objective, and cost-effective manner. During FY19, the Procurement team supported nine **competitive bidding projects**. The competitive bidding projects are published on ICANN's website once the contract has been awarded.

In addition, the Procurement team supported the organization by leading negotiations with various suppliers, performing due diligence, and obtaining cost efficiencies while achieving the fundamental objective of ensuring the right goods and services were procured at the optimal time and price from the optimal supplier.

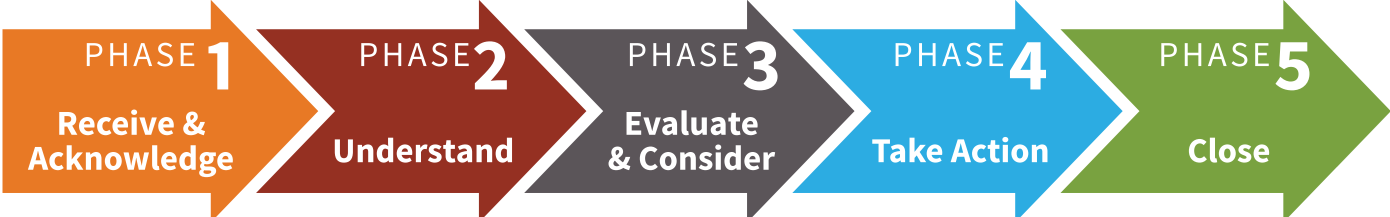
OTHER OPERATIONAL ACTIVITIES

- Integrated the strategic trend analysis with the org's risk assessments process, reduced demand on org-wide resources, enabled input alignment and supported org planning and prioritization, and contributed to cross-functional collaboration.
- Worked with the Regional Office Managing Directors and other ICANN org functions to improve regional office operations.
- Developed program plan and began implementation of ODP. **Read more**.
- Streamlined planning process and achieved USD $72,000 annual savings on planning tool.

ACTION REQUEST REGISTER (ARR) FRAMEWORK

ICANN org developed the ARR process framework to manage community requests to the Board and ICANN org in a consistent, efficient, and transparent manner. Centralized processes were implemented to accommodate advice to the Board from ICANN's ACs including: ALAC, GAC, RSSAC, and SSAC. The ARR also includes **correspondence** to the Board and ICANN org.

Each individual item requiring action follows the five-phase framework below:



TRACKING BOARD ADVICE

The Board received 14 advisories related to ALAC, GAC, RSSAC, and SSAC advice in FY19. This translates to 43 pieces of individual advice as advisories often contain more than one piece of advice. Of these, 32 required action from the Board and 11 were statements and/or informational advisories that do not contain a specific recommendation for the Board. In addition, the ALAC issued 31 public statements in FY19. ICANN org **publishes** monthly statistics with detailed reports on the status of ALAC, RSSAC, and SSAC advice.

PROCESSING CORRESPONDENCE

During FY19, ICANN org handled 1,014 cases related to the work of processing correspondence using the ARR framework. Of those, 113 were letters requiring substantive responses which were published on the **ICANN Correspondence page**. ICANN org also issued 53 letters to the ICANN community. Letters are usually used to request information from the community on various topics.

RISK IDENTIFICATION MANAGEMENT AND THE RISK REGISTER

ICANN org initiated the Risk Identification Management process as an improved way to identify risks faced by the organization. This process is a cross-functional exercise to identify risks at a functional level. Those risks material to ICANN org are included in an org-level Risk Register. For each risk, the Risk Register includes the ICANN org's Executive owner, the estimated likelihood and severity of the risk, controls and mitigation, and recommend action plans, if any. Risks are discussed in a forum with all functions represented and the resulting draft Risk Register is discussed at the Risk Management Committee made up of ICANN org executives. The final Register is approved by the CEO. The top risks in the Risk Register are presented to and discussed with the Board Risk Committee and the ICANN Board. There is a quarterly validation of the Risk Register by all of the functions, and all staff are encouraged to escalate risks as they arise. The Risk Register is confidential as it includes ICANN org vulnerabilities, controls, and mitigations.

ADVANCING THE SECURITY OPERATIONS MODEL

FY19 saw the official and successful migration to ICANN org's Regional Security Manager (RSM) model. For this year, priority for the Security Operations function at ICANN org was improving the geographical distribution of team members and services as well as the balanced management of program responsibilities. These changes enhanced operational and financial effectiveness and allowed the team to eliminate single points of vulnerability. Function job titles were changed to reflect this continuous improvement efforts, including the change from specialist titles such as "Intelligence Manager" or "Event Security Manager" to "Regional Security Manager".

The next iteration of the model – RSM 2.0 – also began in FY19 with the development of Regional Security Coordinators (RSCs). RSCs are existing staff who are able to serve as critical local resources in the absence of the RSM. The Security Operations team plans to fully implement this approach in FY20.

ENHANCING BOARD OPERATIONS

ICANN org's Board Support function worked on a number of areas in FY19 to enhance and streamline Board operations, including:

- Advancing the Board Workshop Agenda Planning Process.
- Proposing and implementing revisions to existing processes and policies to improve cross-functional communication and efficiency.
- Updating to the Board Committee Handbook to encompass key processes and guidelines for consistent best practices across committees including new committee member onboarding.
- Revising and promoting the Board Manual and Board Support Internal Operations Manual for institution knowledge and effective operations.
- Contributing to several key org-wide projects including the Information Transparency Initiative (ITI) and the third Accountability and Transparency Review Team (ATRT3).
- Improving cost management to reach reductions related to Board Workshops, scribing, and training.

3.2
ENSURE STRUCTURED COORDINATION OF ICANN'S TECHNICAL RESOURCES

IMPROVING IT INFRASTRUCTURE, CYBERSECURITY HARDENING, AND CONTROL

ICANN org's Information Security (InfoSec) team initiated several programs to improve the security posture of ICANN systems in FY19:

- The creation of an "InfoSec Ambassador" program to engage the internal ICANN org functions. The program works with functions to understand their InfoSec needs and spread best practices.
- The establishment of the ICANN InfoSec HackerOne program in October 2018. This program has resulted in the discovery, reporting, and remedying of several security bugs on ICANN systems.
- Successful efforts in implementing InfoSec reviews into deployment pipelines. This is accompanied by "red-team" exercises to audit the state of ICANN org networks and systems, including the traveling ICANN Public Meetings network.

ROOT SYSTEM OPERATIONS

In FY19, as the root server operator of L.ROOT-SERVERS.NET, ICANN org continued to deploy ICANN Managed Root Server (IMRS) into the networks of approved organizations. In FY19, 7 additional IMRS instances were added and 1 was removed , bringing the total number across the globe to 167.[1] Work continues to deploy more IMRS instances as opportunities present themselves. Members of the IMRS Engineering team remain actively engaged in the RSSAC and RSSAC Caucus and contribute when appropriate. ICANN org has strong and productive relationships with the root server operators and more broadly the DNS community through IETF and the DNS Operations, Analysis, and Research Center (DNS-OARC).

[1] Instance removed by host request.

The IMRS instances listed below were added between 1 July 2018 and 30 June 2019

AT THE END OF FY19 IMRS INSTANCES TOTAL
167
ACROSS
84
DIFFERENT COUNTRIES OR TERRITORIES

Madrid, Spain
Otopeni, Romania
Ouagadougou, Burkina Faso
Carire, Brazil
Caçador, Brazil
Maseru, Lesotho
Tucumán, Argentina

IT SERVICE SCALING AND PRODUCT MANAGEMENT

ICANN org has reached 99.99 percent uptime on all Tier 1 services. Tier 1 services are those that would result in immediate loss of productivity or ability to communicate internally and/or externally for more that one ICANN function or public functional equivalent or those services that are subject to a formal or informal external Service Level Agreements to which ICANN org is obligated to provide at least a 99.99 percent service availability. This uptime is determined sufficient and will be maintained. ICANN org will not pursue 99.999 percent uptime.

The Meetings Technical Support team once again successfully supported the ICANN Public Meetings with global, bi-directional audio-video feeds with simultaneous multi-language support.

3.3 DEVELOP A GLOBALLY DIVERSE CULTURE OF KNOWLEDGE AND EXPERTISE AVAILABLE TO ICANN'S BOARD, ORGANIZATION, AND STAKEHOLDERS

The priorities of the Global Human Resources and Administrative Services teams are to support an integrated and global approach across the ICANN org.

FY19 highlights include:

- Developing action plans following feedback from the ICANN org Engagement Survey. FY19's survey was launched in June 2018 and over 87 percent of ICANN org participated.
- Improving the management and administration of global benefits.
- Staffing key vacancies.
- Focusing on internal career opportunities to support retention and engagement.
- Continuing initiatives for staff learning and development.
- In keeping with the IANA Naming Function transition agreement, transferring essentially all IANA staff to the PTI legal entity.

Some key FY19 activities that supported these highlights included:

Staff Learning and Development:

- Completed the ICANN org's bi-annual goal setting and performance management, annual compensation, and merit review processes.
- Continued to enhance internal knowledge of ICANN org's functions by offering 12 unique "Getting to Know ICANN" sessions.
- Offered 31 learning courses for leadership and professional development that included an introduction to the Leadership Education and Development (LEAD) Program, Communication, and Conflict workshops.
- Introduced seven learning paths on ICANN org's LinkedIn Learning platform.
- Launched cybersecurity training for all staff, contractors, and temporary workers.
- Launched Workplace Harassment Prevention training for non-supervisory staff that launched on 1 August 2019 (FY20) targeting 160 staff members who are required to complete the training.

Talent Acquisition:

- **Staffed a number of critical roles** through internal transfers, promotions, and external recruitment including the appointment of:
  - Cyrus Namazi to Senior Vice President, Global Domains Division.
  - Responsibility for the IANA function to David Conrad, Senior Vice President and Chief Technology Officer.
  - Sally Newell Cohen to Senior Vice President, Global Communications.
- Maintained an overall employee turnover rate of less than 9 percent, despite a highly competitive job market in the US.
  - Held ICANN org's inaugural networking and recruiting event in September 2018, targeting talent in the technical space. This event helped reach new talent and increased ICANN org's visibility as an employer of choice.
- Established new partnerships with a variety of sourcing agencies, universities, as well as online job sites to attract a broader pool of eligible candidates.

IANA Staff Transfer to PTI:

- Directly employed essentially all employees responsible for performing the IANA functions through PTI, effective 1 January 2019. This coincides with the establishment of PTI and the Services Agreement commitment to transition IANA staff to PTI within three years of the IANA Stewardship Transition.

Global Health and Wellness:

- Created a Global Health and Wellness Program to focus on staff members' total health (financial, mental, physical, and social). This program was designed to encourage the formation of healthy habits through education and awareness, as well as the creation of an organizational culture that embraces flexibility while meeting the objectives of the organization.

GDPR:

- Implemented compliance measures in accordance with the European Union's (EU) General Data Protection Regulation, which included:
    - Distribution of Personnel Data Privacy Notices to ICANN org employees, temps, contractors, and interns.
    - Updated the talent acquisition process with a Notice of Applicant Privacy Policy and amendment of third-party vendor contracts with the inclusion of a Data Processing Addendum.

COLLABORATION AND INFORMATION SHARING

To further develop and support a globally diverse culture of knowledge and expertise available to the Board, community, and ICANN org, a number of cross-functional initiatives were launched to focus on collaboration and information sharing, including:

- **The CEO Report to Board and community.**
- **The Global Legislative and Regulatory Development Tracking Report and associated community discussions.**
- Increased collaboration on the FY21—25 Strategic, Operational, and Financial Plan development with a focus on prioritization and affordability.
- Reorganization of the Board Operations team to elevate ICANN org services to the Board.

STRATEGIC OBJECTIVE 4

Promote ICANN's Role and Multistakeholder Approach

4.1 Encourage Engagement with the Existing Internet Governance Ecosystem at National, Regional, and Global Levels

4.2 Clarify the Role of Governments in ICANN and Work with Them to Strengthen Their Commitment to Supporting the Global Internet Ecosystem

4.3 Participate in the Evolution of a Global, Trusted, Inclusive Multistakeholder Internet Governance Ecosystem That Addresses Internet Issues

4.4 Promote Role Clarity and Establish Mechanisms to Increase Trust Within the Ecosystem Rooted in the Public Interest

4.1 ENCOURAGE ENGAGEMENT WITH THE EXISTING INTERNET GOVERNANCE ECOSYSTEM AT NATIONAL, REGIONAL, AND GLOBAL LEVELS

Coordination of ICANN Participation in Internet Governance

In FY19, the International Telecommunication Union Plenipotentiary (ITU PP-18) was held in Dubai, United Arab Emirates, in October 2018. Ahead of this event, ICANN org followed the discussions of possible country resolutions at the final regional preparatory meetings in Nairobi, Kenya (fourth African Telecoms Union Meeting), in Riyadh, Saudi Arabia (fourth Arab states meeting), the Committee for ITU Policy Meeting in Bonn, Germany, the Inter-American Telecommunication Commission Meeting in Washington D.C., USA, and the fourth Asia-Pacific Telecommunity prep meeting in Kuala Lumpur, Malaysia. During the ITU PP-18 ICANN had a team in Dubai working collaboratively with representatives from sister organizations, governments, and members of the ICANN community serving on country and sector member delegations.

FY19 saw discussions on data protection and GDPR as part of broader outreach and engagement work with governments and Intergovernmental Organizations (IGOs). This included multiple outreach and engagement sessions around the world, discussions at the United Nations General Assembly (UNGA), and in committees on cybersecurity issues.

Internet governance work also involved monitoring or participation in several events and briefings with various IGOs including the ITU Council and its working groups on Internet issues, the World Summit on the Information Society (WSIS), high-level discussions in the UNGA, and the discussions of resolutions that could potentially impact ICANN's remit. Among these were the intersessional meeting of the UN Commission on Science and Technology for Development (CSTD); the Organisation for Economic Co-operation and Development (OECD) Global Forum on Digital Security for Prosperity; the UN High-Level Panel event on Trust and Security; the Committee for ITU Policy (COM-ITU) meeting in Copenhagen, Denmark; the United Nations Institute for Disarmament Research (UNIDR) Workshop on UN Cyber Initiatives; the OECD Going Digital conference; and the United Nations Education, Scientific and Cultural Organization (UNESCO) conference on Roaming and Artificial Intelligence (AI).

4.2
CLARIFY THE ROLE OF GOVERNMENTS IN ICANN AND WORK WITH THEM TO STRENGTHEN THEIR COMMITMENT TO SUPPORTING THE GLOBAL INTERNET ECOSYSTEM

A major event in FY19 in supporting this objective was the High-Level Governmental Meeting (HLGM) held in conjunction with ICANN63 at Barcelona. Held on average every two years, HLGMs are a collaboration between the host country, the Government Advisory Committee (GAC), and ICANN org to bring a greater government awareness to the Internet space.

The HLGM in Spain had 127 delegations taking part with ministerial level representation from dozens of countries and territories. As the first HLGM since the IANA Stewardship Transition, the level of engagement demonstrates an endorsement of the evolution and maturity of the multistakeholder model and that governments have found their place in the Empowered Community model. Identified by the host and GAC as areas of interest, the HLGM sessions covered a range of topics with the following titles: The Role and Opportunities for Governments in ICANN – Post IANA Stewardship Transition; Thematic Challenges in the IG Ecosystem – Cybercrime, Data Protection and Privacy; The Internet Technological Evolution and the Role and Impact on ICANN; and Global Digital Agenda and Internet Policies.

FY19 saw continued work with the GAC's Underserved Regions Working Group (USRWG) on demand-driven capacity-building workshops. A comprehensive evaluation of the initial phase of the capacity-building workshops was completed and submitted to the GAC for review and endorsement. A half day workshop was also delivered before the ICANN65 meeting in Marrakech. This model proved effective for the GAC and, as a result, requests were made for additional sessions in FY20 to continue the training on topics identified by the GAC as useful and relevant. ICANN org continues to work with the GAC to identify possible new ICANN Learn courses and find ways to leverage existing courses and tools to augment workshops.

ICANN org supported the GAC throughout FY19 as it addressed policy issues. This included the question of 2-character codes at the second level. A new 2-character monitoring tool was created, following dialogue with several governments to address and define their concerns. A demonstration was provided for the GAC leadership and GAC participants were able to test the tool following a credentialing and membership process. GAC members will continue to interact with the tool and provide feedback to ICANN org by the ICANN66 meeting in Montréal, Canada.

4.3 PARTICIPATE IN THE EVOLUTION OF A GLOBAL, TRUSTED, INCLUSIVE MULTISTAKEHOLDER INTERNET GOVERNANCE ECOSYSTEM THAT ADDRESSES INTERNET ISSUES

ICANN org continued its active support of the global Internet Governance Forum (IGF) through representation on the IGF Multistakeholder Advisory Group (MAG) and participation in the Global IGF in Paris, France, in November 2018. ICANN org participated in the opening ceremony, presented on one of the featured panels at the high-level meeting organized by the French government, and at an Open Forum that covered organizational priorities and operating principles. In addition, ICANN org collaborated with the Asia-Pacific Network Information Centre (APNIC) on a GDPR-themed workshop, conducted a flash session on multistakeholder Internet governance policy issues and the needs of stakeholders in developing countries and territories, and participated in the Peace Summit. The next global IGF 2019 will be held in Berlin, Germany, 25-29 November 2019.

ICANN org continues to engage with subjects within ICANN's remit and emerging issues in the societal and economic layer of digital governance such as data protection and privacy. The Office of the Chief Technology Officer (OCTO) team provided substantial support to ICANN org's Global Stakeholder Engagement (GSE) and Government Engagement (GE) teams in assessing emerging legislation that may impact the unique identifier systems. OCTO also worked with ICANN org teams to assess global events and incidents that could or did impact the security, stability, or resiliency of the Internet's unique identifier system.

4.4

PROMOTE ROLE CLARITY AND ESTABLISH MECHANISMS TO INCREASE TRUST WITHIN THE ECOSYSTEM ROOTED IN THE PUBLIC INTEREST

CONTRACTUAL COMPLIANCE COMPLAINTS

The Contractual Compliance team received 31,635 complaints in FY19. The complaint volume decreased by approximately 26 percent from 2018, mostly due to a decrease in the volume of WHOIS Accuracy Reporting System (WHOIS ARS) complaints.

VIEW the Contractual Compliance metrics.

COMPLIANCE APPROACH AND PROCESS SUMMARY

The table below presents the number of registrar and registry-related complaints for FY19 as processed through the **informal and formal resolution process**, from ticket receipt to closure. The formal resolution process includes breach, suspension, and termination notices sent to registrars and registries.

FY19 Complaints per Compliance Approach & Process Summary

	Received	Closed before 1st Inquiry/ Notice	1st Inquiry/ Notice	2nd Inquiry/ Notice	3rd Inquiry/ Notice	Breach	Suspension	Termination	Closed
Registrar	29,802	21,234	4,507	707	133	19	2	12	25,575
Registry	1,833	458	1,175	287	95	5	-	-	1,265
FY19 TOTAL	31,635	21,692	5,682	994	228	24	2	12	26,840

ADDRESSING DNS SECURITY THREATS

Contractual Compliance launched a Registry Operator audit on 1,222 gTLDs for addressing DNS security threats. The audit is ongoing at the end of FY19.

CONTRACTING SUPPORT

In FY19, the Contractual Compliance team performed 542 Compliance Status Requests (CSR) — also referred to as compliance checks — of prospective registry operators. The team also conducted 10,892 registrar-related compliance checks in support of the 2013 Registrar Accreditation Agreement renewals for eligible registrars.

In FY19, team highlights included:

- Supported the Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD Registration Data as a member of the Implementation Project Team.
- Conducted proactive reviews, including:
  - Monitoring compliance with the Temporary Specification, which informed the EPDP discussions on topics like redaction, reasonable access to registration data on the basis of legitimate interests, and gaining registrar Forms of Authorization.
  - Worked with Iron Mountain to monitor the completeness of the registrars' data escrow deposits. Iron Mountain, who services the majority of the registrar population, performed in-depth escrow file contents reviews of 59 registrars. A quarter of these had issues that were remediated and retested.
- Organized registrant outreach activities with contracted parties in China, Portugal, Republic of Korea, Russian Federation, Sweden, Uganda, United Arab Emirates, and United States. These sessions increase awareness of common challenges impacting domain name registrants. Participants also share best practices and exchange ideas on how to avoid the issues registrants encountered within the industry.
- Collaborated on a series of registrar training with GDD and GSE teams in China, Portugal, Republic of Korea, the Russian Federation, Sweden, Uganda, the United Arab Emirates, and the United States. The objective of these outreach sessions is to increase awareness among registrars in the region who are not able to participate at ICANN Public Meetings, explain the ICANN Contractual Compliance process and approach, contractual obligations, discuss topics of interest, and exchange ideas in local languages. The team also began a collaboration with the ICANN Registrant Program to provide educational information to registrants regarding their rights and obligations.

CONSUMER SAFEGUARDS

ICANN org's Consumer Safeguards function is distinct from the Contractual Compliance function. The goal of Consumer Safeguards is to engage in outreach to community members and others outside of ICANN and facilitate conversations concerning DNS security threat identification and mitigation, especially those security threats that fall under ICANN's remit. The Consumer Safeguards function coordinated with Contractual Compliance to collaborate with the community in discussions of how to address systematic DNS abuse not covered by ICANN's agreements with contracted parties.

In FY19, highlights included:

- Prior to ICANN63 in Barcelona, the Consumer Safeguards Director spoke about ICANN, Internet issues, and DNS security threats at two law schools in Madrid, Spain.
- Following ICANN63, the Consumer Safeguards function addressed students and faculty in Poland at the College of Europe and the University of Łódź.
- Beginning in January 2019, through outreach to representatives from ICANN's SOs and ACs, facilitated conversations among ICANN's community members about a potential, cross-community DNS security threat session at a future ICANN Public Meeting.
- The Consumer Safeguards Director actively participated throughout the year in the Internet and Jurisdiction Policy Network's working group on Domains and Jurisdictions to contribute to an Operational Approaches document presented at the project's meeting in Berlin, Germany, in June 2019.

STRATEGIC OBJECTIVE 5

Develop and Implement a Global Public Interest Framework Bounded by ICANN's Mission

5.1 Act as a Steward of the Public Interest

5.2 Promote Ethics, Transparency, and Accountability Across the ICANN Community

5.3 Empower Current and New Stakeholders to Fully Participate in ICANN Activities

5.1
ACT AS A STEWARD OF THE PUBLIC INTEREST

LEGAL SUPPORT AND ADVICE

During FY19, ICANN org's Legal function provided legal support for all ICANN org functions through close coordination across the organization, including support in serving as a steward of and upholding the public interest. This legal support includes advice to ICANN's Board of Directors, ICANN org's internal operations, as well as to functions supporting community work.

ICANN org's lawyers serve as liaisons to community efforts such as the EPDP on the Temporary Specification for gTLD Registration Data Policy Recommendations and the Cross-Community Working Group on Auction Proceeds (CCWG-AP), as well as internal work such as reviewing all contracts in the organization, advising on privacy and human resources issues, and supporting all projects and initiatives across ICANN org as needed.

SUPPORT FOR ICANN BOARD

During FY19, ICANN org provided direct support to the boards of ICANN and ICANN's wholly-owned affiliate, Public Technical Identifiers (PTI), which is the entity responsible for performing the IANA functions on ICANN's behalf. This includes both administrative and logistical support for Board activities, but is also where ICANN demonstrates how its decisions are taken in the public interest.

For all substantive Board decisions taken in FY19, the ICANN Board continued its practice of providing a statement detailing how the decision serves the public interest. ICANN org reports on this practice as part of the **Accountability Indicators**. One of the Board's priorities in FY19, which will continue into FY20, is to develop a framework for consideration for the global public interest. ICANN org has been supporting that effort to lead towards the facilitation of a bottom-up, community-driven process to develop a framework as a toolkit for the community to consider the global public interest, while using the existing ICANN bottom-up multistakeholder processes.

These considerations would not change the process by which decisions are made but could instead serve as tools for the community to reinforce the commitment to the public interest and to demonstrate how specific recommendations, advice, and public comments are in the global public interest.

READ about the FY19 Board work.

5.2
PROMOTE ETHICS, TRANSPARENCY, AND ACCOUNTABILITY ACROSS THE ICANN COMMUNITY

CROSS-COMMUNITY WORKING GROUP ON ENHANCING ICANN ACCOUNTABILITY (CCWG-ACCT) WORKSTEAM 2 (WS2)

The WS2 Working Group developed additional recommendations to further enhance ICANN's accountability and transparency and submitted its **Final Report to the Board** in November 2018. ICANN org is working with the Board to prepare for the Board's adoption of the recommendations. This includes preparing the agreed upon implementation assessment report to go out for Public Comment. Once public comments are incorporated, the implementation assessment report will accompany the recommendations for the Board's action on adopting the recommendations in November 2019.

ADVANCING SPECIFIC AND ORGANIZATIONAL REVIEWS

Specific and Organizational Reviews provide an external assessment of the effectiveness of community structures and performance. These are conducted in the context of the ICANN organization's commitment to continuous improvement in sections **4.4** and **4.6** of the ICANN Bylaws.

The timing of Specific and Organizational Reviews mandated by the Bylaws resulted in multiple reviews taking place concurrently. At the end of FY19, ten reviews were in progress. The Board, community, and ICANN org are working toward streamlining reviews, to address the strain the current schedule places on the community and ICANN org resources. The goal is to conduct reviews on a sustainable and predictable schedule, to support the evolution of ICANN as an institution that continuously improves, promoting the global public interest, with sensitivity to the changing environment as it relates to ICANN's mission.

The development of Operating Standards for Specific Reviews continued throughout the year. The Board **adopted** the Operating Standards in June 2019, after receiving extensive community input on the Draft Operating Standards.

Section 4.5 of the Bylaws requires ICANN org publish an Annual Reviews Implementation Report that provides an overview of the implementation status of Specific Review processes and the status of ICANN's implementation of recommendations from Specific Review.

READ the Annual Reviews Implementation Report.

ORGANIZATIONAL REVIEWS PROGRESS (conducted by third-party independent examiners)

Organizational reviews highlights included:

- Recommendations from the second review of the GNSO have been implemented and the **Final Implementation Report** was published in July 2018. The Board **accepted** the Final Implementation Report in January 2019.
- The Board **accepted** the At-Large Advisory Committee's detailed Implementation Plan in January 2019. Implementation work is underway and will continue into FY20.
- The Board accepted the Final Reports and the Feasibility Assessment and Initial Implementation Plans from the second review of the **Nominating Committee** in March 2019, the second review of the **Root Server System Advisory Committee** in May 2019, and the second review of the **Security and Stability Advisory Committee** in June 2019.

ACCOUNTABILITY AND TRANSPARENCY MECHANISMS WORK TO SUPPORT COMPLIANCE WITH ICANN'S ACCOUNTABILITY AND TRANSPARENCY MECHANISMS FRAMEWORK

ICANN org continues to support ICANN's accountability mechanisms, in particular the Independent Review and Reconsideration Processes. This includes supporting the Board Accountability Mechanisms Committee (BAMC), developed to oversee accountability mechanisms. ICANN org continues prompt posting of all materials to ICANN.org so that the broader community has access to information on the usage of these mechanisms.

READ MORE on the Accountability Mechanisms.

TRANSPARENCY REPORTING

READ the Transparency Report contained in this Annual Report.

5.3 EMPOWER CURRENT AND NEW STAKEHOLDERS TO FULLY PARTICIPATE IN ICANN ACTIVITIES

SUPPORTING PUBLIC INTEREST INITIATIVES

ICANN | PRS
Public Responsibility Support

HUMAN RIGHTS IMPACT ASSESSMENT

Public Responsibility Support (PRS) facilitated the Human Rights Impact Assessment of ICANN org's daily business operations. The conclusions, published in May 2019, are broadly positive, highlighting ICANN's good business practices. Most recommendations are geared towards formalizing some practices into policies and increasing training and awareness efforts.

READ the report.

AGE DIVERSITY AND PARTICIPATION SURVEY

In FY19, the Age Diversity and Participation Survey was held across the ICANN community in order to gather data to inform ongoing community discussions. A total of 380 people responded to the survey.

READ the report.

SUPPORTING STAKEHOLDER PARTICIPATION

ICANN | FELLOWS

This financial year, ICANN org awarded 113 fellowships to 100 individuals from various stakeholder groups. Fellows hailed from Asia Pacific (32%), Latin America and Caribbean (21%), Europe (21%), Africa (19%), and North America (7%). The self-declared gender of fellowship recipients was 59% male and 41% female.

New **selection criteria** for incoming fellows, including mandatory ICANN Learn courses, were implemented starting at ICANN65 in Marrakech. Other program updates include SOs and ACs appointing program **mentors** and **selection committee members**, fellows producing publicly available Statements of Interest, and post-meeting reports written by the fellows.

LEARN MORE about the program.

ICANN | NEXTGEN

Forty-four people from across Europe, Asia Pacific, and Africa participated in the NextGen@ICANN Program, which aims to encourage the next generation to engage with ICANN and Internet policymaking. The NextGen@ICANN Program will undergo a community review in FY20 with resulting changes implemented in FY20.

LEARN MORE about the review.

SUPPORTING EDUCATION

ICANN | LEARN

ICANN Learn is ICANN's online capacity-development platform. In FY19, more than 3,000 new students signed up to the platform, for a total of over 9,000 participants. The platform hosted more than 25 self-paced online courses at the end of FY19. More courses focusing on technical content, ICANN ecosystem knowledge-building, and personal effectiveness skill-building are scheduled for development in FY20.

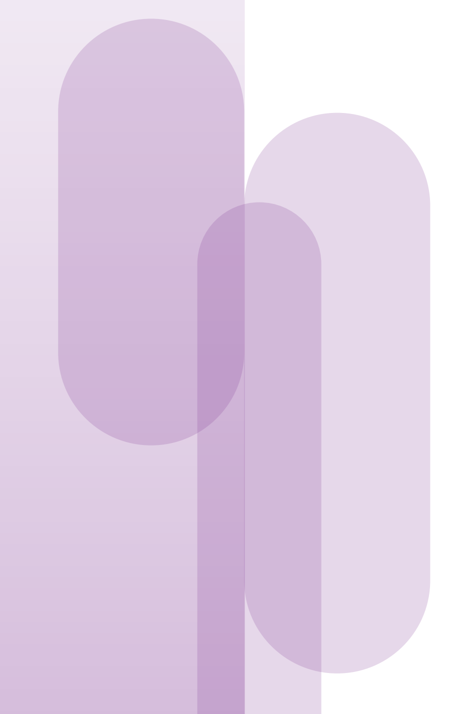
EXPLORE courses on ICANN Learn.

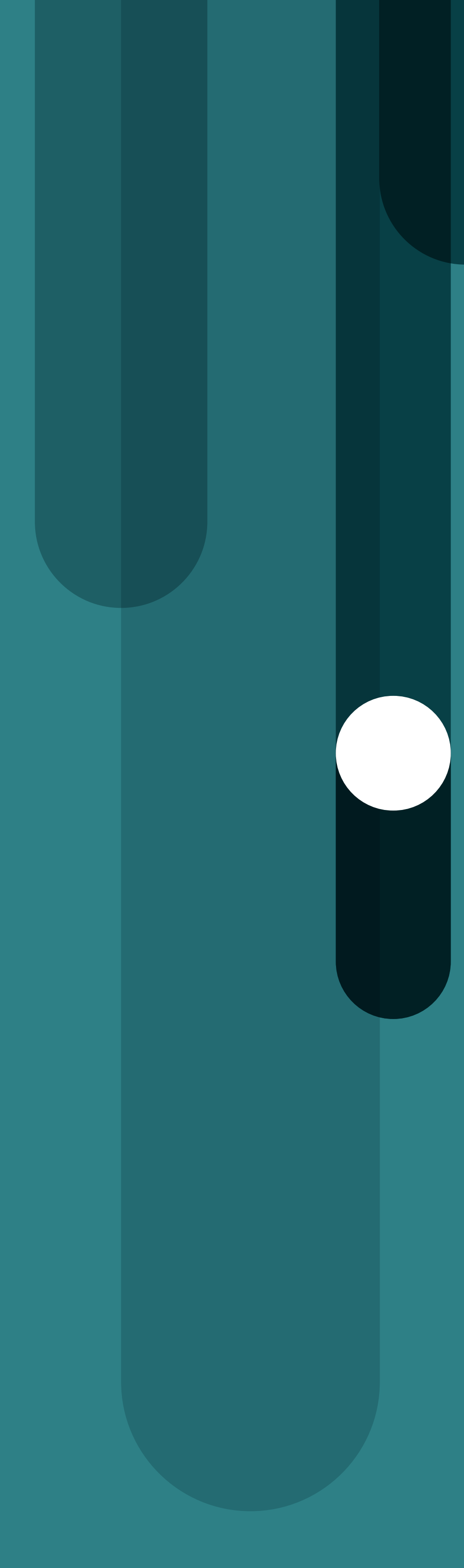
The **ICANN Academy Leadership Program (LP)** is a two-day program that aims to bring together current and incoming community leaders to enhance facilitation skills and increase understanding between members of the various ICANN SOs and ACs. Held at ICANN64, the Leadership Program brought together 27 community leaders from 15 different groups within the ICANN community, including four new Board members.

At ICANN64, the **Chairing Skills Program** held its second edition and through peer-coaching efforts, eight experienced leaders from across the ICANN community met with and observed 14 current ICANN chairs during their sessions in order to provide feedback to help develop their chairing skills. The work between the coaches and the chairs continued through virtual observations until ICANN65.

In FY19, new content was developed for the ICANN History Project, including the production of an ICANN Learn course and a research paper. New interviews and a library of historical documents will be available in FY20.

EXPLORE the History Project.





REGIONAL REPORTS

AFRICA REGIONAL REPORT

YEAR AT A GLANCE - TIMELINE

2018

3-5 July
ICANN org held the sixth **Africa DNS Forum** in Cotonou, Benin, in partnership with the Africa Top Level Domain Organization (AFTLD) and AfRegistrar.

6 July
ICANN org supported and took part in the celebration of **20 Years of Africa Internet Governance** in Cotonou, Benin.

18-19 September
ICANN org held a **DNS Abuse workshop in Lilongwe, Malawi**, the first in this country.

20 October
ICANN org launched the revised **Africa Strategic Plan Version 3.0** after working with the regional community to update the plan.

3-5 December
ICANN org was invited by Interpol to attend the Working Group **Meeting of the African Heads of Cybercrime Units** in Accra, Ghana.

2019

14-15 March
ICANN org members attended **the West and Central African Research and Education Network (WACREN)** meeting in Accra, Ghana, to talk about the Identifier Technology Health Indicators (ITHI). The event was preceded by a Universal Acceptance workshop organized in partnership with the Internet Society Ghana Chapter.

9-21 June
ICANN org was a gold sponsor of the **Africa Internet Summit** in Kampala, Uganda, and hosted several activities as part of this Summit, including **ICANN Day and a workshop for registries, registrars, and registrants**.

24-27 June
ICANN65 was held in Marrakech, Morocco, preceded by a number of ICANN org engagement activities with the local stakeholders.

REGIONAL HIGHLIGHTS

THE GROWTH OF THE AFRICA DNS FORUM

ICANN org's Domain Name System (DNS) Forum has become a flagship event and a key platform for capacity development. The sixth Africa DNS Forum, hosted by the Communications Regulator in Benin (ARCEP) was held in Cotonou, Benin, from 3-5 July 2018. This event followed previous successful Forums held in South Africa (2013), Nigeria (2014), Kenya (2015), Morocco (2016), and the United Republic of Tanzania (2017).

The Forum addresses national and regional industry topics, including:

- Registry and registrar strategies.
- Legal issues such as dispute resolutions and cross-border domain registrations.
- Registrar accreditation.
- Automation such as the resiliency of registries and payment gateways, etc.
- Governments supporting the growth of ccTLDs.

Through the Africa DNS Forum and other similar initiatives, ICANN org is committed to helping the African DNS industry become a significant contributor to the digital economy in Africa.

THE AFRICA STRATEGIC PLAN VERSION 3.0 LAUNCHED

ICANN org's Africa Strategy is the cornerstone of all engagement efforts within the continent. Prepared by the regional ICANN community, it has served as a road map for ICANN org activities in Africa.

Since the adoption of the strategy, three reviews have been held to ensure alignment with the changing needs of the African community. Following the third review process in May 2018 and a Public Comment period, the final strategy document, **ICANN Africa Strategy Version 3.0 2016 – 2020**, was completed.

ICANN AT THE AFRICA INTERNET SUMMIT

For the seventh year in a row, ICANN org participated in the Africa Internet Summit (AIS). This year, it was held in Kampala, Uganda, from 9-21 June 2019. As a gold sponsor and a key player at the Summit, ICANN org hosted an ICANN Day, a workshop for African registries, registrars, and registrants, an IANA update, and a media roundtable.

A youth community workshop was also held on the AIS sidelines on 13-14 June. It was organized by ICANN org in partnership with ISOC Uganda Chapter, the National Telecommunications and Information Administration of Uganda (NTIA-U), and the Ministry of ICT of Uganda. More information is available **here**.

REGIONAL PARTICIPATION : SUPPORTING ORGANIZATIONS

Regional SO leaders

Caleb Olumuyiwa Ogundele
NPOC Executive Committee

Wafa Dahmani
ASO Address councilor

Omo Oiya
ASO Address councilor

Noah Maina
ASO Address councilor

Abdallah Omari
ccNSO councilor

Souleymane Oumtanaga
ccNSO councilor

Biyi Oladipo
ccNSO councilor

Arsene Tungali
GNSO councilor

Ines Hfaiedh
NCUC Executive Committee

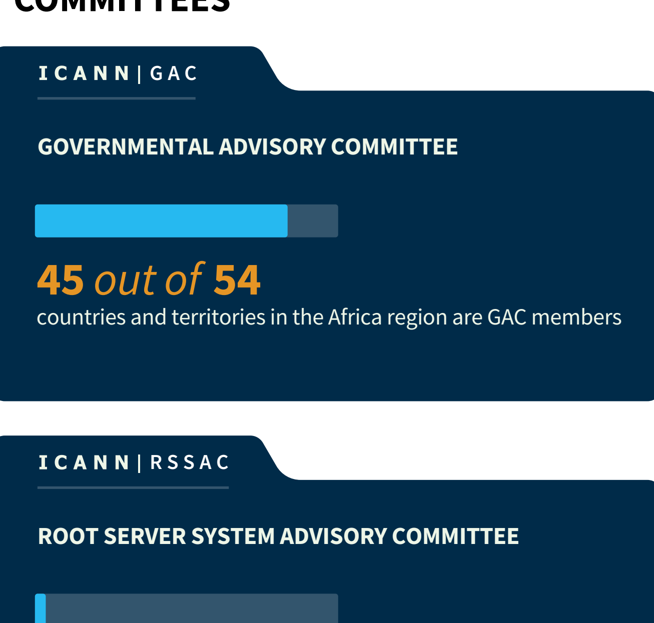
Jimson Olufuye
Business Constituency Executive Committee

REGIONAL PARTICIPATION : ADVISORY COMMITTEES

AT-LARGE ADVISORY COMMITTEE

3 *out of* **19**
members

60 At-Large Structures in **32** African countries and territories are part of the African Regional At-Large Organization (AFRALO).



ICANN | GAC

GOVERNMENTAL ADVISORY COMMITTEE

45 *out of* **54**
countries and territories in the Africa region are GAC members

ICANN | RSSAC

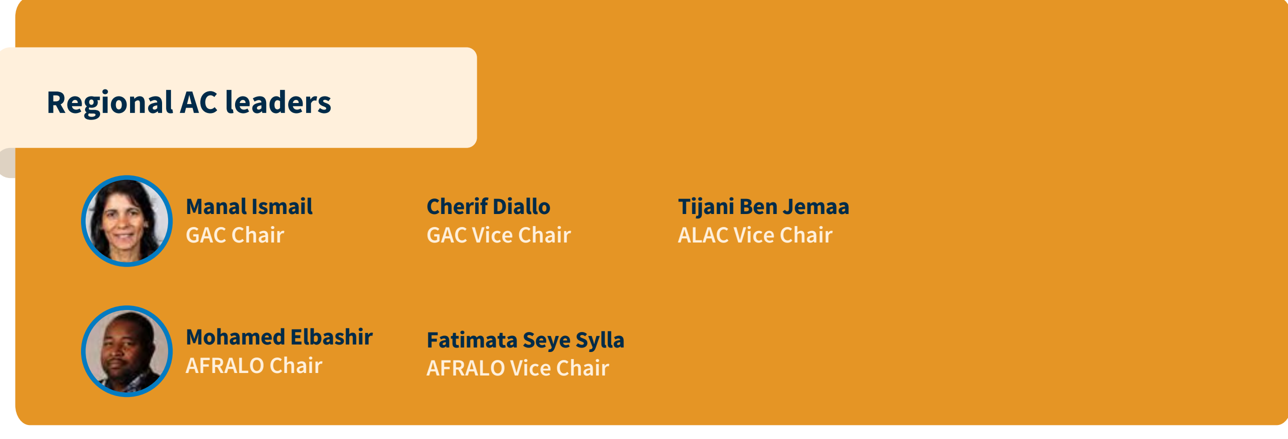
ROOT SERVER SYSTEM ADVISORY COMMITTEE

4 *out of* **112**
members are from Africa

ICANN | SSAC

SECURITY AND STABILITY ADVISORY COMMITTEE

3 *out of* **39**
members are from Africa



Regional AC leaders

Manal Ismail
GAC Chair

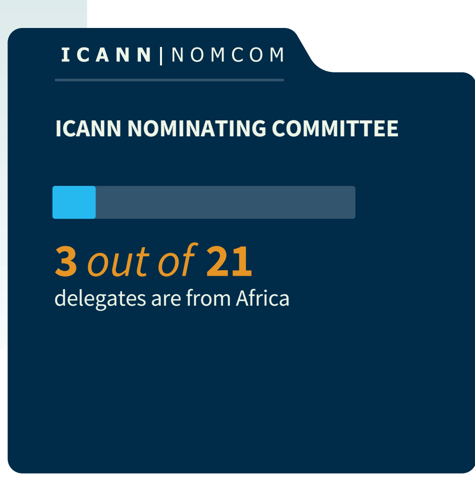
Cherif Diallo
GAC Vice Chair

Tijani Ben Jemaa
ALAC Vice Chair

Mohamed Elbashir
AFRALO Chair

Fatimata Seye Sylla
AFRALO Vice Chair

REGIONAL PARTICIPATION : OTHERS



ICANN | NOMCOM

ICANN NOMINATING COMMITTEE

3 *out of* **21**
delegates are from Africa

Community Leadership

Lawrence Olawale-Roberts
NomCom delegate

Anriette Esterhuysen
NomCom delegate

Aziz Hilali
NomCom delegate

POLICY DEVELOPMENT PROCESSES (PDP)

NEW GTLD SUBSEQUENT PROCEDURES

18 *out of* **198**
members are from Africa

CROSS-COMMUNITY WORKING GROUPS

CROSS-COMMUNITYWORKING GROUP ON NEW GTLD AUCTION PROCEEDS

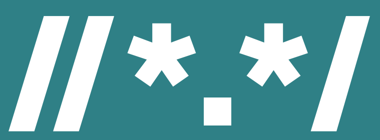
1 *out of* **25**
members are from Africa

REVIEWS

SPECIFIC REVIEWS
THIRD ACCOUNTABILITY AND TRANSPARENCY REVIEW TEAM (ATRT3)

2 *out of* **18**
members are from Africa

REGIONAL PARTICIPATION : UNIVERSAL ACCEPTANCE AND INTERNATIONALIZED DOMAIN NAMES



Universal Acceptance

In FY19, five countries from Africa (Benin, Ghana, Kenya, Nigeria, and South Africa) were selected for special outreach on Universal Acceptance (UA) and Internationalized Domain Names (IDNs). Workshops were organized for academics, content developers, governments, and the private sector in the selected countries to raise awareness around UA and IDNs. These were also used as an opportunity to invite these new audiences to participate in ICANN.

Regional UA Ambassadors

Abdalmonem Galila - Egypt

Internationalized Domain Names

Two script generation panels that are relevant to Africa were formed, completed, and integrated:

Forming	Working	Finalizing	Integrated
			Arabic
			Ethiopic

CAPACITY-DEVELOPMENT ACTIVITIES IN AFRICA

TRAINING FOR TECHNICAL COMMUNITY

ICANN org held technical workshops and webinars on DNSSEC and Universal Acceptance across the region.

Total number of workshops:

4

Number of participants:

90

TRAINING FOR NON-TECHNICAL COMMUNITY

The focus this year in the region was on bolstering the multistakeholder model.

Total number of workshops:

6

Number of participants:

199

TRAINING FOR LAW ENFORCEMENT AGENCIES

ICANN org provides training for law enforcement agencies so that they can better handle abuse and misuse related to Internet identifiers.

Total number of workshops:

4

Number of participants:

300

LOOKING AHEAD

During FY20, ICANN org will continue to support its flagship programs in the region like the DNS Exchange Program, the Africa DNS Forum, and the DNSSEC roadshow. Capacity development, as well as the promotion of informed participation from African stakeholders in ICANN will continue to be an important part of the regional efforts.

ICANN org will continue to focus on areas within cybersecurity that conform to ICANN's remit to help build trust and confidence in the Internet. ICANN org will continue to build strategic partnerships with the International Telecommunication Union, the Africa Union Commission, the Africa Telecommunication Union, and the UN Economic Commission for Africa to support governments and other stakeholders with Internet governance related issues within ICANN's mission and remit.

ICANN org has finalized its Strategic Plan for fiscal years 2021-2025, and this will require the participation of the African community to align the regional strategy with the newly adopted ICANN org strategy.

ASIA PACIFIC REGIONAL REPORT

YEAR AT A GLANCE - TIMELINE

2018

23-27 July
The third **Asia Pacific Internet Governance Academy (APIGA)** was held in Gwangju, Republic of Korea. The five-day workshop was jointly organized by Korea Internet and Security Agency (KISA) and ICANN.

13-16 August
The **Asia Pacific Regional Internet Governance Forum (APrIGF)** took place at Port Vila, Vanuatu, making its debut in the Pacific Islands.

28 August
A year-long **Universal Acceptance awareness campaign** kicked off in New Delhi, India, with the Universal Acceptance Steering Group (UASG) and the Internet and Mobile Association of India (IAMAI).

5-7 September
ICANN org participated in the **GSMA Mobile 360 Digital Societies Forum** in Bangkok, Thailand, and discussed how Internationalized Domain Names (IDN) can contribute to the next billion Internet users.

8 September
The **first ICANN engagement event** in **Dhaka, Bangladesh**, took place in collaboration with Bangladesh Association of Software and Information Services (BASIS).

9 October
A **Domain Name System (DNS) Abuse workshop** was held in Tokyo, Japan, for contracted parties and the local Internet community to raise awareness about DNS security and abuse handling.

7-9 November
Representatives from the ICANN Board and org attended the **World Internet Conference** in Wuzhen, China, and **met with contracted parties and academics in Shanghai, China**.

4 December
A multicity **IDN and Universal Acceptance Roadshow** was launched in China led by UASG and the China Internet Network Information Center (CNNIC). The first stop was Hangzhou, China.

2019

18-28 February
ICANN org contributed to discussions on topics such as routing security, DNS operations, and Domain Abuse Activity Reporting (DAAR) at the **Asia Pacific Regional Internet Conference on Operational Technologies (APRICOT)**, the **AP* Retreat**, and **APNIC 45** in Daejeon, Republic of Korea.

9-14 March
An ICANN Public Meeting returned to Japan after 19 years with **ICANN64** in **Kobe, Japan**. The high turnout at the Community Forum was a result of successful outreach conducted in the run up to the event.

16-17 April
Taiwan Network Information Center (TWNIC) collaborated with ICANN org to organize the **ICANN APAC-TWNIC Engagement Forum** on the DNS and Internet ecosystem in Taipei.

6-13 May
ICANN org brought the annual **GDD Industry Summit** to Asia for the first time. The three-day event in Bangkok, Thailand was followed by the **Registrations Operations Workshop**, the **ICANN DNS Symposium**, and the **DNS Operations, Analysis, and Research Center Workshop (OARC30)**.

18 June
The **Internet Identifier Innovation Center** in India was announced. The collaboration between ICANN and India's National Association of Software and Services Companies (NASSCOM) Centre of Excellence for Internet of Things (COE-IOT) will focus on research and engagement activities to foster innovation in Internet identifier technologies.

REGIONAL HIGHLIGHTS

NEW PARTNERSHIP CENTER FOR TECHNICAL RESEARCH

In June 2019, ICANN org and India's National Association of Software and Services Companies (NASSCOM) Centre of Excellence for Internet of Things (COE-IOT) jointly announced a new partnership center in India. The new venture, the Internet Identifier Innovation Center, will contribute to ICANN org's mission to ensure the stable and secure operation of the Internet's unique identifier systems.

This is ICANN org's first partnership center focusing on technical research. The collaboration provides a structure to jointly identify research projects.

The first research project focused on testing the use of the DNS to update Internet of Things firmware and studying how the proposed technology could scale outside a lab environment. Upon completion, the research results could contribute towards global Internet standards.

The collaboration also includes engagement activities to promote the research projects as well as capacity-development workshops to strengthen the active participation of Indian community in ICANN's policymaking processes.

GUIDING THE TRANSITION OF THE NEXT GENERATION FROM DIGITAL NATIVES TO DIGITAL CITIZENS

In July 2018, the third Asia Pacific Internet Governance Academy (APIGA) welcomed 32 young adults from the Asia Pacific region to Gwangju, Republic of Korea. The program's objective is to develop young leaders' knowledge and skills to encourage their contributions to the Internet community as digital citizens.

APIGA has been recognized as the premier platform for youth engagement on Internet governance issues in the region. It has also been successful in nurturing and cultivating an alumni that remain involved in the Internet governance ecosystem. The workshop has hosted 124 participants since its beginning, and 32 alumni are currently active in the Internet community.

The five-day Internet governance capacity-development workshop was co-organized by ICANN and the Korea Internet and Security Agency (KISA), with support from partners like the Asia Pacific Network Information Center (APNIC), DotAsia, and the Internet Society (ISOC).

GLOBAL ICANN MEETINGS IN THE APAC REGION

To encourage regional participation in ICANN64 Kobe and GDD Summit, ICANN org conducted additional outreach leading up to these meetings:

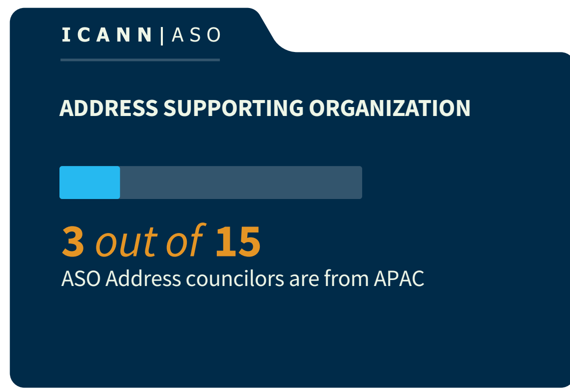
ICANN64 Kobe

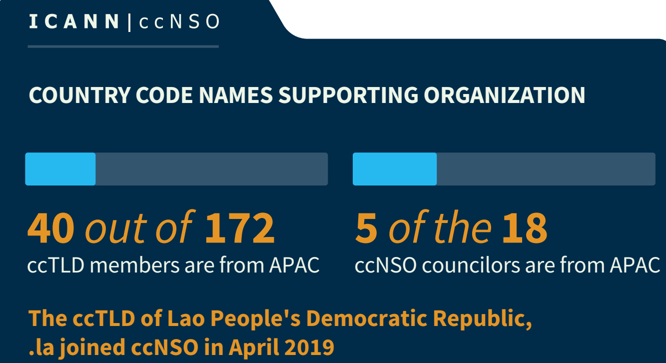
The focus of the Kobe outreach was to engage with the various local stakeholder groups (e.g., industry, academia, youth, and end users) to raise awareness of ICANN and ICANN-related issues.

GDD Summit

Around 50 contracted parties from the region, mostly first timers, attended the GDD Summit. The regional team organized a "meet-and-greet" session for the contracted parties to help them get to know one another.

REGIONAL PARTICIPATION : SUPPORTING ORGANIZATIONS





ICANN | GNSO

GENERIC NAMES SUPPORTING ORGANIZATION

GNSO COUNCIL

4 out of 23
councilors are from APAC

INTERNET SERVICE PROVIDERS AND CONNECTIVITY PROVIDERS CONSTITUENCY (ISPCP)

14 out of 62
companies are from APAC

NONCOMMERCIAL USERS CONSTITUENCY (NCUC)

24 out of 151
organizational members are from APAC

93 out of 604
individual members are from APAC

BUSINESS CONSTITUENCY (BC)

3 out of 71
companies are from APAC

REGISTRARS STAKEHOLDER GROUP (RRSG)

1 out of 10
Executive Committee members are from APAC

13 out of 100
member registrars are from APAC

INTELLECTUAL PROPERTY CONSTITUENCY (IPC)

4 out of 55
members are from APAC

REGISTRIES STAKEHOLDER GROUP (RYSG)

12 out of 83
member registry operators are from APAC

NOT-FOR-PROFIT OPERATIONAL CONCERNS CONSTITUENCY (NPOC)

1 out of 6
Executive Committee

9 out of 96
members are from APAC

REGIONAL PARTICIPATION : SUPPORTING ORGANIZATIONS cont'd

Regional SO leaders

**Newly appointed in FY19*

Donna Austin
RySG Chair

Aftab Sidiqqui
ASO Address Council Chair

***Simon Sohel Baroi**
ASO Address councilor

Brajesh Jain
ASO Address councilor

***Jordan Carter**
ccNSO councilor

***Ajay Data**
ccNSO councilor

Hirofumi Hotta
ccNSO councilor

***Jian Zhang**
ccNSO councilor

***Pam Little**
GNSO Council Vice Chair

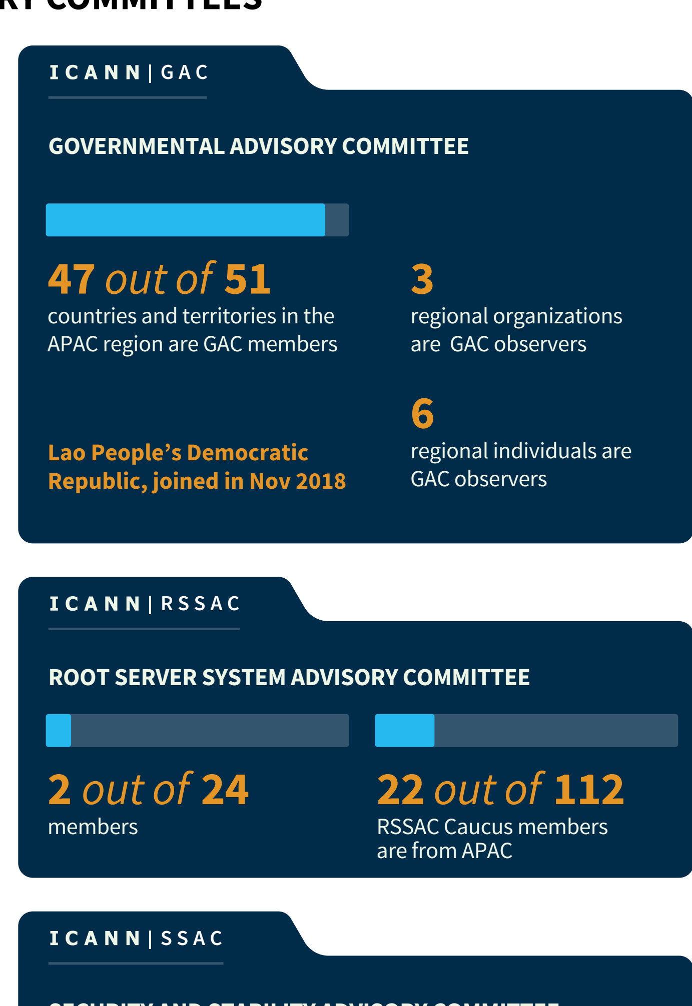
***Syed Ismail Shah**
GNSO councilor

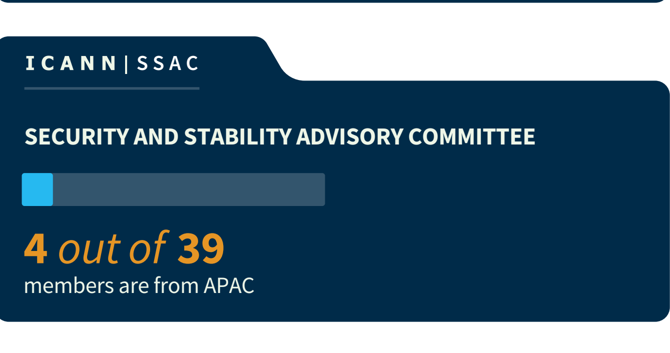
***David Cake**
NPOC Executive Committee

Monika Zalnieriute
NCSG Executive Committee

Rafik Dammak
GNSO Council Vice Chair
Rafik is originally Tunisian but has been residing in Japan. He contributes to both the Middle East and APAC ICANN communities.

REGIONAL PARTICIPATION : ADVISORY COMMITTEES





Regional AC leaders

**Newly appointed in FY19*

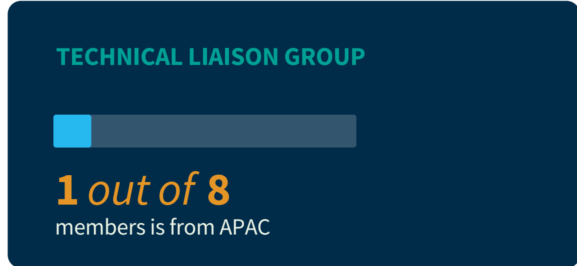
***Maureen Hilyard**
ALAC Chair

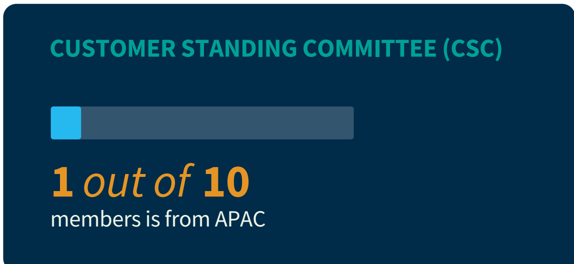
Satish Babu
APRALO Chair

***Par Brümark**
GAC Vice Chair

Julie Hammer
SSAC Vice Chair, ALAC Liaison to SSAC

REGIONAL PARTICIPATION : OTHERS





Community Leadership

**Newly appointed in FY19*

Brajesh Jain
NomCom (ASO-appointed) delegate

Jie Zhang
Technical Liaison Group member

***Holly Raiche**
ALAC Liaison to the CSC

REGIONAL PARTICIPATION : POLICY DEVELOPMENT AND REVIEWS

POLICY DEVELOPMENT PROCESSES (PDP)

PROTECTION OF INTERNATIONAL GOVERNMENTAL ORGANIZATION – INTERNATIONAL NON-GOVERNMENTAL ORGANIZATION (IGO-INGO) IDENTIFIERS IN ALL GTLDS

2 *out of* **16**
members are from APAC

NEW GTLD SUBSEQUENT PROCEDURES

36 *out of* **196**
members are from APAC

REVIEW OF ALL RIGHTS PROTECTION MECHANISMS (RPMS) IN ALL GTLDS

18 *out of* **168**
members are from APAC

CROSS-COMMUNITY WORKING GROUPS

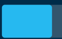
NEW GTLD AUCTION PROCEEDS

4 *out of* **25**
members are from APAC

REVIEWS

SPECIFIC REVIEWS

THIRD ACCOUNTABILITY AND TRANSPARENCY REVIEW (ATRT)



3 *of the* **18**
members are from APAC

COMPETITION, CONSUMER TRUST, AND CONSUMER CHOICE REVIEW (CCT)

1 *of the* **11**
members is from APAC

SECOND SECURITY, STABILITY, AND RESILIENCY REVIEW (SSR):

2 *of the* **15**
members are from APAC

REGISTRATION DIRECTORY SERVICE (RDS) (ON HOLD):

2 *of the* **11**
members are from APAC

REGIONAL PARTICIPATION : POLICY DEVELOPMENT AND REVIEWS cont'd

REGIONAL WORKING GROUP LEADERS

CHERYL LANGDON-ORR

- NEW GTLD SUBSEQUENT PROCEDURES PDP WORKING GROUP CO-CHAIR
- AT-LARGE REVIEW WORKING PARTY CO-CHAIR

CHING CHIAO

- CCWG NEW GTLD AUCTION PROCEEDS CO-CHAIR

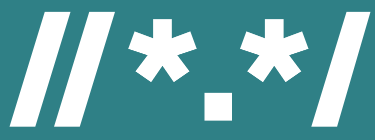
MICHAEL FLEMMING

- NEW GTLD SUBSEQUENT PROCEDURES PDP WORKING GROUP, WORK TRACK 2 CO-CHAIR

SOPHIA FENG SHUO

- NEW GTLD SUBSEQUENT PROCEDURES PDP WORKING GROUP, WORK TRACK 2 CO-CHAIR

REGIONAL PARTICIPATION : UNIVERSAL ACCEPTANCE AND INTERNATIONALIZED DOMAIN NAMES



Universal Acceptance

Working with the Universal Acceptance Steering Group (UASG) over the past year, ICANN org conducted a number of significant outreach activities in China and India. UASG also appointed Universal Acceptance Ambassadors who help to promote UA to their peers in the industry.

Regional UASG Leaders

- Edmon Chung — Vice Chair (term ended in March 2019)
- Ajay Data - Email Address Internationalization (EAI) Working Group Co-Chair (before March 2019)
- **Ajay Data — Chair (appointed in March 2019)**
- **Jiankang Yao — EAI Working Group Co-Chair**

Regional UA Ambassadors

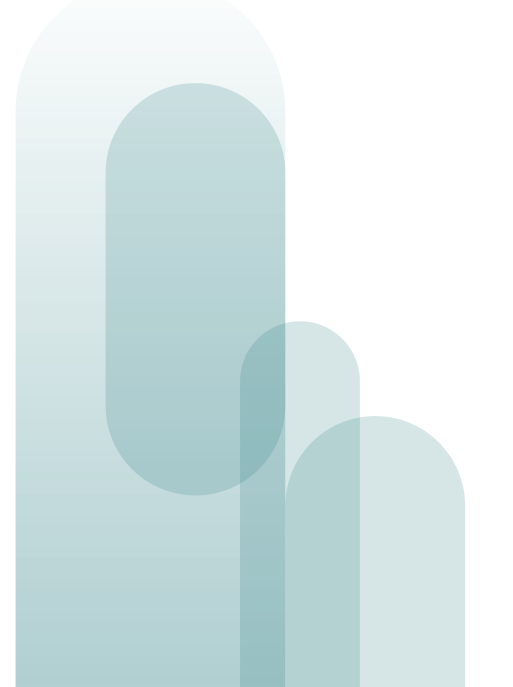
- Harish Chowdhary — Delhi, India
- Ashish Modi — Jaipur, India
- **Walter Wu — Hong Kong, China**

names in bold = newly appointed in FY19

Internationalized Domain Names

Below is an update on the status of current Script Generation Panels (GPs) in the APAC region. Once the script Label Generation Rules (LGR) are finalized, they are integrated into the Root Zone LGR.

Forming	Working	Finalizing	Integrated
Thaana	Myanmar	Chinese	Devanagari
Tibetan		Japanese	Gujarati
		Korean	Gurmukhi
		Neo-Brahmi (Bangla)	Kannada
			Khmer
			Lao
			Malayalam
			Oriya
			Sinhala
			Tamil
			Telugu
			Thai



CAPACITY-DEVELOPMENT ACTIVITIES IN ASIA PACIFIC

TRAINING FOR TECHNICAL COMMUNITY

As part of ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems, ICANN org provides capacity-building training for Domain Name System (DNS), DNS Security Extensions (DNSSEC), and DNS/Network Security to the APAC community.

Total number of workshops:

13

Number of participants:

555

TRAINING FOR NON-TECHNICAL COMMUNITY

The org also regularly helps to build capacity for nontechnical community such as accredited registrars and registry operators. These trainings are aimed towards helping these stakeholders to better understand ICANN policies and processes.

Total number of workshops:

5

Number of participants:

101

TRAINING FOR LAW ENFORCEMENT AGENCIES

ICANN org provides training for law enforcement agencies so that they can better handle abuse and misuse related to Internet identifiers.

Total number of workshops:

2

Number of participants:

45

LOOKING AHEAD

Looking ahead, Universal Acceptance (UA) and Internationalized Domain Names (IDNs) will remain key focus areas. The APAC region is very diverse and home to 21 of the world's most spoken languages. Greater awareness and support of IDNs and UA will contribute to a multilingual Internet, and help the region's communities to thrive online.

The **UASG FY20 Action Plan** will guide the partnership between ICANN org, the UASG, and the regional community. In particular, the team aims to drive local UA initiatives in the region, starting with China and India.

The technical focus – in line with ICANN's technical remit – will continue in this region. The partnership center with India's NASSCOM is an example of the type of technical collaboration that the region seeks. ICANN org, through the Office of the CTO and the org's regional team, will work with the regional community to protect the security, stability, and resiliency of the Internet's unique identifier system.

Another highlight going forward will be the ICANN68 Policy Forum, which will take place in Kuala Lumpur, Malaysia, from 22–25 June 2020. This will be the first Policy Forum to be held in the Asia Pacific region. The org will work with the APAC community to encourage more regional community members to attend and participate in ICANN org's policy development.

ICANN org welcomes any suggestions or feedback. The regional team can be reached at **apachub@icann.org.**

EUROPE REGIONAL REPORT

YEAR AT A GLANCE - TIMELINE

REGIONAL HIGHLIGHTS

A NEW APPROACH IN EUROPE: POLICY AND OPERATIONAL TRAINING PROGRAM

Understanding ICANN is not always easy for a newcomer and can discourage active participation. To address this issue, ICANN org developed a pilot Community Engagement Training in Europe in early 2018.

The latest workshop was held in June 2019, aimed at training DNS industry professionals in southern Europe. Participants learned about topics like the effect of the General Data Protection Regulation (GDPR) on ICANN org and its contracted parties, and the operation of ICANN org's compliance department.

The plan is to institutionalize this training program by broadening the spectrum of community groups that can be potential trainees. Anyone interested in becoming more active at ICANN is invited.

ICANN ACTIVITY IN THE IBERIAN PENINSULA

ICANN63 in Barcelona, Spain, allowed the ICANN org to roll out a series of significant outreach activities before and during the meeting. The team was able to engage with a variety of stakeholder groups, from academics to top judges and ministers, as well as telecom operators. Some of these activities include:

- Five ICANN-focused lectures at Spanish universities, including the world-renowned ESADE Graduate / MBA Business School in Barcelona, Nebrija University Law School in Madrid, and Complutense University of Madrid held from September to mid-October.
- ICANN Keynote Lecture organized at the Spanish Royal Academy of Law in Madrid on 17 October.
- Barcelona Internet Governance School Week, organized by ICANN org with the Pompeu Fabra University, IBEI School of International Relations, CSUC Spanish Education Network, with the support of the Anti-Phishing Working Group and La Caixa Bank from 15-19 October.
- Press conference with ICANN org involvement, organized at the Spanish Internet Governance Forum Spain in Madrid on 18 October.

SEEDIG GROWS IN EUROPE

The South Eastern Dialogue on Internet Governance (SEEDIG) continues to grow stronger. ICANN has been one of SEEDIG's main supporters since it was initially conceived at the ICANN Public Meeting in London, United Kingdom of Great Britain and Northern Ireland, in 2014. At the May 2019 SEEDIG conference in Bucharest, Romania, participants discussed concerns from content regulation to Universal Acceptance. The multilingual Internet is a topic of special interest to this community, notably with the Cyrillic script developing as an increasingly popular tool for the development of local content. SEEDIG has steadily informed a multistakeholder approach to solving issues related to the Internet in the region, with SEEDIG participants now regularly consulted and involved in the development of Internet policy across the region.

REGIONAL PARTICIPATION : SUPPORTING ORGANIZATIONS

REGIONAL PARTICIPATION : SUPPORTING ORGANIZATIONS cont'd

Claudia Selli
BC Chair

Katrina Sataki
ccNSO Chair

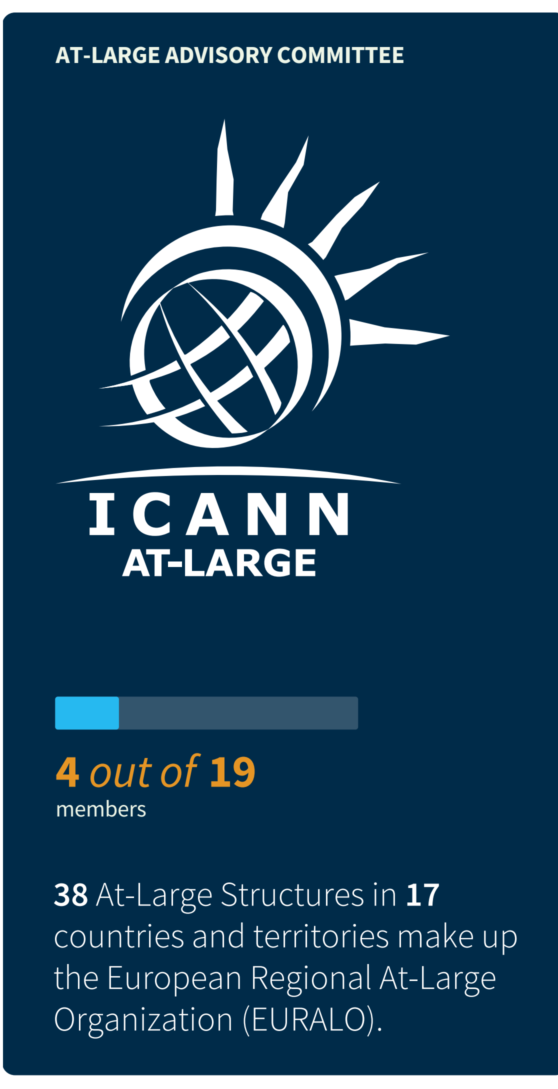
Raoul Plommer
NPOC Vice Chair

Tatiana Tropina
GNSO councilor

Ayden Federline
GNSO councilor

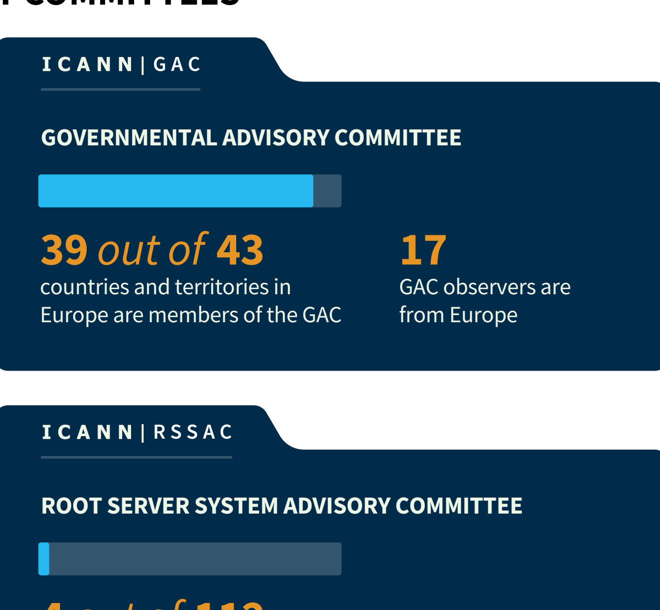
REGIONAL PARTICIPATION : ADVISORY COMMITTEES

AT-LARGE ADVISORY COMMITTEE



4 *out of* **19**
members

38 At-Large Structures in **17** countries and territories make up the European Regional At-Large Organization (EURALO).



ICANN | GAC

GOVERNMENTAL ADVISORY COMMITTEE

39 *out of* **43**
countries and territories in Europe are members of the GAC

17
GAC observers are from Europe

ICANN | RSSAC

ROOT SERVER SYSTEM ADVISORY COMMITTEE

4 *out of* **112**
RSSAC Caucus members are from Europe

ICANN | SSAC

SECURITY AND STABILITY ADVISORY COMMITTEE

9 *out of* **39**
members are from Europe

Regional AC leaders

Olivier Crépin-Leblond
Regional At-Large (EURALO) Chair

REGIONAL PARTICIPATION : OTHERS

ICANN NOMINATING COMMITTEE

4 *out of* **17**
delegates are from Europe

CROSS-COMMUNITY WORKING GROUPS

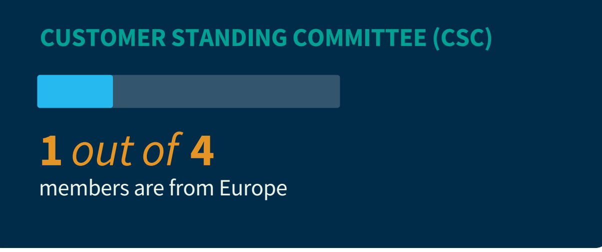
NEW GTLD AUCTION PROCEEDS

5 *out of* **25**
members are from Europe

TECHNICAL LIAISON GROUP

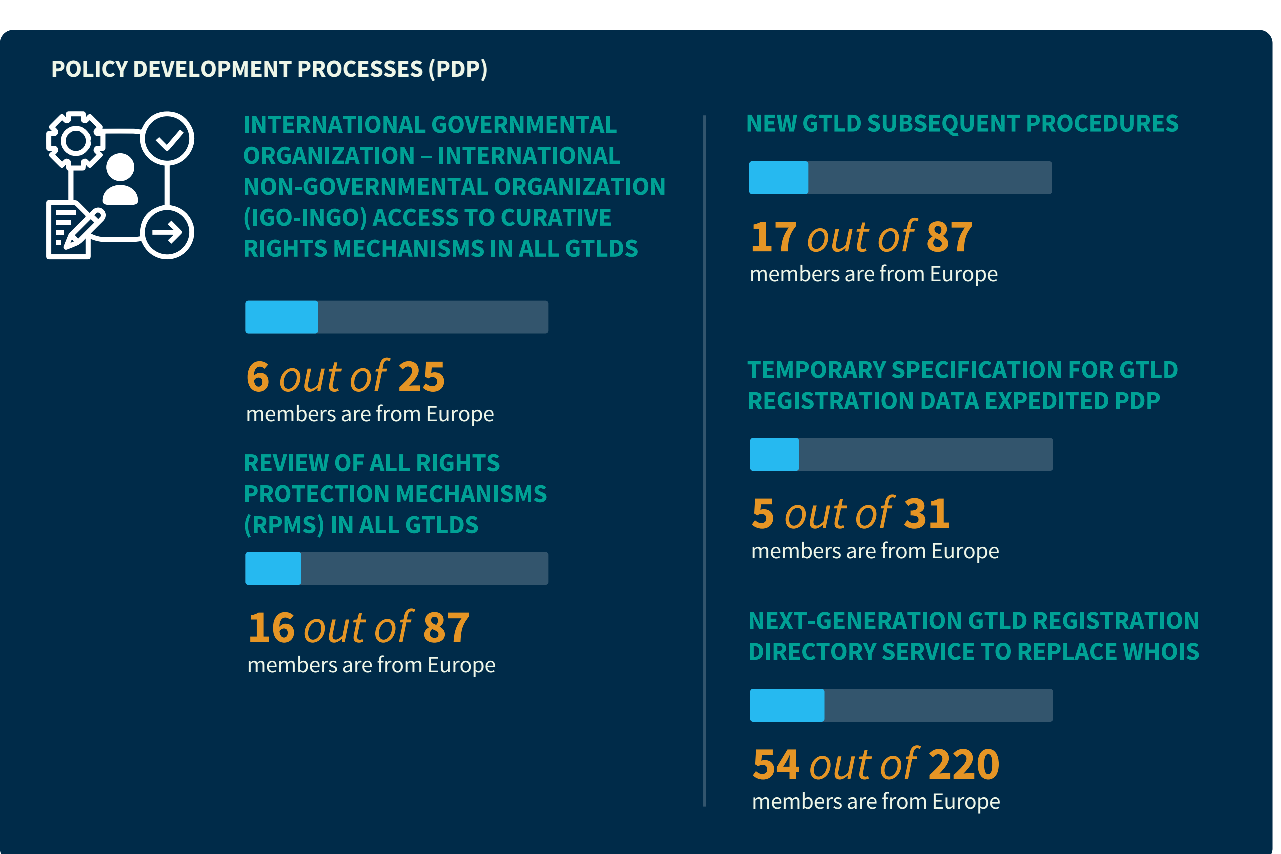
3
organizations represented in TLG are based in Europe

14
members are from Europe



CUSTOMER STANDING COMMITTEE (CSC)

1 *out of* **4**
members are from Europe



POLICY DEVELOPMENT PROCESSES (PDP)

INTERNATIONAL GOVERNMENTAL ORGANIZATION – INTERNATIONAL NON-GOVERNMENTAL ORGANIZATION (IGO-INGO) ACCESS TO CURATIVE RIGHTS MECHANISMS IN ALL GTLDS

6 *out of* **25**
members are from Europe

REVIEW OF ALL RIGHTS PROTECTION MECHANISMS (RPMS) IN ALL GTLDS

16 *out of* **87**
members are from Europe

NEW GTLD SUBSEQUENT PROCEDURES

17 *out of* **87**
members are from Europe

TEMPORARY SPECIFICATION FOR GTLD REGISTRATION DATA EXPEDITED PDP

5 *out of* **31**
members are from Europe

NEXT-GENERATION GTLD REGISTRATION DIRECTORY SERVICE TO REPLACE WHOIS

54 *out of* **220**
members are from Europe

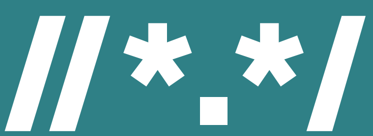
REGIONAL PARTICIPATION : POLICY DEVELOPMENT AND REVIEWS cont'd

REGIONAL WORKING GROUP LEADERS

ERIKA MANN
GNSO APPOINTED CO-CHAIR, CCWG ON NEW GTLD AUCTION PROCEEDS

JANIS KARKLINS
EPDP PHASE 2 CHAIR

REGIONAL PARTICIPATION : UNIVERSAL ACCEPTANCE AND INTERNATIONALIZED DOMAIN NAMES



Universal Acceptance

ICANN org together with partners in the Universal Acceptance Steering Group (UASG) focused its efforts to promote UA in the region on raising awareness among chief information officers, and the wider technical community. The team successfully worked with the International Association of CIOs (IAC) to publish an article on UA in their worldwide newsletter and website. ICANN org members in Europe also gave speeches at several technical conferences, such as the new Czech and Slovak Network Operators Group (CS-NOG) meeting in May 2019, and secured UA promotion via articles in their publications.

Regional UASG Leader

- Dusan Stojicevic - UASG Vice Chair

Regional UA Ambassadors

- Lars Steffen - Germany
- Tobias Sattler - Germany

Internationalized Domain Names

This year, ICANN org has intensified the efforts to promote Internationalized Domain Names (IDNs) and Universal Acceptance (UA) across Europe and beyond. The **Hebrew Label Generation Panel** was formed, leading to rules being adopted officially on July 2019. South Eastern European scripts such as Cyrillic are also seeing growing interest and take-up. Below is an update on the status of current Script Generation Panels (GPs) in the region. Once the script Label Generation Rules (LGR) are finalized, they are integrated into the Root Zone LGR.

Forming	Working	Finalizing	Integrated
	Greek	Latin	Hebrew
			Cyrillic

CAPACITY-DEVELOPMENT ACTIVITIES IN EUROPE

TRAINING FOR TECHNICAL COMMUNITY

ICANN org provided DNS Network Security and DNSSEC training to the European community.

Total number of workshops:

7

Number of participants:

290

TRAINING FOR NON-TECHNICAL COMMUNITY

The org also regularly helps to build capacity for the community such as accredited registrars and registry operators. In addition, ICANN org engaged with government and civil society for training that is relevant to these sectors.

Total number of workshops:

5

Number of participants:

56

TRAINING FOR LAW ENFORCEMENT AGENCIES

ICANN org collaborated with European law enforcement on DNS security training.

Total number of workshops:

4

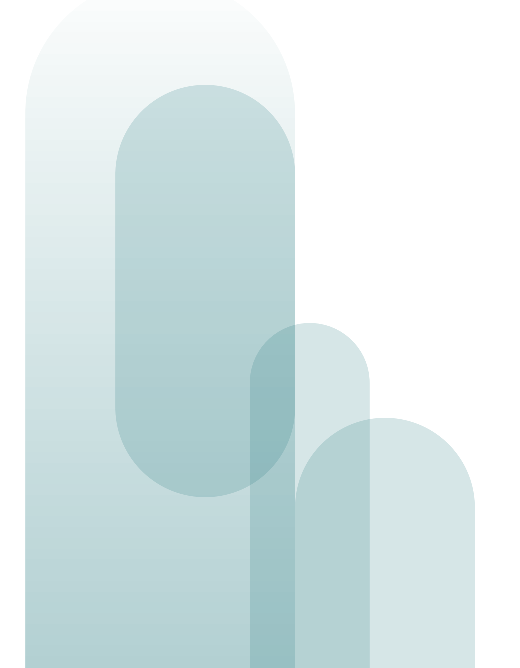
Number of participants:

127

LOOKING AHEAD

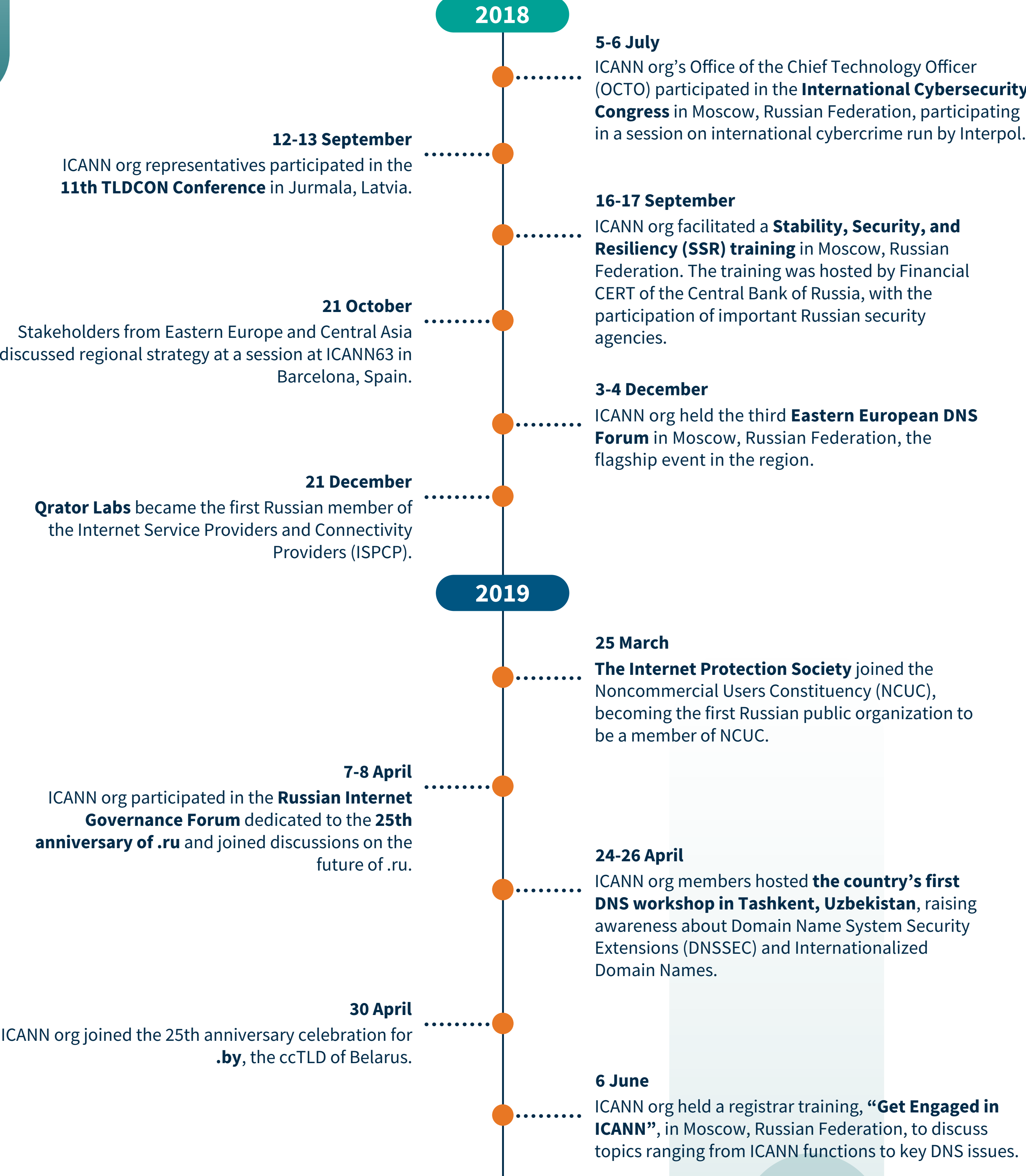
In FY20, the approach in Europe will be adapted in line with ICANN org's Strategic Plan for FY21-25. The ICANN org team in Europe recognizes the importance of raising awareness and capacity building on policy and technical matters, as well as addressing upcoming regulatory and legislative challenges. The new ICANN strategic plan encourages the team to continue building on the efforts in that direction.

Through education, raising awareness, and advocacy, ICANN org will continue to build and enhance relations with the key relevant stakeholder groups in Europe, both within the existing ICANN community and beyond.



EASTERN EUROPE AND CENTRAL ASIA REGIONAL REPORT

YEAR AT A GLANCE - TIMELINE



2018

5-6 July
ICANN org's Office of the Chief Technology Officer (OCTO) participated in the **International Cybersecurity Congress** in Moscow, Russian Federation, participating in a session on international cybercrime run by Interpol.

12-13 September
ICANN org representatives participated in the **11th TLDCON Conference** in Jurmala, Latvia.

16-17 September
ICANN org facilitated a **Stability, Security, and Resiliency (SSR) training** in Moscow, Russian Federation. The training was hosted by Financial CERT of the Central Bank of Russia, with the participation of important Russian security agencies.

21 October
Stakeholders from Eastern Europe and Central Asia discussed regional strategy at a session at ICANN63 in Barcelona, Spain.

3-4 December
ICANN org held the third **Eastern European DNS Forum** in Moscow, Russian Federation, the flagship event in the region.

21 December
Qrator Labs became the first Russian member of the Internet Service Providers and Connectivity Providers (ISPCP).

2019

25 March
The Internet Protection Society joined the Noncommercial Users Constituency (NCUC), becoming the first Russian public organization to be a member of NCUC.

7-8 April
ICANN org participated in the **Russian Internet Governance Forum** dedicated to the **25th anniversary of .ru** and joined discussions on the future of .ru.

24-26 April
ICANN org members hosted **the country's first DNS workshop in Tashkent, Uzbekistan**, raising awareness about Domain Name System Security Extensions (DNSSEC) and Internationalized Domain Names.

30 April
ICANN org joined the 25th anniversary celebration for **.by**, the ccTLD of Belarus.

6 June
ICANN org held a registrar training, **"Get Engaged in ICANN"**, in Moscow, Russian Federation, to discuss topics ranging from ICANN functions to key DNS issues.

REGIONAL HIGHLIGHTS

FLAGSHIP EVENT BRINGS THE REGION TOGETHER

The Eastern European DNS Forum (EEDNSF) is part of ICANN org's regional engagement efforts to collaborate with stakeholders and raise awareness on issues related to the DNS.

The third EEDNSF, held on 3-4 December 2018 in Moscow, Russian Federation, was a joint venture with regional community leaders to develop a platform that brings together the regional stakeholders annually for knowledge-sharing within and beyond the regional DNS community. **READ MORE about the EEDNSF.**

This Forum will continue across the region, visiting different local communities and enriching its participants with new perspectives and ideas each year.

CAPACITY DEVELOPMENT FOR REGISTRARS AND REGISTRIES

A training for ICANN-accredited registrars, “Get Engaged in ICANN - Seminar for Registrars”, was held on 6 June 2019 in Moscow, Russian Federation. This initiative was a result of discussions with the registrar community who asked to learn more about key DNS issues.

In addition, Domain Name System Security Extensions (DNSSEC) trainings were held in Georgia and Uzbekistan to promote measures enhancing security, stability, and resiliency of the Internet’s unique identifier system:

- On 24-25 April 2019, a DNSSEC training was held as part of a DNS Workshop in Tashkent, Uzbekistan, for the .uz and .af registries. The workshop was organized in collaboration with the Asia Pacific Top Level Domain Association (APTLD) and it was the first ICANN capacity-development activity held in Uzbekistan.
- On 6 May 2019, a DNSSEC training was held for the .ge Registry in Tbilisi, Georgia, providing insight into DNSSEC design choices and project planning for DNSSEC signing.

ICANN CONSTITUENCIES WELCOME NEW MEMBERS FROM THE REGION

ICANN | ISPCP

Internet Service Providers & Connectivity Providers

FY19 saw some new regional organizations joining ICANN community constituencies such as:

- Qrator Labs, which became the first Russian member of the Internet Service Providers and Connectivity Providers (ISPCP).
- The Internet Protection Society, which joined the Noncommercial Users Constituency (NCUC), becoming the first Russian public organization to be a member of NCUC.

REGIONAL PARTICIPATION : SUPPORTING ORGANIZATIONS

Regional SO leaders

Maxim Alzoba
GNSO councilor

ICANN | GNSO

GENERIC NAMES SUPPORTING ORGANIZATION

GNSO COUNCIL

1 *out of* **23**
councilors are from EECA

REGISTRARS STAKEHOLDER GROUP (RRSG)

2 *out of* **100**
member registrars are from EECA

REGISTRIES STAKEHOLDER GROUP (RYSG)

1 *out of* **83**
member registry operators are from EECA

INTERNET SERVICE PROVIDERS AND CONNECTIVITY PROVIDERS CONSTITUENCY (ISPCP)

2 *out of* **62**
members are from EECA

NONCOMMERCIAL USERS CONSTITUENCY (NCUC)

7 *out of* **151**
organizational members are from EECA

4 *out of* **604**
individual members are from EECA

NOT-FOR-PROFIT OPERATIONAL CONCERNS CONSTITUENCY (NPOC)

4 *out of* **96**
members are from EECA

REGIONAL PARTICIPATION : ADVISORY COMMITTEES

AT-LARGE ADVISORY COMMITTEE

5 At-Large Structures and **2** individual members across 3 countries and territories in Asian, Australasian, and Pacific Islands Regional At-Large Organization (APRALO).

4 At-Large Structures and **7** individual members across 2 countries and territories in European Regional At-Large Organization (EURALO).

GOVERNMENTAL ADVISORY COMMITTEE

10 *out of* **12**
countries and territories in the EECA region are GAC members

SECURITY AND STABILITY ADVISORY COMMITTEE

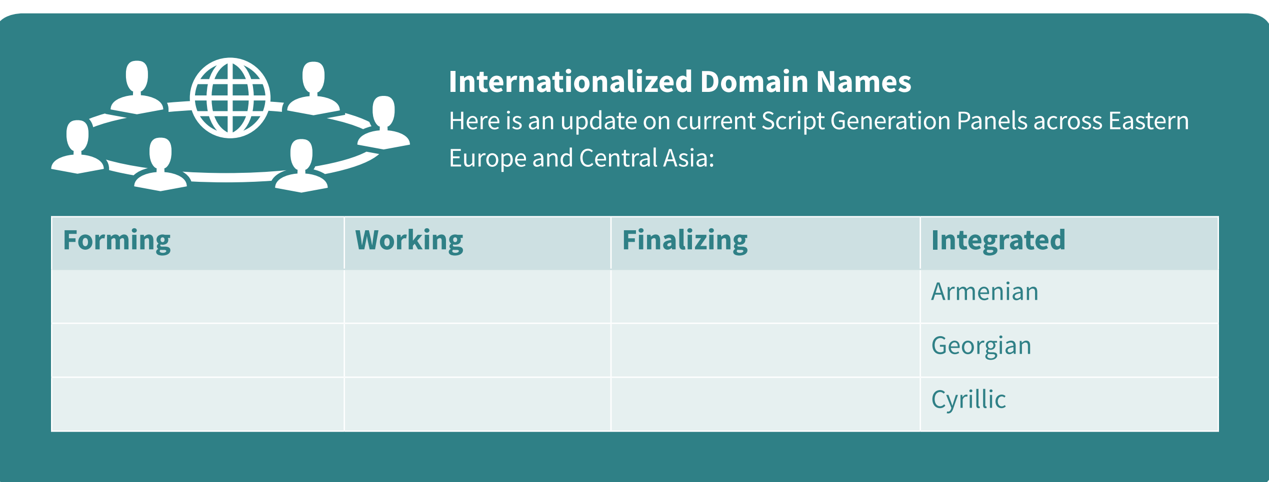
1 *out of* **39**
members are from EECA

Regional AC leaders

Lianna Galstyan
APRALO Vice Chair

Natalia Filina
EURALO Secretariat
(active starting in November 2019)

REGIONAL PARTICIPATION : INTERNATIONALIZED DOMAIN NAMES



Internationalized Domain Names

Here is an update on current Script Generation Panels across Eastern Europe and Central Asia:

Forming	Working	Finalizing	Integrated
			Armenian
			Georgian
			Cyrillic

CAPACITY-DEVELOPMENT ACTIVITIES IN EECA

TRAINING FOR TECHNICAL COMMUNITY

Total number of workshops:

2

Number of participants:

40

TRAINING FOR NON-TECHNICAL COMMUNITY

Total number of workshops:

1

Number of participants:

26

TRAINING FOR LAW ENFORCEMENT AGENCIES

Total number of workshops:

1

Number of participants:

25

LOOKING AHEAD

FY19 was a period full of engagement activities in the region. Community members from several countries and territories highlighted certain needs specific to Eastern Europe and Central Asia. In FY20, ICANN org will continue to build on these engagement efforts and work on capacity development to meet the needs of the regional stakeholders.

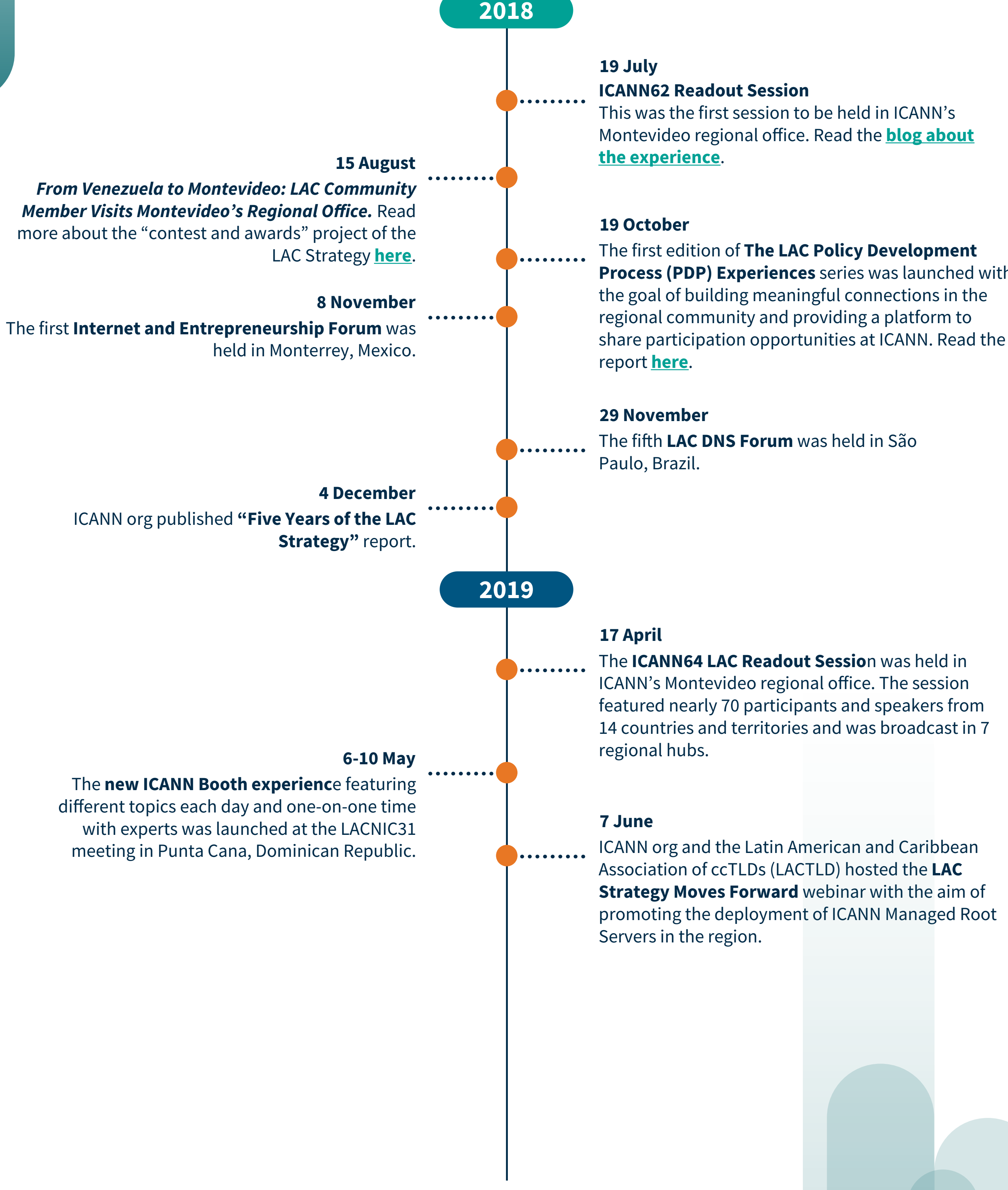
Raising awareness about ICANN org's mission, strategy, and the multistakeholder model of governance within the broader Internet community will be key drivers. Another FY20 goal is to help strengthen DNS security and evolution of the unique identifier systems in collaboration with the stakeholders. This is aligned with ICANN's strategic plan.

To achieve this, regional teams will better localize and tailor efforts, focusing on the needs of different stakeholder groups, and bring in ICANN org expertise to support regional Internet communities. This will include events dedicated to DNS security, DNS hygiene, and DNSSEC. One of the main regional activities coming up in the region will be the fourth Eastern European DNS Forum, which will take place in October 2019 in Yerevan, Armenia.

Along with other stakeholders, ICANN org will continue to engage with regional governments to help them participate more effectively in ICANN-related discussions and build on existing cooperation to preserve the safety, security, and interoperability of the Internet for the benefit of all users.

LATIN AMERICAN AND CARIBBEAN ISLANDS REGIONAL REPORT

YEAR AT A GLANCE - TIMELINE



2018

19 July
ICANN62 Readout Session
This was the first session to be held in ICANN's Montevideo regional office. Read the **blog about the experience**.

15 August
From Venezuela to Montevideo: LAC Community Member Visits Montevideo's Regional Office. Read more about the "contest and awards" project of the LAC Strategy **here**.

19 October
The first edition of **The LAC Policy Development Process (PDP) Experiences** series was launched with the goal of building meaningful connections in the regional community and providing a platform to share participation opportunities at ICANN. Read the report **here**.

8 November
The first **Internet and Entrepreneurship Forum** was held in Monterrey, Mexico.

29 November
The fifth **LAC DNS Forum** was held in São Paulo, Brazil.

4 December
ICANN org published **"Five Years of the LAC Strategy"** report.

2019

17 April
The **ICANN64 LAC Readout Sessio**n was held in ICANN's Montevideo regional office. The session featured nearly 70 participants and speakers from 14 countries and territories and was broadcast in 7 regional hubs.

6-10 May
The **new ICANN Booth experienc**e featuring different topics each day and one-on-one time with experts was launched at the LACNIC31 meeting in Punta Cana, Dominican Republic.

7 June
ICANN org and the Latin American and Caribbean Association of ccTLDs (LACTLD) hosted the **LAC Strategy Moves Forward** webinar with the aim of promoting the deployment of ICANN Managed Root Servers in the region.

REGIONAL HIGHLIGHTS

FIVE YEARS OF THE LAC STRATEGY IN FOCUS

Latin American and Caribbean participation in ICANN has grown in the last five years. What started as a few stakeholder meetings during ICANN Public Meetings, grew into formalized sessions, including the LAC Space and the newly formed LAC Session on Policy Development Processes (PDPs). The level of awareness about ICANN also improved, due to regional events and outreach efforts that encouraged the participation of new voices in the region.

The Report highlights contributions from the regional community creating key initiatives over the past 5 years like **Centro de Emprendimiento e Internet de América Latina y el Caribe** and **Virtual DNS Entrepreneurship Center for the Caribbean**, and the establishment of ICANN org regional office in Montevideo, Uruguay. As a result, the vibrant regional ICANN community continues to grow. Read the full Report **here**.

LATIN AMERICAN AND CARIBBEAN ISLANDS REGIONAL REPORT

The ICANN org LAC team would like to thank all the community members who have contributed to strategy development. Learn more about the LAC Strategy for 2018-2020 **here**.

REGIONAL EFFORTS SUPPORTING ICANN'S SUCCESSFUL KEY SIGNING KEY ROLLOVER

On 11 October 2018, ICANN successfully changed the cryptographic key that helps protect the Domain Name System (DNS), an event known as the Key Signing Key (KSK) rollover.

To help prepare for a smooth transition, ICANN org focused its efforts in Brazil, which is home to many Autonomous System Numbers and independent regional Internet Service Providers (ISPs). Eighteen percent of ISPs enabled with Domain Name System Security Extensions (DNSSEC) are Brazilian.

The ICANN org team partnered with the Brazilian Network Information Center (NIC.br) and travelled to eight Brazilian states to deliver KSK rollover readiness instructions during the IX Regional Forum. It was a great opportunity to engage with the large community of professionals that provide Internet services to remote cities.

COMMUNITY COMES TOGETHER FOR THE 2018 LAC DNS FORUM

The annual LAC DNS Forum brought together industry, Internet policy, and technical professionals interested in DNS-related issues. On 29 November 2018, over 200 community members participated in the LAC DNS Forum held in Sao Paulo, Brazil. The National Association of Hosting and Internet Services Companies (ABRAHOSTING), local stakeholders including the Brazilian Network Information Center (NIC.br), and the Brazilian Software Association (ABES) contributed to the event by sharing their work in the domain name field and Universal Acceptance.

REGIONAL PARTICIPATION : SUPPORTING ORGANIZATIONS

REGIONAL PARTICIPATION : SUPPORTING ORGANIZATIONS cont'd

Regional SO leaders

**Newly appointed in FY19*

Bruna Martins
NCUC Chair

Jorge Villa
ASO Address Council Vice Chair

***Ricardo Patara**
ASO Address councilor

Esteban Lescano
ASO Address councilor

Alejandra Reynoso
ccNSO Council Vice Chair

Margarita Valdés
ccNSO councilor

Demi Getschko
ccNSO councilor

***Laura Margolis**
ccNSO councilor

Carlos Gutiérrez
GNSO councilor

Rubens Kuhl
GNSO councilor

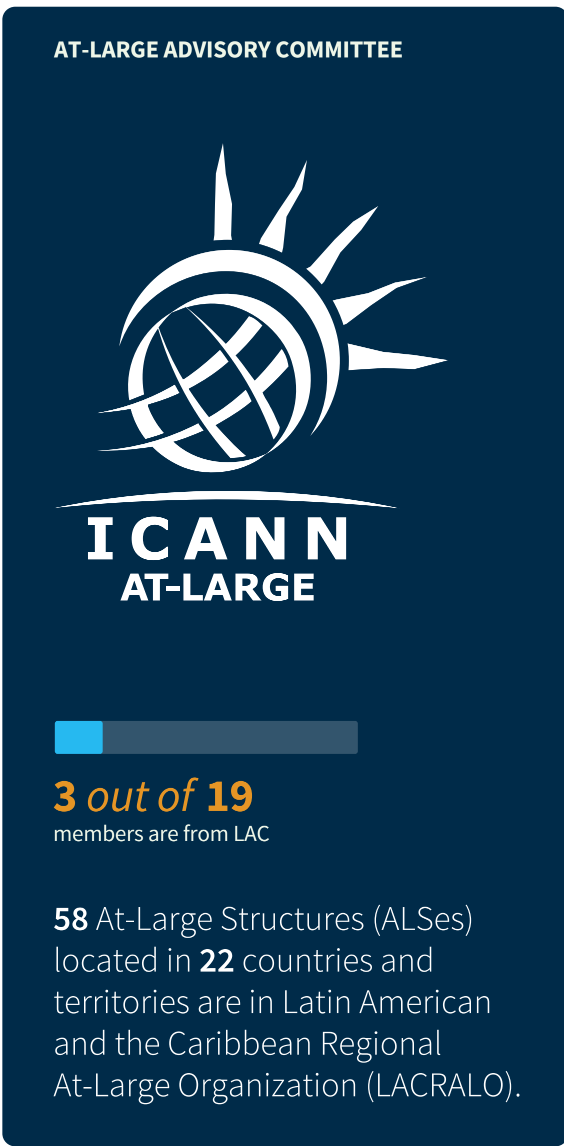
Osvaldo Novoa
GNSO councilor

Martin Silva Valent
GNSO councilor

Tony Harris
NCSG Executive Committee

Juan Manuel Rojas
NPOC Membership Committee Chair

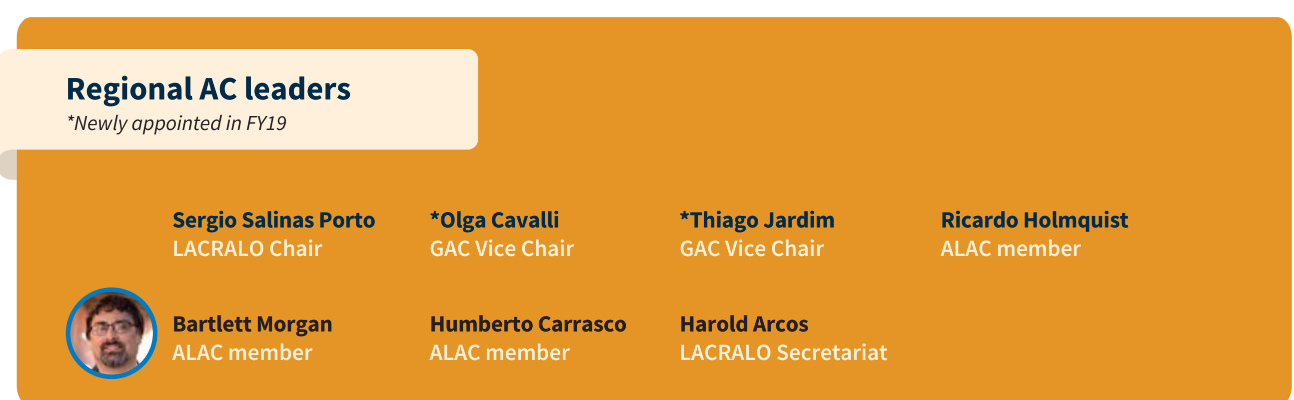
REGIONAL PARTICIPATION : ADVISORY COMMITTEES



ICANN | SSAC

SECURITY AND STABILITY ADVISORY COMMITTEE

1 out of 39
members are from LAC



REGIONAL PARTICIPATION : OTHERS

ALEJANDRO ACOSTA
NOMCOM DELEGATE

***TRACY HACKSHAW**
NOMCOM DELEGATE

**Newly appointed in FY19*

POLICY DEVELOPMENT PROCESSES (PDP)

TEMPORARY SPECIFICATION FOR GTLD REGISTRATION DATA EXPEDITED PDP

2 *out of* **26**
members are from LAC

INTERNATIONAL GOVERNMENTAL ORGANIZATION– INTERNATIONAL NON-GOVERNMENTAL ORGANIZATION (IGO-INGO) ACCESS TO CURATIVE RIGHTS PROTECTION MECHANISMS

1 *out of* **26**
members is from LAC

PROTECTION OF IGO AND INGO IDENTIFIERS IN ALL GTLDS

2 *out of* **16**
members are from LAC

NEW GTLD SUBSEQUENT PROCEDURES

16 *out of* **196**
members are from LAC

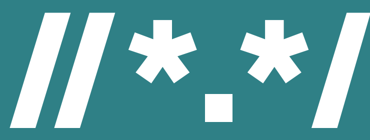
REVIEW OF ALL RIGHTS PROTECTION MECHANISMS (RPMS) IN ALL GTLDS

8 *out of* **168**
members are from LAC

NEXT-GENERATION GTLD REGISTRATION DIRECTORY SERVICES TO REPLACE WHOIS

16 *out of* **220**
members are from LAC

REGIONAL PARTICIPATION : UNIVERSAL ACCEPTANCE



Universal Acceptance

The primary focus for work towards a multilingual Internet in the region has been around preparation for Universal Acceptance, particularly in Brazil with the support of the Brazilian National Software Association (ABES).

Highlights:

- National Universal Acceptance study (Brazil): "Evaluation of Brazilian Websites for Universal Acceptance" presented by Paulo Milliet Roque and Mark William Datysgeld during the LAC Space session in ICANN63 held in Barcelona, Spain.
- Global Universal Acceptance study: After the Barcelona presentation, the Universal Acceptance Steering Group (UASG) invited the Brazilian National Software Association (ABES) to conduct a global scale test for the most popular 1000 websites. The experts involved in this global study are all from Brazil: Paulo Milliet Roque, Nivaldo Cleto, Mark William Datysgeld (Business Constituency), and Sávyo Vinícius de Morais (NextGen).
- ICANN org Universal Acceptance presentations at major Caribbean events to software and systems developers including CaribNOG in Barbados, LAC-i-Roadshows in Turks and Caicos Islands, and the Bahamas.

Regional UA Ambassador

Mark William Datysgeld - Brazil

names in bold = newly appointed in FY19

CAPACITY-DEVELOPMENT ACTIVITIES IN LATIN AMERICA AND CARIBBEAN

TRAINING FOR TECHNICAL COMMUNITY

To build ICANN's relationship with contracted parties in the LAC region, ICANN org hosted a training in Brazil in November 2018. As part of the regional strategy, ICANN org partnered with LACTLD to offer a new technical training initiative in ccTLD management.

Total number of workshops:

4

Number of participants:

34

TRAINING FOR NON-TECHNICAL COMMUNITY

The LAC-i-Roadshow, a feature of the Latin America and the Caribbean Strategy, provides outreach on key topics related to the critical infrastructure of the Domain Name System (DNS). In addition to the LAC-i-Roadshow, the regional team held capacity building and outreach webinars covering topics like Rights Protection Mechanisms (RPMs), future rounds of new gTLDs, the European Union's General Data Protection Regulation (GDPR), Universal Acceptance (UA) project in Brazil, and ICANN Managed Root Servers (IMRS).

Total number of workshops:

15

Number of participants:

527

TRAINING FOR LAW ENFORCEMENT AGENCIES

ICANN org's Security, Stability, and Resiliency Engagement team visited Argentina, Paraguay, Colombia, and Brazil to raise awareness about Domain Name System (DNS) abuse and other critical threats. Read this **blog** to learn more about this effort.

Total number of workshops:

4

Number of participants:

920

LOOKING AHEAD

The next fiscal year will be an important one for the Latin American and Caribbean region. The ICANN67 Public Meeting will take place in Cancun, Mexico, from 7-12 March 2020. As in previous meetings held in the region, ICANN org will promote the development of activities and sessions created and designed by organizations from and for the region. ICANN67 will also be the first ICANN Community Forum to be held in LAC, and a great opportunity for newcomers to learn and interact with each other.

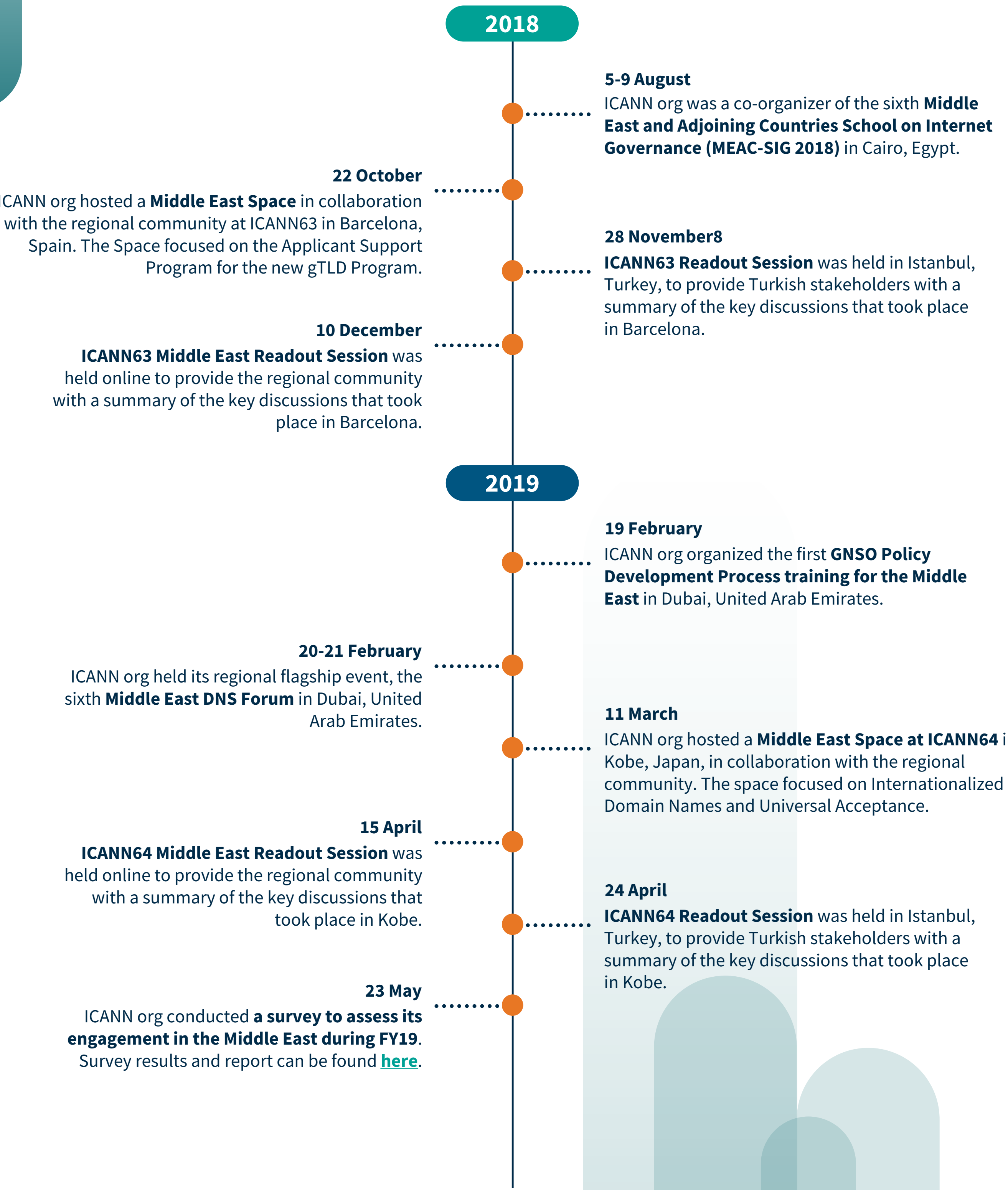
LAC's regional strategic plan will be in the spotlight in 2020. The goal of ICANN's regional strategy is to enhance the participation of the Latin American and Caribbean region and support regional stakeholders in the ICANN ecosystem. A working group made up of representatives of the different communities and regional organizations active in ICANN will gather in ICANN's regional office in Montevideo to renew their commitments and align their objectives with ICANN's new strategic plan. The group will then develop new projects to launch a third version of the regional strategy for the 2020-2024 period.

ICANN org will deepen its efforts to identify and address gaps in LAC community participation. The regional team is working on the next version of a more comprehensive map of LAC community participation in ICANN's ecosystem, and will share its progress with the regional community in the next year. This is an important initiative that seeks to facilitate more participation and a clear regional voice in ICANN's processes.

The Montevideo Office will continue to coordinate more capacity-building activities and regional events, strengthening ICANN's presence in the region and achieving additional milestones with partner organizations and the vibrant regional community.

MIDDLE EAST REGIONAL REPORT

YEAR AT A GLANCE - TIMELINE



2018

5-9 August
ICANN org was a co-organizer of the sixth **Middle East and Adjoining Countries School on Internet Governance (MEAC-SIG 2018)** in Cairo, Egypt.

22 October
ICANN org hosted a **Middle East Space** in collaboration with the regional community at ICANN63 in Barcelona, Spain. The Space focused on the Applicant Support Program for the new gTLD Program.

28 November8
ICANN63 Readout Session was held in Istanbul, Turkey, to provide Turkish stakeholders with a summary of the key discussions that took place in Barcelona.

10 December
ICANN63 Middle East Readout Session was held online to provide the regional community with a summary of the key discussions that took place in Barcelona.

2019

19 February
ICANN org organized the first **GNSO Policy Development Process training for the Middle East** in Dubai, United Arab Emirates.

20-21 February
ICANN org held its regional flagship event, the sixth **Middle East DNS Forum** in Dubai, United Arab Emirates.

11 March
ICANN org hosted a **Middle East Space at ICANN64** in Kobe, Japan, in collaboration with the regional community. The space focused on Internationalized Domain Names and Universal Acceptance.

15 April
ICANN64 Middle East Readout Session was held online to provide the regional community with a summary of the key discussions that took place in Kobe.

24 April
ICANN64 Readout Session was held in Istanbul, Turkey, to provide Turkish stakeholders with a summary of the key discussions that took place in Kobe.

23 May
ICANN org conducted **a survey to assess its engagement in the Middle East during FY19**. Survey results and report can be found here.

REGIONAL HIGHLIGHTS

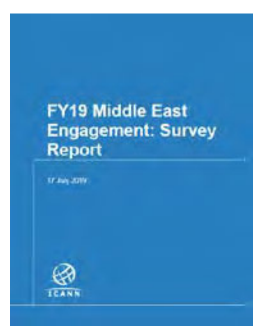
MIDDLE EAST DNS FORUM IN DUBAI, UNITED ARAB EMIRATES

For the first time, the Middle East DNS Forum (MEDNSF) was held in conjunction with another Internet-related event, the Asia Pacific Top Level Domain Association Annual General Meeting, APTLD75. The event took place in Dubai, United Arab Emirates, from 20-21 February 2019.

This stemmed from recommendations resulting from the **"Middle East DNS Forum 5-Year Assessment Survey"** distributed to the regional community in May 2018. The community suggested the Forum be organized in conjunction with similar events to add value and maximize attendance.

As customary, a survey on this specific edition of the Forum was also distributed to get participant feedback. Seventy-nine percent of the respondents rated the Forum as either excellent or very good. Survey results can be found **here**.

MIDDLE EAST COMMUNITY FEEDBACK ON REGIONAL WORK



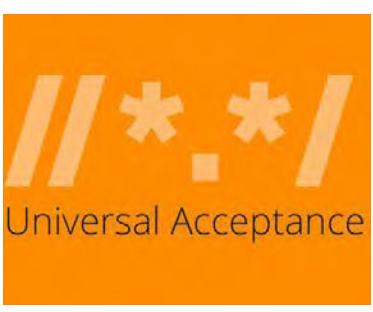
As part of ICANN org's commitment to engagement with the stakeholders in the Middle East, a survey was conducted to assess the satisfaction levels of ICANN org's engagement efforts across the region. Initial highlights of the responses were as follows:

- 70% found regional engagement efforts to be either effective or extremely effective.
- 74% showed satisfaction or extreme satisfaction with the engagement efforts during FY19.

The activities that attracted the highest participation rate from the region included the Middle East Space at ICANN Public Meetings, the Middle East DNS Forum, webinars, capacity-development activities, and the Middle East and Adjoining Countries Strategy Working Group (MEAC-SWG).

Overall, the survey showed satisfaction with the work undertaken, the professionalism of ICANN org members, and an eagerness to continue working on regional priorities. For more on this survey, **click here**.

UNIVERSAL ACCEPTANCE EFFORTS IN THE MIDDLE EAST



Universal Acceptance (UA) is a foundational requirement for a truly multilingual Internet, one in which users around the world can navigate entirely in their local languages. It is a very important topic in the Middle East as most of the countries and territories in the region have an Internationalized Domain Name country code top-level domain (IDN ccTLD). UA is expected to ensure better utilization of such TLDs.

Several meetings and talks were held to raise awareness on UA in the following countries across the region: In Pakistan with the Pakistan Software Export Board; in Egypt at the DNS Entrepreneurship Center (DNS-EC); in Turkey as part of the Hosting Talk event; and in Lebanon as part of the 2019 Middle East Network Operators Group and Peering Forum (MENOG19).

The UA Program Ambassador in the region, Abdelmonim Galilla, conducted many awareness sessions on IDNs, Email Address Internationalization (EAI), and UA in Egypt and across the Middle East and Africa:

- In Egypt, workshops were held in the following cities: Assuit, Cairo, Fayoum, Ismailia, Madinat, Mansoura, Menofeya, Nasr, and Tanta. These workshops attracted around 650 participants.
- Across the Middle East and Africa, workshops and talks were held in the following cities: Baghdad, Iraq; Amman, Jordan; Beirut, Lebanon; Marrakech, Morocco; Khartoum, Sudan; Kampala, Uganda; and Tashkent, Uzbekistan (for the .af registry team from Afghanistan).

REGIONAL PARTICIPATION : SUPPORTING ORGANIZATIONS

Regional SO leaders

Rafik Dammak
GNSO Council Vice Chair

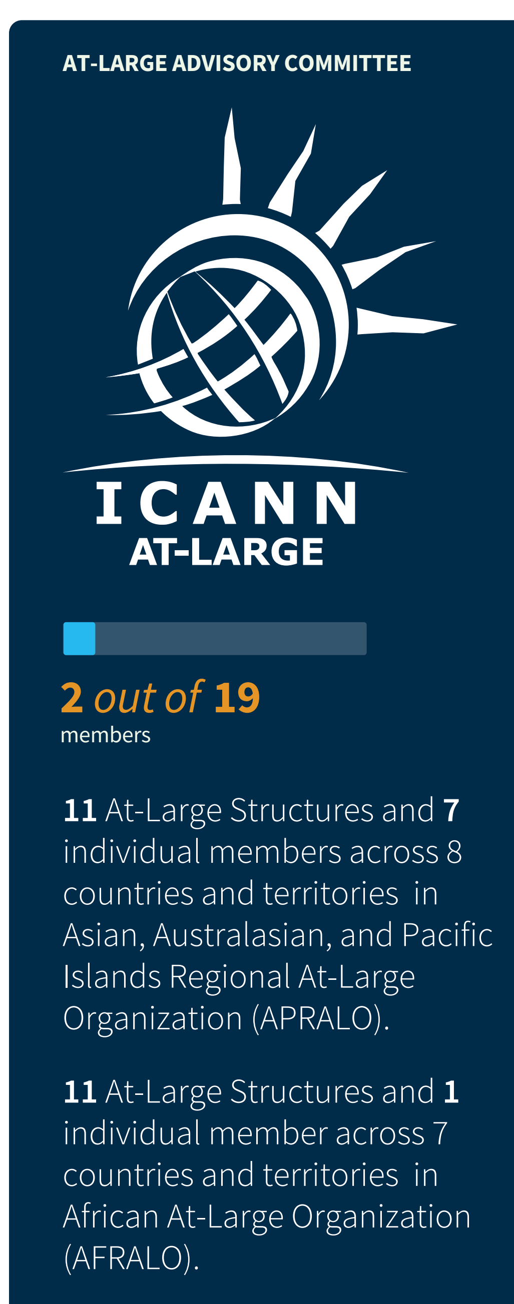
Syed Ismail Shah
GNSO councilor

Elsa Saade
GNSO councilor

Wafa Dahmani
ASO Address councilor

Rafik is originally Tunisian but has been residing in Japan. He contributes to both the Middle East and APAC ICANN communities.

REGIONAL PARTICIPATION : ADVISORY COMMITTEES



REGIONAL PARTICIPATION : OTHERS

Community Leadership

Zahid Jamil
NomCom Associate Chair

Nadira Alaraj
NomCom delegate

Aziz Hilali
NomCom delegate

POLICY DEVELOPMENT PROCESSES (PDP)

TEMPORARY SPECIFICATION FOR GTLD REGISTRATION DATA EXPEDITED PDP - PHASE 1

3
members are from the Middle East

NEW GTLD SUBSEQUENT PROCEDURES

6
members from the Middle East

TEMPORARY SPECIFICATION FOR GTLD REGISTRATION DATA EXPEDITED PDP - PHASE 2

4
members are from the Middle East

REVIEW OF ALL RIGHTS PROTECTION MECHANISMS IN ALL GTLD'S

6
members are from the Middle East

INTERNATIONAL GOVERNMENTAL ORGANIZATION–INTERNATIONAL NON-GOVERNMENTAL ORGANIZATION (IGO-INGO) ACCESS TO CURATIVE RIGHTS PROTECTION MECHANISMS IN ALL GTLDS

1
member is from the Middle East

CROSS-COMMUNITY WORKING GROUPS

NEW GTLD AUCTION PROCEEDS

1 *out of* **25**
members is from the Middle East

REGIONAL PARTICIPATION : REVIEWS

REVIEWS

SPECIFIC REVIEWS

SECOND SECURITY, STABILITY, AND RESILIENCY OF THE DNS REVIEW (SSR2)

1 *out of* **15**

members is from the Middle East

ORGANIZATIONAL REVIEWS

CCNSO ORGANIZATIONAL REVIEW

1 *out of* **10**

members of the ccNSO Review Working Party is from the Middle East

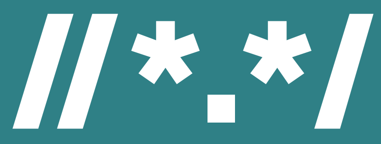
REGIONAL LEADERS

RAFIK DAMMAK

EPDP PHASE 1 VICE CHAIR

Rafik is originally Tunisian but has been residing in Japan. He contributes to both the Middle East and APAC ICANN communities.

REGIONAL PARTICIPATION: UNIVERSAL ACCEPTANCE AND INTERNATIONALIZED DOMAIN NAMES



Universal Acceptance

The efforts to raise awareness on Universal Acceptance and Internationalized Domain Names across the Middle East were among the key activities in FY19.

Regional UA Ambassador	Regional IDN Leader
Abdalmonem Galila - Egypt	Ahmed Bakhat Masood – Chair of the TF-AIDN

Internationalized Domain Names

The work on the Arabic Script, carried out by Task Force on Arabic Script Internationalized Domain Names (TF-AIDN) was completed and the Arabic script was integrated into the root zone in March 2016. Arabic script was released in the first Root Zone Label Generation Rules (LGR-1). Read here for more information.

Forming	Working	Finalizing	Integrated
			Arabic

CAPACITY-DEVELOPMENT ACTIVITIES IN THE MIDDLE EAST

TRAINING FOR TECHNICAL COMMUNITY

As part of ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems, ICANN org provided workshops on DNS Operations, DNSSEC, and DNS Abuse.

Total number of workshops:

6

Number of participants:

87

TRAINING FOR NON-TECHNICAL COMMUNITY

ICANN org also regularly helps to build capacity for non-technical community such as accredited registrars and registry operators, and reaches out to the larger community to help stakeholders better understand ICANN policies and processes.

Total number of workshops:

13

Number of participants:

416

TRAINING FOR LAW ENFORCEMENT AGENCIES

In the region, ICANN org helps support law enforcement with workshops on DNS security.

Total number of workshops:

4

Number of participants:

39

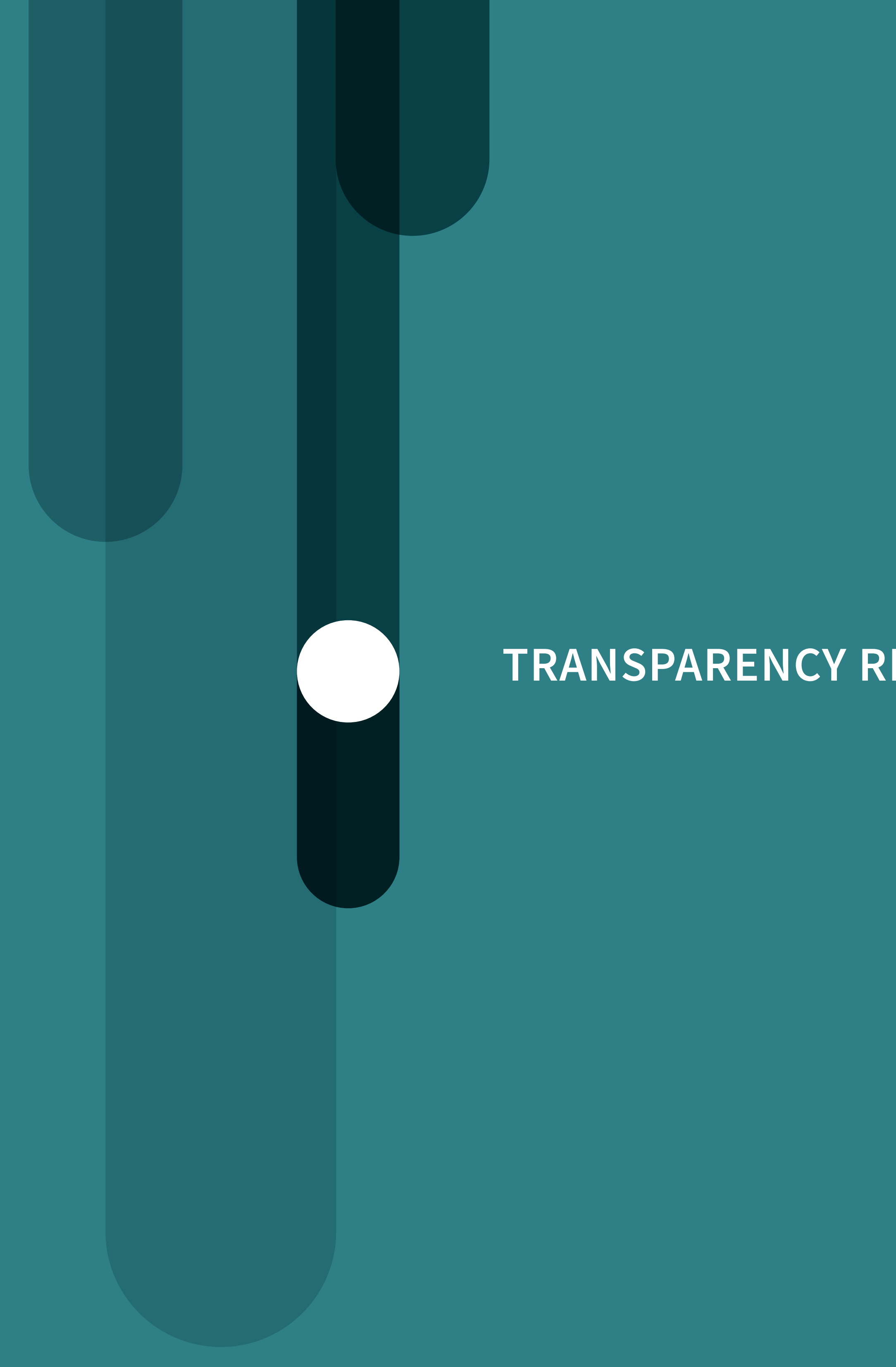
LOOKING AHEAD

In FY20, the ICANN org team in the Middle East will build on the progress regarding community participation in ICANN and capacity development. The commitment to enhancing the engagement efforts, while seeking feedback from the regional community and reviewing the regional activities accordingly, will also be continued. In particular, the regional team will be working with the community to take the feedback and suggestions received in the FY19 community survey into consideration when planning the next steps.

The current regional engagement strategy is in its last year, thus still in progress, and the regional goals remain focused on fulfilling the regional strategic objectives, with increased efforts to:

- Diversify engagement and outreach to new communities and stakeholders particularly from countries and territories that are less engaged in ICANN.
- Develop more DNS and DNS security technical capacity building.
- Raise awareness about Universal Acceptance and encourage more participation from the community in the UA-related work.

A new community working group will be put together to develop the regional engagement strategy beyond FY20. The consensus among community members has been to align the regional strategy with ICANN's Strategic Plan for FY 2021-2025. This is one of the top priorities in the upcoming period, and the commitment to support the community throughout this process and working closely with them on the implementation of the new strategy will underline the upcoming period.



TRANSPARENCY REPORT

TRANSPARENCY REPORT

Transparency is a fundamental aspect to the success of the multistakeholder decision-making model. Transparency of processes, interests, and access to information is essential for stakeholders to collaborate and achieve consensus effectively in policy-making activities.

Principles of transparency are embedded throughout the ICANN ecosystem and the ICANN Board, community, and ICANN org work continuously to improve transparency and accountability efforts. As part of this focus, the second Accountability and Transparency Review Team (ATRT2) issued **Recommendation 9.4** on the development of transparency metrics and reporting in the Annual Report.

The activities in support of this recommendation are covered below.

TRANSPARENCY METRICS

ICANN org regularly updates its transparency metrics in Section 5.2 of the **Accountability Indicators**. The charts in Section 5.2 describe and track the key areas of transparency work in ICANN's operations. As outlined in Recommendation 9.4, metrics include:

REQUESTS OF THE DOCUMENTARY INFORMATION DISCLOSURE POLICY (DIDP) PROCESS AND THE DISPOSITION OF REQUESTS

The "Document Information Disclosure Policy" chart shows the number of requests received/ completed, and the number completed within the required response time.

All DIDP Requests and Responses are listed and updated **online**.

PERCENTAGE OF REDACTED-TO-UNREDACTED BOARD BRIEFING MATERIALS RELEASED TO THE GENERAL PUBLIC

The "Board Decision-Making Materials Published/Redacted" chart outlines the percentage of documents redacted compared to documents published. The reporting includes grounds for redactions and nondisclosure, the percentage of redacted or not disclosed pages, and an evaluation of continuing need for redactions or nondisclosure.

NUMBER AND NATURE OF ISSUES THAT THE BOARD DETERMINED SHOULD BE TREATED CONFIDENTIALLY

In FY19, the ICANN Board approved the redaction of information from resolutions or minutes on 11 occasions.

The grounds for determining that something should be withheld as confidential are set forth in Section 3.5(b) of the ICANN Bylaws.

OTHER ICANN USAGE OF REDACTION AND OTHER METHODS TO NOT DISCLOSE INFORMATION TO THE COMMUNITY AND STATISTICS ON REASONS GIVEN FOR USAGE OF SUCH METHODS

For FY19, there are no additional items to report aside from those covered above. However, in accordance with the Bylaws, a Confidential Disclosure Framework was put into place guiding heightened access to review teams for their work. Nothing has been redacted or disclosed to date through operation of that framework.

EMPLOYEE "ANONYMOUS HOTLINE" AND/OR OTHER WHISTLEBLOWING ACTIVITY, INCLUDING: i) REPORTS SUBMITTED; ii) REPORTS VERIFIED AS CONTAINING ISSUES REQUIRING ACTION; AND iii) REPORTS THAT RESULTED IN CHANGE TO ICANN PRACTICES

Every year, all ICANN org staff members receive a copy of the Anonymous Hotline Policy and Procedures and acknowledge their understanding of how to use this resource.

No reports have been received through the Anonymous Employee Hotline during FY19.

ICANN org is currently updating and modifying the Anonymous Hotline Policy and Procedures to address the remaining recommendations received after an independent review of ICANN's Policy. The relaunch of the Policy during FY20 will fulfill the implementation of the review's recommendations and is in line with the recommendations arising out of the Cross-Community Working Group on Enhancing ICANN Accountability's Work Stream 2.

CONTINUED RELEVANCE AND USEFULNESS OF EXISTING TRANSPARENCY METRICS, INCLUDING CONSIDERATIONS ON WHETHER ACTIVITIES ARE BEING GEARED TOWARD THE METRICS (I.E. "TEACHING TO THE TEST") WITHOUT CONTRIBUTING TOWARD THE GOAL OF GENUINE TRANSPARENCY

ICANN org continues to evaluate the utility of metrics on an ongoing basis. Since the launch of the Accountability Indicators, metrics integrated include:

- The number of completed Specific Reviews recommendations.
- The number of Board decision-making materials published and redacted, and the number of Board decision-making materials posted by the deadline.
- Data describing the number of days it takes to publish the Annual Audited Financial Statement within the deadline as required by ICANN Bylaws.
- Number of comments received and responded to during the Annual Operating Plan and Budget process.
- Number of "In-Scope" and "Out-of-Scope" Complaints received by the Complaints Office.

RECOMMENDATIONS FOR NEW METRICS

ICANN org is developing new metrics to enhance transparency provided on the work of the Board, ICANN org, and the community.

ICANN org is updating the Annual Operating Plan and Budget chart to focus on the breadth of input from the community by measuring participation in the process against the structure **published online** rather than the sheer volume of comments received.

For a full description and visualization of data for each of these new metrics, explore the **Accountability Indicators**.

DEFAULT STANDARDS OF TRANSPARENCY ACROSS ORG AND COMMUNITY

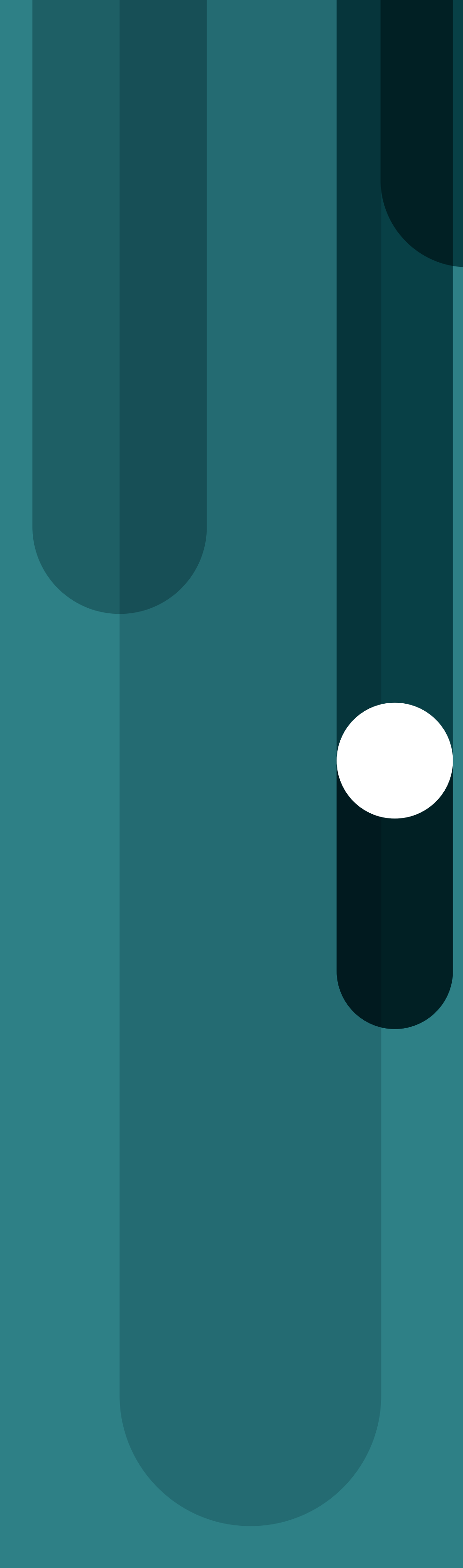
Recognizing that transparency is a broad and evolving subject, it features as a continued topic of discussion and work amongst the ICANN Board, ICANN org, and the community.

The Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) Work Stream 2 (WS2) addressed this topic in a number of areas, including recommending best practices for SO/AC accountability, DIDP modifications, transparency enhancements for Board deliberations, and for reporting on ICANN org's interactions with governments. The recommendations are expected to result in continued improvements to ICANN's transparency practices. The ICANN Board will be considering recommendations from this work in FY20.

The third Accountability and Transparency review (ATRT3) launched in FY19. The review will assess ICANN's execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making reflect the public interest and are accountable to the Internet community.

ICANN org publishes extensive information to inform the community including: open and transparent details on the work of review teams and review working parties; Fact Sheets to share the progress of Specific Reviews (ATRT3, CCT, RDS-WHOIS2, and SSR2); an **Annual Reviews Implementation Report** as part of this Annual Report; archives of review team mailing lists, plenary and leadership call recordings and transcripts, and periodic Executive Team reports to summarize each function's highlights, milestones, and recent activities.

The ICANN Board, community, and the ICANN org create and publish a large volume of information. In FY19, the ICANN org continued to focus on enhancing the transparency of our information by making it easier for stakeholders to find content through its work on the Information Transparency Initiative.



THE ANNUAL REVIEWS IMPLEMENTATION REPORT

ANNUAL REVIEWS IMPLEMENTATION REPORT

If you have comments about this report, please send your feedback to: **reviews@icann.org**.

SPECIFIC REVIEWS AT ICANN

Specific Reviews originated under the **Affirmation of Commitments** in 2009 and are now mandated in Section 4.6 of the ICANN Bylaws. They are conducted by community-led review teams which assess ICANN's performance in fulfilling its commitments.

Specific Reviews form an important part of ICANN's accountability measures and are critical to maintaining a healthy multistakeholder model. Reviews support continuous improvement and are a tool for the ICANN community to hold the ICANN Board and ICANN org accountable to key commitments.

Section 4.5 of the ICANN Bylaws states that:

"ICANN will produce an annual report on the state of the accountability and transparency reviews, which will discuss the status of the implementation of all review processes required by **Section 4.6** and the status of ICANN's implementation of the recommendations set forth in the final reports issued by the review teams to the Board following the conclusion of such review ("Annual Review Implementation Report"). The Annual Review Implementation Report will be posted on the Website for public review and comment. Each Annual Review Implementation Report will be considered by the Board and serve as an input to the continuing process of implementing the recommendations from the review teams set forth in the final reports of such review teams required in Section 4.6."

In line with Section 4.5 of the ICANN Bylaws, this first Annual Review Implementation Report charts the progress of Specific Reviews and the progress of implementing the resulting recommendations.

The four Specific Reviews are:

- **Accountability and Transparency (ATRT)**
- **Competition, Consumer Trust, and Consumer Choice (CCT)**
- **Registration Directory Service (RDS)**
- **Security, Stability, and Resiliency (SSR)**

As of 30 June 2019, the Competition, Consumer Trust, and Consumer Choice review is the only Specific Review to have issued recommendations since the Specific Reviews were integrated into the Bylaws and the reporting requirement went into effect on 1 October 2016.

Specific Reviews follow a documented process. The **flowchart** and **handbook** for Specific Reviews are available on the icann.org website and are updated periodically.

Discussions are underway in consultation with the ICANN community to develop a sustainable schedule and streamline future reviews, and to address budgeting and prioritization of recommendations.

ICANN BOARD OVERSIGHT OF SPECIFIC REVIEWS

The ICANN Board's Organizational Effectiveness Committee (OEC) is responsible for "the review and oversight of all Specific Reviews mandated by Section 4.6 of ICANN Bylaws or any replacement or revisions to that section of the Bylaws."

The OEC's responsibilities include "the review and oversight of policies, processes, and procedures relating to … Specific Reviews".[1] The OEC oversees the implementation of review recommendations resulting from the Specific Reviews and regularly reports to the full Board on the progress of Specific Reviews and the implementation status of the recommendations.

In line with best practice experience from the work related to the IANA Stewardship Transition process, the Board is using Caucus Groups as a mechanism to provide input to Specific Review Teams on the scope of work, feasibility of recommendations, and other key matters. Caucus Groups are small groups of Board members with expertise and interest in the particular review-related topics. The goal is to create an interactive environment where the Board can engage with the Review Teams to offer input and observations for Review Teams' consideration on a timely basis.

OPERATING STANDARDS

ICANN org developed Operating Standards to provide guidance on conducting Specific Reviews and to address required items detailed in **Section 4.6(a)(i) of the Bylaws** related to: candidate nomination; review team selection; review team size; conflict of interest policies; decision-making procedures; solicitation of independent experts; and review team access to confidential documentation subject to the Confidential Disclosure Framework.

The Operating Standards also incorporated best practices from recent and ongoing Specific Reviews that were launched or conducted under the new Bylaws, including best practices, process improvements, and **public comments** on **Long-Term Options to Adjust the Timeline for Specific Reviews**.

In consultation with the ICANN community, the process to develop the Operating Standards began shortly after the adoption of the updated Bylaws in 2016. Updates were presented to the ICANN community in **webinars** and public sessions during **ICANN57**, **ICANN58**, **ICANN60**, **ICANN63**, and **ICANN64**. **Draft Operating Standards** were posted for **Public Comment** in October 2017 and an **updated draft** for was posted for **Public Comment** in December 2018.

The Board **adopted** the Operating Standards at ICANN64. The adopted Operating Standards inform the work of current (to the extent applicable) and future Specific Reviews teams.

[1] See the Organizational Effectiveness Committee Charter as approved by the ICANN Board of Directors on 14 March 2019: **https://www.icann.org/resources/pages/charter-oec-2019-04-05-en**

FACT SHEETS

In line with ICANN's transparency and accountability commitments, Specific Review Fact Sheets are posted publicly on the Review Team's wiki pages and updated on a quarterly basis. These provide the ICANN community with high-level information and are aimed at enhancing general understanding of progress and resources. Fact Sheets are produced and updated by ICANN org in collaboration with Review Team leadership.

Fact Sheets track accomplishment of milestones, participation of Review Team members, financial resources used compared to allocated budget, and supporting resources provided by the ICANN org.

ACCOUNTABILITY AND TRANSPARENCY (ATRT) REVIEW

ATRT BACKGROUND

Section 4.6(b) of the **Bylaws** states that:

i. The Board shall cause a periodic review of ICANN's execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making reflect the public interest and are accountable to the Internet community ("Accountability and Transparency Review").

ii. The issues that the review team for the Accountability and Transparency Review (the "**Accountability and Transparency Review Team**") may assess include, but are not limited to, the following:

  A. assessing and improving Board governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which the Board's composition and allocation structure meets ICANN's present and future needs, and the appeal mechanisms for Board decisions contained in these Bylaws;

  B. assessing the role and effectiveness of the GAC's interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;

  C. assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);

  D. assessing the extent to which ICANN's decisions are supported and accepted by the Internet community;

  E. assessing the policy development process to facilitate enhanced cross-community deliberations, and effective and timely policy development; and

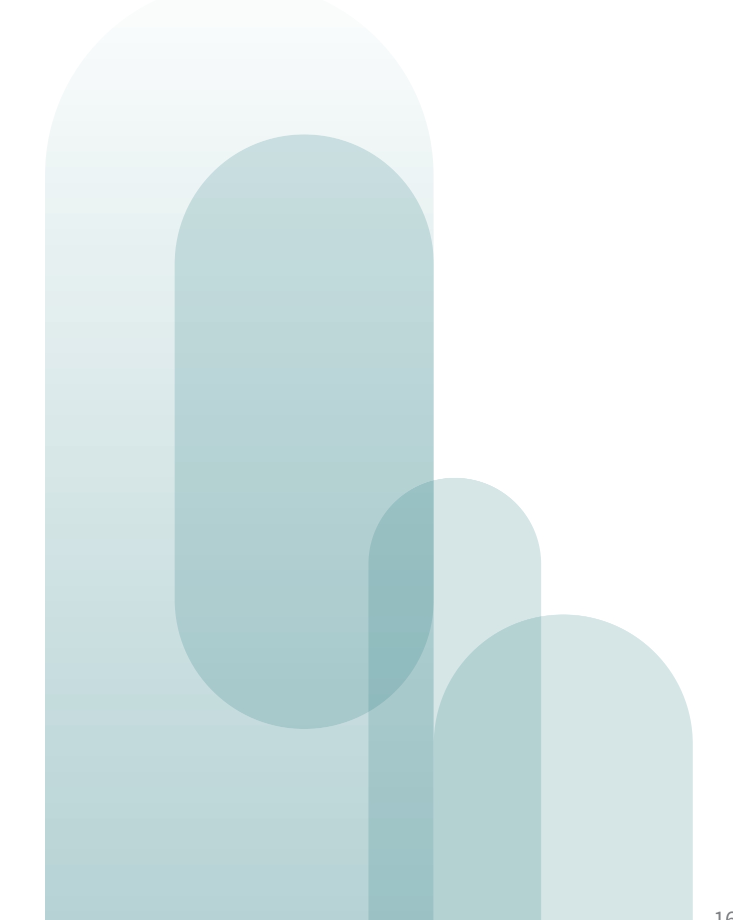
  F. assessing and improving the Independent Review Process.

iii. The Accountability and Transparency Review Team shall also assess the extent to which prior Accountability and Transparency Review recommendations have been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

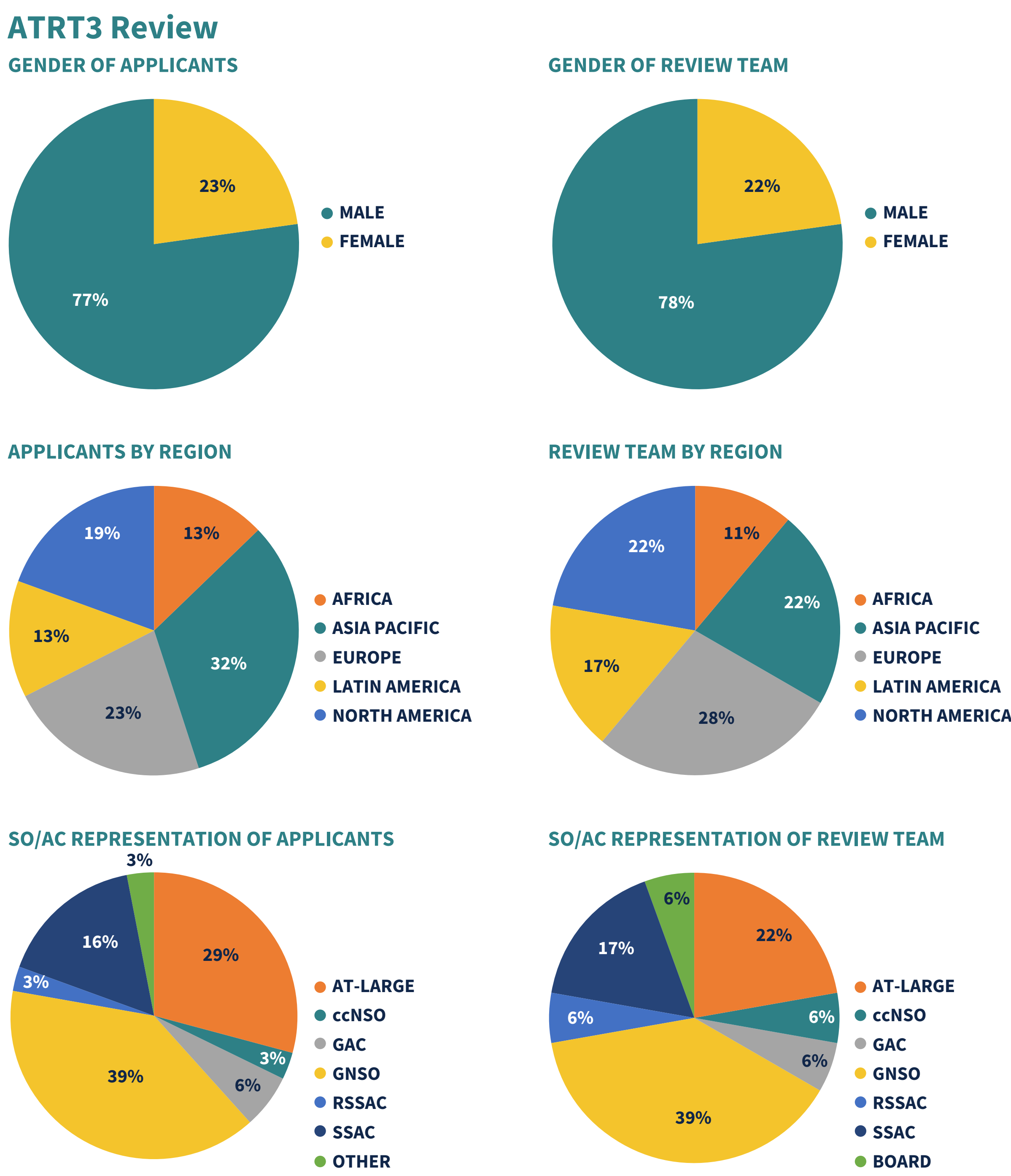
iv. The Accountability and Transparency Review Team may recommend to the Board the termination or amendment of other periodic reviews required by this Section 4.6, and may recommend to the Board the creation of additional periodic reviews.

v. The Accountability and Transparency Review Team should issue its final report within one year of convening its first meeting.

vi. The Accountability and Transparency Review shall be conducted no less frequently than every five years measured from the date the previous Accountability and Transparency Review Team was convened."



Below graphs represent the third Accountability and Transparency Review (ATRT3) applicants and selected Review Team members by gender, region, and Supporting Organization and Advisory Committee (SO/AC) representation.



READ MORE:

- ATRT Review Home Page.
- ATRT3 Review Wiki Page.
- ATRT3 Review Fact Sheet.

STATUS OF ATRT3

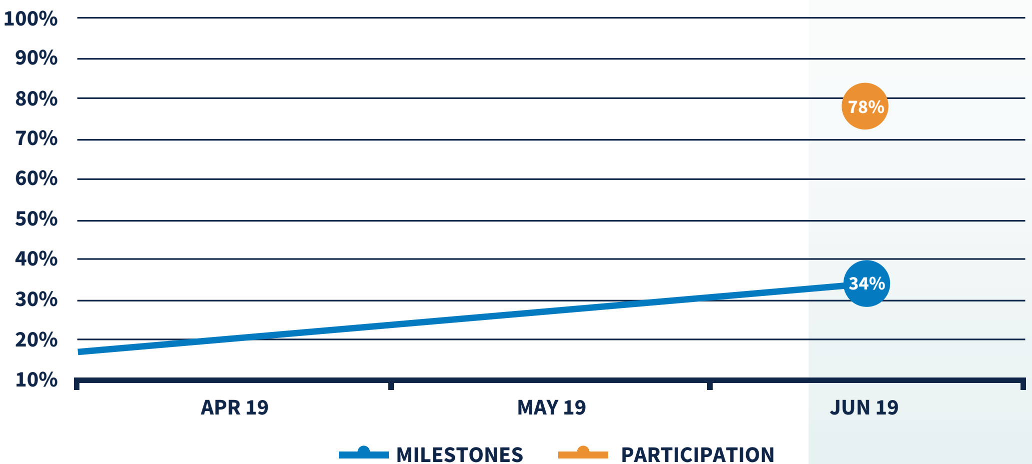
ATRT3 was initiated on schedule with the **call for volunteers** published in January 2017. The Review received 26 **applications** and SO/AC Chairs made the final selection of the Review Team. This selection followed the outcome of public comments on **Short-term Options to Adjust the Timeline of Reviews**.

The ATRT3 Terms of Reference and Work Plan were approved by consensus of the Review Team and **submitted** to the ICANN Board in June 2019. The Review Team held a face-to-face meeting and various engagement sessions with SO/ACs and constituencies at ICANN65 in Marrakech to advance research and findings. The Review Team intends to submit its draft report for Public Comment after ICANN66.

REVIEW the ATRT3 Wiki page.

Tracking of ATRT3 Review Team's Progress: Fiscal Year 2019 via Fact Sheet

The chart below illustrates that the Review Team completed 34 percent of its total milestones by June 2019. Participation by the Review Team members in team meetings averaged 78 percent. The Review Team spent and committed to spend approximately $150,000 through June 2019. This represents 27 percent of its allocated budget of $550,000.



Review Team members spent more than 900 hours in plenary, leadership, and subgroups calls through June 2019. Similarly, the number of hours spent on these calls by the project managers and subject matter experts within the ICANN org was more than 200 hours.

COMPETITION, CONSUMER TRUST AND CONSUMER CHOICE (CCT) REVIEW

CCT BACKGROUND

The ICANN **Bylaws** Section 4.6(d) outlines the following as the scope of the CCT Review:

i. "ICANN will ensure that it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection prior to, or concurrent with, authorizing an increase in the number of new top-level domains in the root zone of the DNS pursuant to an application process initiated on or after the date of these Bylaws ("**New gTLD Round**")."

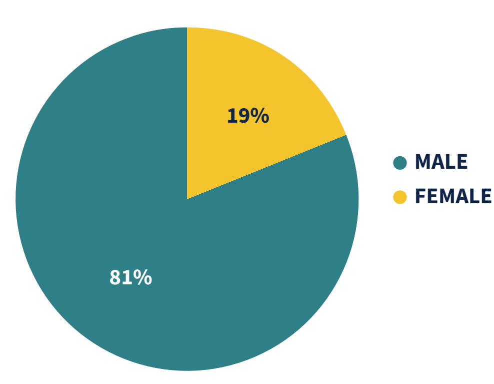
However, the CCT Review referenced in this report was initiated under the Affirmation of Commitments, as it relates to a review of the first round of the New gTLD Program. The scope of this first CCT Review requires that the review shall examine the extent to which the expansion of gTLDs has promoted competition, consumer trust, and consumer choice. The review also assesses the effectiveness of the New gTLD Round's application and evaluation process, as well as the safeguards put in place to mitigate issues arising from the New gTLD Round. As the Final Report was released after the Specific Reviews were incorporated into the Bylaws, the ICANN Board and org have been following the Bylaws' obligations in consideration of and reporting on the recommendations made by the CCT Review Team.

The CCT Review Team was announced in December 2015 and was originally comprised of 17 community representatives and volunteer subject matter experts under the Affirmation of Commitments (AoC) Section 9.3.

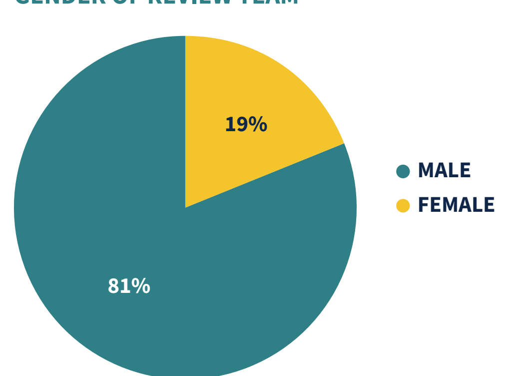
Below graphs outline the applicants and selected Review Team members by gender, region, and SO/AC representation.

CCT Review

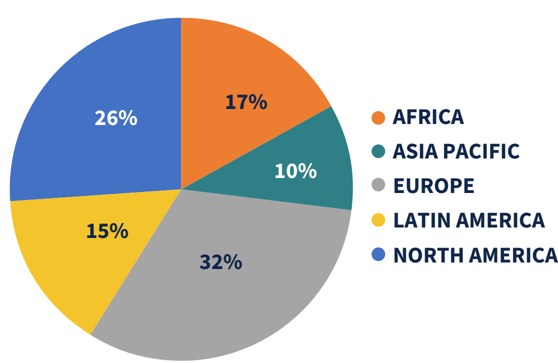
GENDER OF APPLICANTS



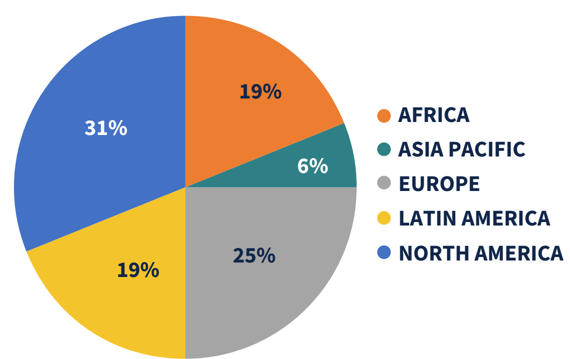
GENDER OF REVIEW TEAM



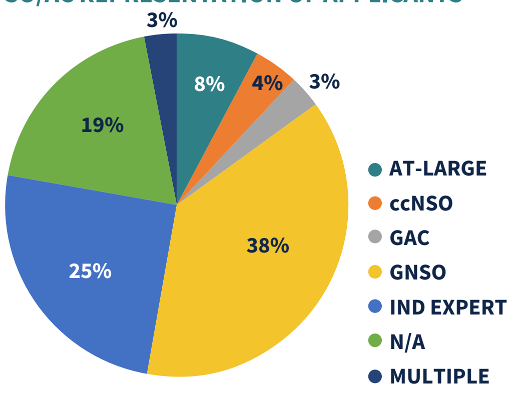
APPLICANTS BY REGION



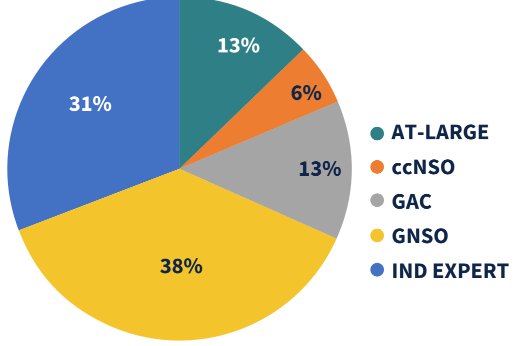
REVIEW TEAM BY REGION



SO/AC REPRESENTATION OF APPLICANTS



SO/AC REPRESENTATION OF REVIEW TEAM



READ MORE:

- CCT Review Home Page.
- CCT Review Wiki Page.
- CCT Review Fact Sheet.

STATUS OF CCT REVIEW

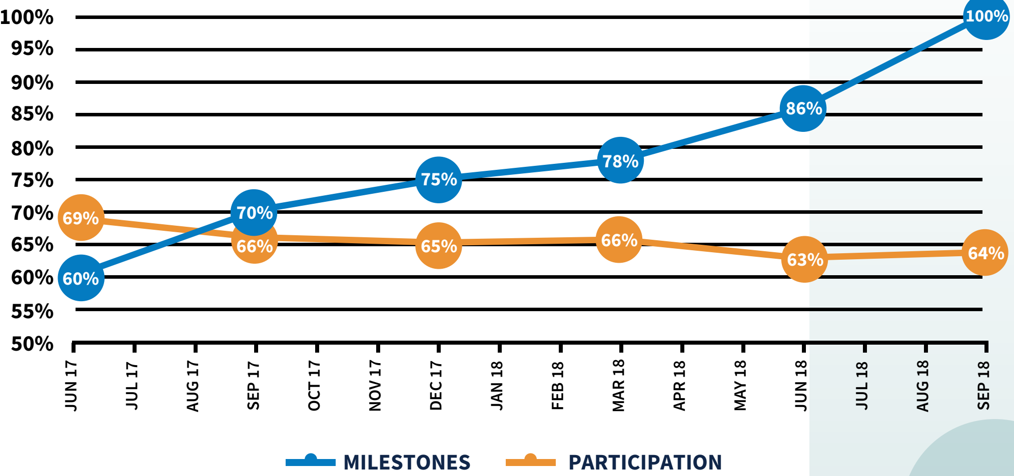
The CCT Review Final Report was issued in September 2018, following almost three years of work. The broad-reaching report contained 35 recommendations covering topics including: requests for additional data collection; policy issues for reference to the policy development processes; and suggested enhancements relating to reporting and data collection within ICANN org's Contractual Compliance function.

The Review Team held 67 plenary calls (3 in FY19), 75 subteam calls (0 in FY19), and 8 face-to-face meetings (0 in FY19) as well as 1 penholders meeting in July 2018. The status of the review including duration, milestones, and professional services and travel expenses were posted on a quarterly basis on the Review Team's **Wiki page**.

The CCT Review Team strengthened recommendations in line with the SMART objectives approach before publishing the **Final Report**. This approach focuses on setting goals that are Specific, Measurable, Achievable, Relevant, and Time-Bound. The Review Team received **input** from the ICANN Board as well as comments received during the **Public Comment** periods, some of which were considered and included in the Final Report.

TRACKING CCT REVIEW TEAM'S PROGRESS: FISCAL YEAR 2019 VIA FACT SHEET

Upon conclusion of the review, overall participation by the CCT Review Team members was 64 percent.



Review Team members spent more than 3,400 hours (approximately 60 in FY19) in plenary, leadership, and subgroup calls through June 2019. The number of hours spent on these calls by the project managers and subject matter experts within the ICANN organization was approximately 1,800 hours (approximately 30 in FY19) through the end of the fiscal year.

STATUS OF IMPLEMENTATION OF THE RECOMMENDATIONS

Following the **submission** of the CCT Final Report to the ICANN Board in September 2018, the Board took action on the Final Recommendations on 1 March 2019. In its **resolution**, the Board accepted six recommendations for which the Board directed "the ICANN President and CEO, or his designee(s), to develop and submit to the Board a plan for the implementation of the accepted recommendations. This plan should be completed and provided to the community for consideration no later than six months after this Board action. The ICANN President and CEO, or his designee(s), is directed to report back to the Board on the plan and any community input no later than nine (9) months after this Board action."

Additionally, the Board placed 17 recommendations into pending status on which it commits to take further action subsequent to the completion of intermediate steps as identified in the scorecard titled "Final CCT Recommendations: Board Action (1 March 2019)". The Board directs the ICANN org to provide to the Board relevant information, as requested in the scorecard titled "Final CCT Recommendations: Board Action (1 March 2019)", and advise if additional time is needed within six months from this Board action. The Board passed through 14 recommendations (in whole or in part) to the identified parts of the ICANN community for consideration and ICANN org notified the relevant community groups.

In September 2019, ICANN org posted a plan for implementation of accepted recommendations for **Public Comment** in accordance with the Board's March 2019 resolution. ICANN org will provide an update on the progress toward addressing the additional information the Board has requested on the pending recommendations.

READ about recent implementation developments.

REGISTRATION DIRECTORY SERVICE (RDS) REVIEW

RDS BACKGROUND

According to Section 4.6(e) of the **Bylaws**:

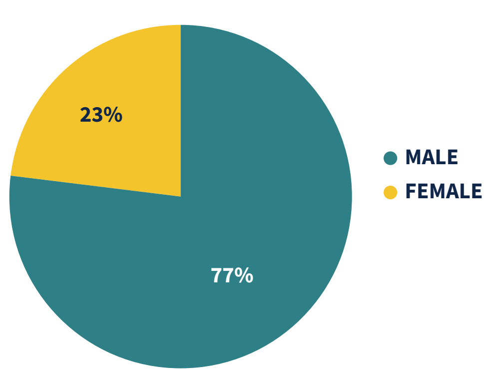
i. "Subject to applicable laws, ICANN shall use commercially reasonable efforts to enforce its policies relating to registration directory services and shall work with Supporting Organizations and Advisory Committees to explore structural changes to improve accuracy and access to generic top-level domain registration data, as well as consider safeguards for protecting such data.

ii. The Board shall cause a periodic review to assess the effectiveness of the then current gTLD registry directory service and whether its implementation meets the legitimate needs of law enforcement, promoting consumer trust and safeguarding registrant data ("Directory Service Review").

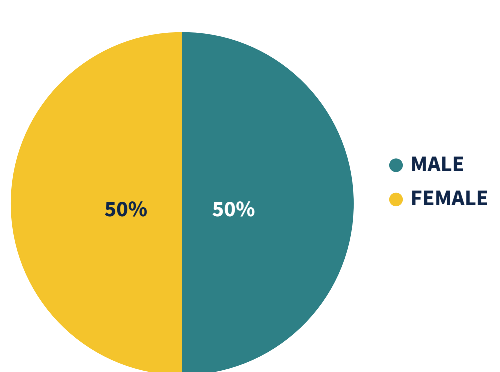
iii. The Directory Service Review Team shall assess the extent to which prior Directory Service Review recommendations have been implemented and the extent to which implementation of such recommendations has resulted in the intended effect."

The RDS Review was initiated with a **call for volunteers** in October 2016. After the call for volunteers was extended three times, the Review received 38 **applications**. The SO/AC Chairs made the final **selection** of the Review Team in June 2017. Below graphs represent the applicants and selected Review Team members by gender, region, and SO/AC representation.

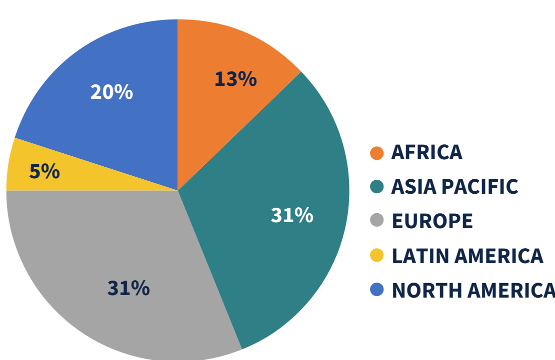
RDS Review



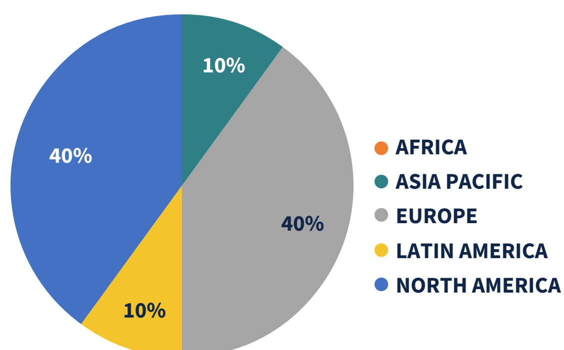
GENDER OF REVIEW TEAM



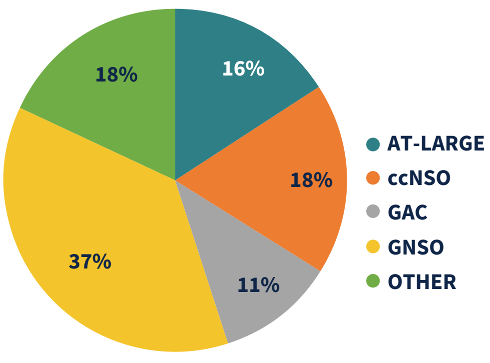
APPLICANTS BY REGION



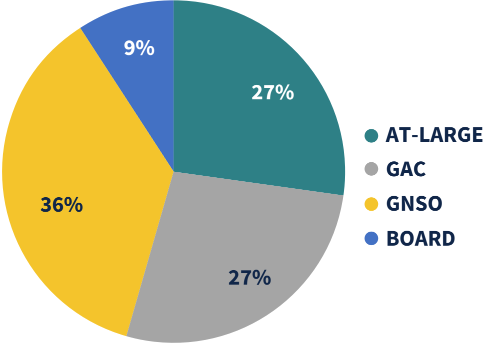
REVIEW TEAM BY REGION



SO/AC REPRESENTATION OF APPLICANTS



SO/AC REPRESENTATION OF REVIEW TEAM



READ MORE:

- RDS Review Home Page.
- RDS Review Wiki Page.
- RDS Review Fact Sheet.

STATUS OF RDS REVIEW

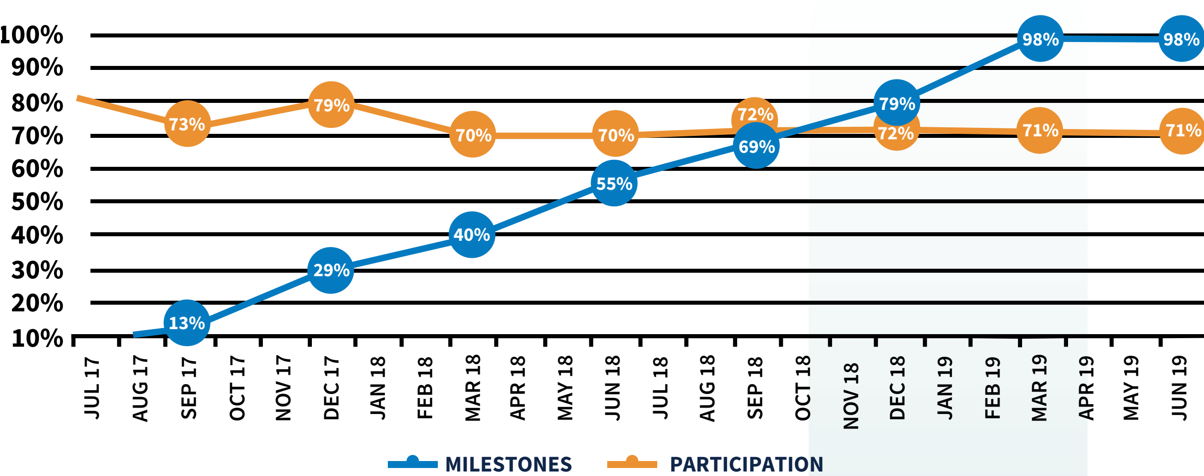
The RDS Review Team began work in June 2017 and has held a total of 45 **plenary** calls (15 in FY19), 51 **leadership** calls (19 in FY19), 22 subgroup calls (2 in FY19), and 4 face-to-face meetings (2 in FY19). In April 2018, the Review Team held a **face-to-face meeting** to advance its work, finalize findings, and adopt draft recommendations produced by subgroups. The Review Team held its last face-to-face meeting in Brussels in **July 2018** and made significant progress towards publication of the Final Report after incorporating comments received during the Public Comment proceedings. The Review Team issued its Final Report in September 2019.

READ the Final Report.

TRACKING OF RDS REVIEW TEAM'S PROGRESS: FISCAL YEAR 2019 VIA FACT SHEET

The Review Team completed 98 percent of its milestones as of June 2019. Participation by the Review Team members in team meetings ranged from 82 percent at the start of the review to 71 percent by June 2019. The Review Team spent approximately $230,000, 42 percent of its allocated budget of $550,000.

RDS Review Fact Sheet KPIs



Review Team members spent approximately 1,150 hours (468 in FY19) in plenary, leadership, and subgroups calls through June 2019. The number of hours spent on these calls by the project managers and subject matter experts within the ICANN org was approximately 785 hours.

STATUS OF IMPLEMENTATION OF THE RECOMMENDATIONS

In FY19, the RDS worked on its draft Final Report which had two main areas of assessment: the first was the extent to which prior Directory Service Review recommendations have been implemented and resulted in the intended effect; the second was effectiveness of the then current gTLD registry directory service and whether its implementation meets the legitimate needs of law enforcement, promotes consumer trust, and safeguards registrant data.

As a result of the analysis of the past WHOIS1 Review Team recommendations, as well as this review team's new findings and recommendations, the RDS-WHOIS2 Review Team made 22 new recommendations. The Final Report was released the following fiscal year, in September 2019, and implementation information will be covered in the FY20 ICANN Annual Report.

VISIT the RDS Wiki page.

SECURITY, STABILITY, AND RESILIENCY OF THE DNS (SSR) REVIEW

BACKGROUND

Section 4.6(c) of the **Bylaws** sets out the scope and parameters of the SSR Review:

i. "The Board shall cause a periodic review of ICANN's execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the systems and processes, both internal and external, that directly affect and/or are affected by the Internet's system of unique identifiers that ICANN coordinates ("**SSR Review**").

ii. The issues that the review team for the SSR Review ("**SSR Review Team**") may assess are the following:

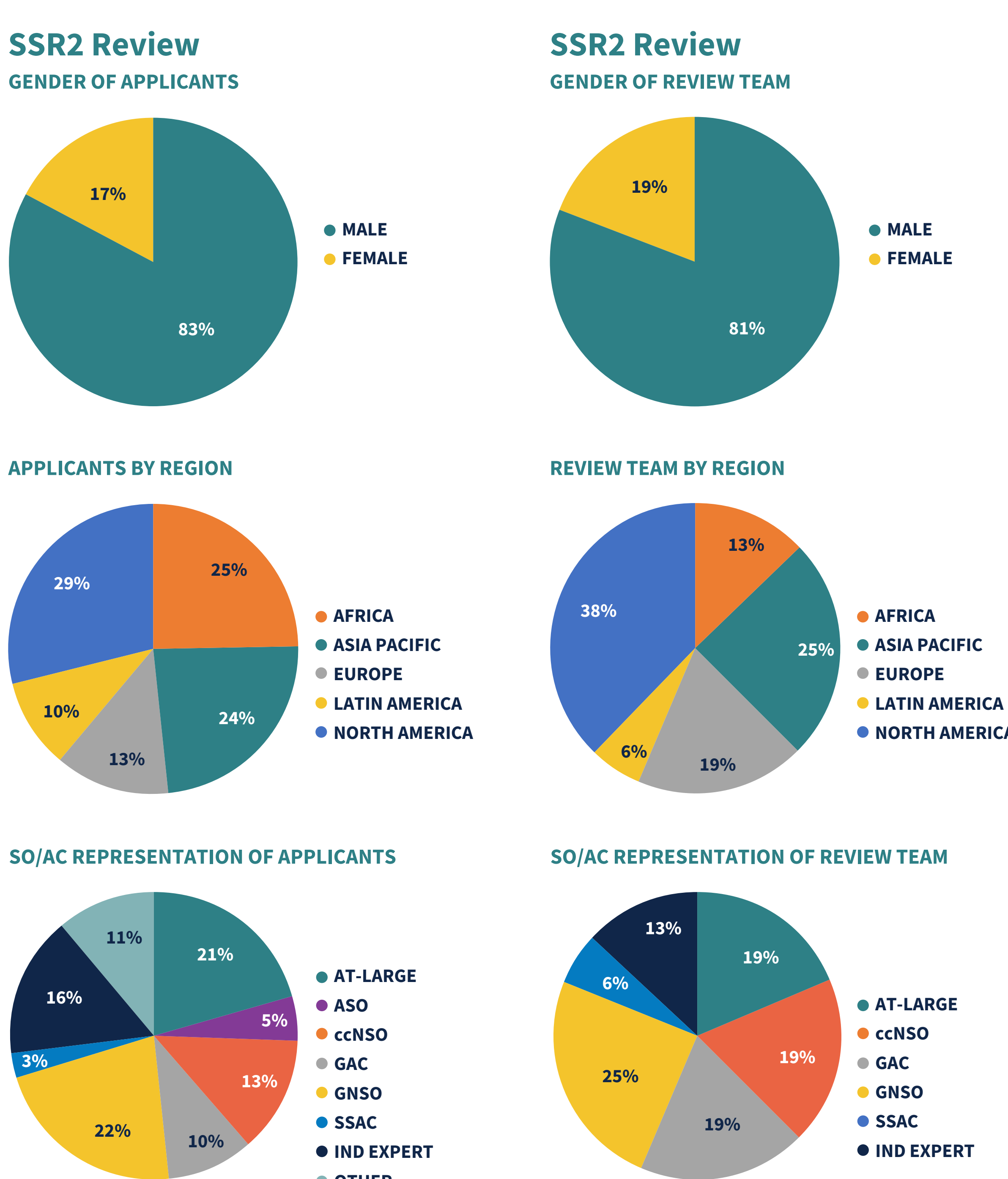
- **A.** security, operational stability and resiliency matters, both physical and network, relating to the coordination of the Internet's system of unique identifiers.
- **B.** conformance with appropriate security contingency planning framework for the Internet's system of unique identifiers.
- **C.** maintaining clear and globally interoperable security processes for those portions of the Internet's system of unique identifiers that ICANN coordinates.

iii. The SSR Review Team shall also assess the extent to which ICANN has successfully implemented its security efforts, the effectiveness of the security efforts to deal with actual and potential challenges and threats to the security and stability of the DNS, and the extent to which the security efforts are sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the DNS, consistent with ICANN's Mission.

iv. The SSR Review Team shall also assess the extent to which prior SSR Review recommendations have been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

v. The SSR Review shall be conducted no less frequently than every five years, measured from the date the previous SSR Review Team was convened."

The SSR2 Review was initiated with a call for volunteers in June 2016 and the Review Team was announced in February 2017. The below graphs represent the applicants and selected Review Team members by gender, region, and SO/AC representation.



READ MORE:

[SSR Review Home Page.](#) [SSR2 Review Wiki Page.](#) [SSR2 Review Fact Sheet.](#)

STATUS OF SSR2 REVIEW

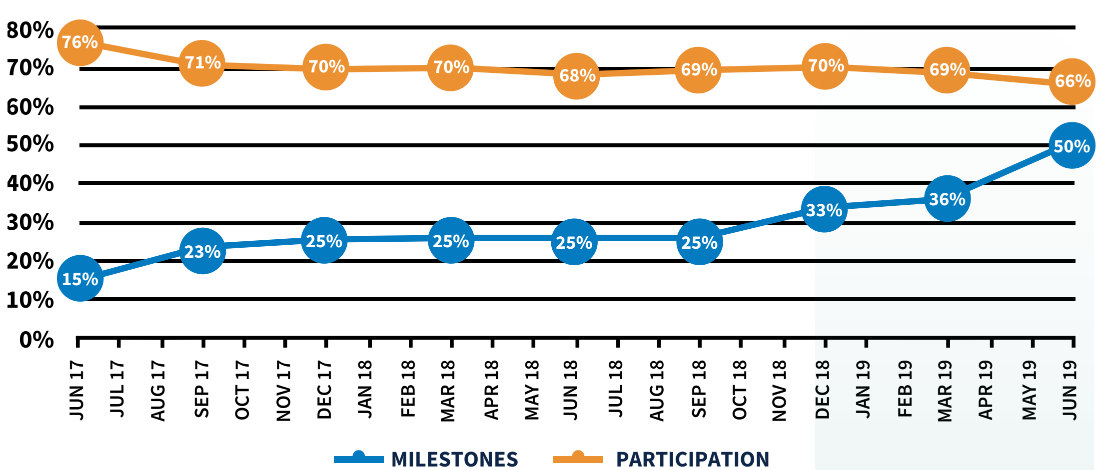
Through June 2019, the SSR2 Review Team held 57 plenary calls (35 in FY19), 52 leadership calls (36 in FY19), 10 subgroup calls, and 10 face-to-face meetings through ICANN65 (6 meetings during FY19). FY19 included a three-day facilitated **meeting** in August 2018, attendance at **ICANN63**, a **meeting** in Los Angeles in January 2019, attendance at **ICANN64**, a **meeting** in Brussels in May 2019, and attendance at **ICANN65**. The Review Team is currently in the research and findings phase of its work and expects to have draft recommendations completed in 2019.

TRACKING SSR2 REVIEW TEAM'S PROGRESS: FISCAL YEAR 2019 VIA FACT SHEET

The Review Team completed 50 percent of its milestones as of June 2019. Overall, participation by the Review Team members in team meetings ranged from 84 percent at the beginning of the fiscal year to 66 percent by June 2019. The Review Team spent approximately $570,000, 104 percent of its allocated budget of $550,000 as of June 2019.

SSR2 Review Fact Sheet KPIs

JULY 2017 - JUNE 2019



Review Team members spent more than 2,200 hours (1,200 hours in FY19) in plenary, leadership, and subgroups calls through June 2019. The number of hours spent on these calls by the project managers and subject matters experts within ICANN org was approximately 1,100 hours (approximately 350 hours in FY19).

COMPLAINTS REPORT

COMPLAINTS REPORT

The ICANN org Complaints Office was established in 2017 as an impartial, operational accountability mechanism to receive, research, analyze, and resolve complaints regarding ICANN org in an open and transparent manner. ICANN org established this mechanism for stakeholders to escalate operational issues that are not being resolved, are taking too long to resolve, have not been properly resolved, or that occur repeatedly.

In the two years since the Complaints Office was established, the office has received a total of 50 complaints. Of those 50 complaints, 24 were received during FY19, 23 in FY18, and 3 in FY17. Of the responses issued so far, 64 percent resulted in improvements and 25 percent resulted in an opportunity to educate the complainant on how the ICANN institution works and where they can seek further assistance.

When improvements are identified, the Complaints Office uses a collaborative, problem-solving approach to achieve actionable recommendations and improvements. Two examples of complaints addressed in FY19 include:

COMPLAINT REGARDING THE GLOBAL DOMAINS DIVISION PUBLIC INTEREST COMMITMENTS DISPUTE RESOLUTION PROCEDURE

ICANN org received a complaint about a specific step in the Public Interest Commitments Dispute Resolution Procedure process. The complaint arose from the first time this step in the Public Interest Commitments Dispute Resolution Procedure was used. There were a number of process gaps and opportunities for improvement that the appropriate ICANN org teams have or are in the process of implementing. Two of the identified process improvements were: 1) establishing clear guidance regarding what communications are shared amongst parties to the process and, 2) publishing the final report received from the Public Interest Commitments Dispute Resolution Procedure panel. The Complaints Office provided an impartial escalation point and enabled resolution to this unique case.

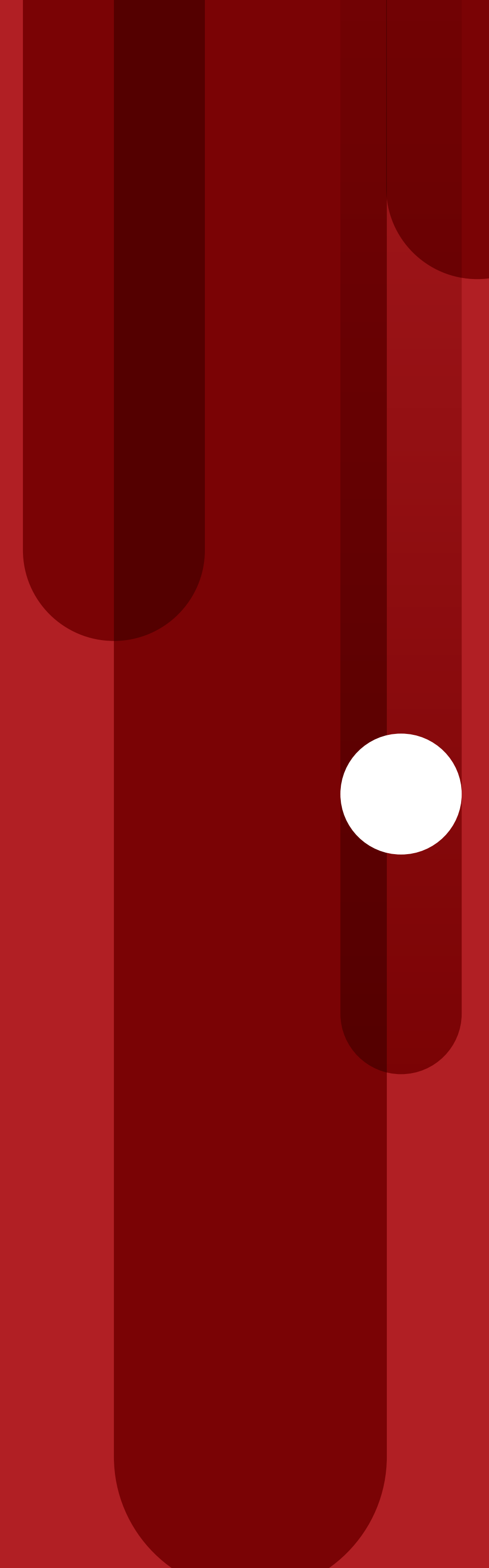
COMPLAINT REGARDING RAISING AWARENESS OF ICANN'S ANTI-HARASSMENT POLICY

ICANN org received an anonymous letter regarding ICANN's Anti-Harassment Policy. Part of this letter noted that the ICANN org should take a more active role in making ICANN community participants more aware of the policy. This portion of the complaint was identified as an opportunity for ICANN org to review and implement improvements. The Complaints Office worked with the Ombudsman — whose function is the process owner for the Anti-Harassment Policy — to identify several opportunities to increase awareness on this topic. Three of the opportunities included: requiring meeting participants to acknowledge their acceptance of Anti-Harassment Policy when registering for ICANN Public Meetings, creating and conspicuously displaying six-foot banners at ICANN Public Meetings, and the Ombudsman reminding attendees about the policy when opening ICANN Public Meetings and Public Forums.

LOOKING AHEAD

In FY20, the Complaints Office will:

- Continue to serve as an impartial, operational accountability mechanism to receive, research, analyze, and resolve complaints regarding the ICANN org in an open and transparent manner.
- Focus on growing internal and external engagement efforts including: consulting with ICANN org employees to review different areas of responsibility; obtaining input on barriers that might exist for community participants in using the Complaints Office; and generating ideas on awareness raising on the role of the Complaints Office.
- Expand Complaints Office knowledge and skills, including: reviewing best practices in complaints handling; networking with other Complaints Officers whose expertise can be leveraged; and continuing education.
- Examine existing ICANN org processes based on trends identified by the Office or when community feedback suggests opportunity for improvement.



EXPENSE REIMBURSEMENTS AND OTHER PAYMENTS TO DIRECTORS

- **REVIEW the Report of the Expense Reimbursement and Other Payments to ICANN Directors – Fiscal Period ending 30 June 2019.**

ICANN BOARD, COMMUNITY, AND CORPORATE LEADERSHIP

1 July 2018-30 June 2019

ICANN BOARD OF DIRECTORS

As of 30 June 2019

Cherine Chalaby
Chair, ICANN Board of Directors

Ron da Silva
Executive Director, Internet Tool & Die Company

Chris Disspain
Vice Chair, ICANN Board of Directors

Chief Executive Officer, DNS Capital Ltd.

Sarah Deutsch
Attorney, Law Office of Sarah B. Deutsch

Harald Alvestrand
IETF Liason to the ICANN Board

Engineer, Google

Avri Doria
Independent Researcher

Maarten Botterman
Independent strategic advisor, Internet governance expert

Lito Ibarra
Founding President and Executive Director, SVNet

Becky Burr
Partner, Harris, Wiltshire & Grannis, LLP

Manal Ismail
GAC Liaison to the ICANN Board

Executive Director, International Technical Coordination, National Telecom Regulatory Authority (NTRA), Egypt

ICANN BOARD OF DIRECTORS

As of 30 June 2019

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Partner, Jugodata Ltd. Serbia

Kaveh Ranjbar
RSSAC Liaison to the ICANN Board

Chief Information Officer, RIPE NCC

Merike Käo
SSAC Liaison to the ICANN Board

Founder and CEO, Double Shot Security

Nigel Roberts
CEO and Founder, Island Networks

Khaled Koubaa
Public Policy Manager for North Africa, Facebook

León Sánchez
Managing Partner, Fulton & Fulton SC

Akinori Maemura
General Manager, Internet Development Department, Japan Network Information Center

Matthew Shears
Director, Cyber, Global Partners Digital

Göran Marby
Ex officio Member of the Board

President and CEO, ICANN

Tripti Sinha
Assistant Vice President and Chief Technology Officer, University of Maryland

ICANN COMMUNITY LEADERS

As of 30 June 2019

SUPPORTING ORGANIZATIONS

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Chair
Address Supporting Organization (ASO)

Aftab Siddiqui
Chair
Address Supporting Organization Address Council (ASO AC)

Katrina Sataki
Chair
Country Code Names Supporting Organization (ccNSO) Council

Keith Drazek
Chair
Generic Names Supporting Organization (GNSO)

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Noncommercial Stakeholder Group (NCSG)

Graeme Bunton
Chair
Registrar Stakeholder Group (RrSG)

Donna Austin
Chair
Registries Stakeholder Group (RySG)

ICANN COMMUNITY LEADERS

As of 30 June 2019

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Chair

Commercial Business Users Constituency (BC)

Brian Winterfeldt
President

Intellectual Property Constituency (IPC)

Wolf-Ulrich Knoben
Chair

Internet Service Providers and Connectivity Service Providers Constituency (ISPCP)

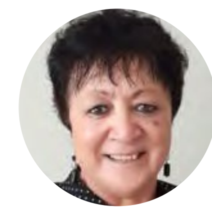
Bruna Martins dos Santos
Chair

Noncommercial Users Constituency (NCUC)

Joan Kerr
Chair

Not-for-Profit Operational Concerns Constituency (NPOC)

ADVISORY COMMITTEES



Maureen Hilyard
Chair

At-Large Advisory Committee (ALAC)

Manal Ismail
Chair

Governmental Advisory Committee (GAC)

Fred Baker
Chair

Root Server System Advisory Committee (RSSAC)

Brad Verd
Chair

Root Server System Advisory Committee (RSSAC)

Rod Rasmussen
Chair

Security and Stability Advisory Committee (SSAC)

ICANN COMMUNITY LEADERS

As of 30 June 2019

REGIONAL AT-LARGE ORGANIZATIONS

Mohamed Elbashir
Chair
African Regional At-Large Organization (AFRALO)

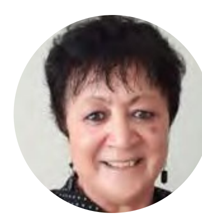
Satish Babu
Chair
Asian, Australasian, and Pacific Islands Regional At-Large Organization (APRALO)

Olivier Crépin-Leblond
Chair
European Regional At-Large Organization (EURALO)

Sergio Salinas Porto
Chair
Latin American and Caribbean Islands Regional At-Large Organization (LACRALO)

Eduardo Diaz
Chair
North American Regional At-Large Organization (NARALO)

EMPOWERED COMMUNITY ADMINISTRATION (ECA)

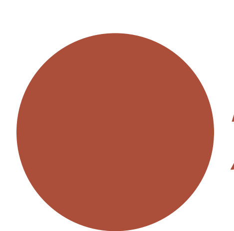


Maureen Hilyard
ALAC

Stephen Deerhake
ccNSO

Manal Ismail
GAC

Keith Drazek
GNSO



Axel Pawlik
ASO

ICANN COMMUNITY LEADERS

As of 30 June 2019

OTHER COMMUNITY GROUPS

Byron Holland
Chair

Customer Standing Committee (CSC)

Damon Ashcraft
Chair

Nominating Committee (NomCom)

Duane Wessels
Chair

Root Zone Evolution Review Committee (RZERC)

ICANN CORPORATE OFFICERS

As of 30 June 2019

Göran Marby
President and Chief Executive Officer

Joined in May 2016
Former Director-General of the Swedish Post and Telecom Authority, Chair of the Body of European Regulators for Electronic Communications (BEREC), Chair of the European Regulators Group for Postal Services (ERGP), and member of the Swedish Broadband Commission, with two decades of experience as a senior executive in the Internet and technology sectors.

Susanna Bennett
Chief Operating Officer

Joined in July 2013
Prior experience as Chief Financial Officer, Vice President of Human Resources and Board Director for Jazz Technologies, a public semiconductor company, where she led a merger integration.

Xavier Calvez
Chief Financial Officer

Joined in August 2011
Spent the 10 years before joining ICANN in progressive leadership positions in finance at Technicolor, ultimately serving as Chief Financial Officer for Technicolor Creative Services.

John Jeffrey
General Counsel and Secretary

Joined in September 2003
Over 30 years of business, legal, strategic, and general management experience at Live365, Discovery Communications, TCI, and Fox Television, as well as private litigation practice. Experience includes over two decades as General Counsel, including the last 15 years as ICANN's General Counsel and Secretary.

David Olive
Senior Vice President, Policy Development Support

Joined in February 2010
Previously completed a 20-year career at Fujitsu Limited, a leading provider of ICT-based business solutions, where he most recently served as General Manager and Chief Corporate Representative.

Ashwin Rangan
Senior Vice President, Engineering and Chief Information Officer

Joined in March 2014
Previously served as Chief Information Officer for Edwards Lifesciences Corporation, a medical equipment company, and also held Chief Information Officer positions with Walmart and Conexant Systems.

Theresa Swinehart
Senior Vice President, Multistakeholder Strategy and Strategic Initiatives

Rejoined in 2013
Swinehart rejoined ICANN after leading Internet Policy for Verizon Communications. Previous to Verizon, she spent nearly ten years at ICANN overseeing Global and Strategic Partnerships. Swinehart holds a law degree from American University Washington College of Law and a post graduate degree in International Studies from the University of Vienna.

COMMUNITY RECOGNITION

During ICANN63, ICANN recognized 44 community leaders who concluded a term of service between ICANN60 and ICANN63. In addition to receiving certificates during the annual Community Recognition Program, the ICANN Board passed a **resolution** recognizing the 44 community leaders. ICANN extends its thanks to the following community members for their hard work over the years.

Address Supporting Organization Address Council

Tomohiro Fujisaki
Wilfried Wöber

At-Large Advisory Committee

Bastiaan Goslings
Alan Greenberg
Maureen Hilyard
Andrei Kolesnikov
Bartlett Morgan
Seun Ojedeji
Alberto Soto

Business Constituency

Andrew Mack

Country Code Names Supporting Organization Council

Ben Fuller
Nigel Roberts
Christelle Vaval
Jian (Jane) Zhang

Customer Standing Committee

Jay Daley
Kal Feher
Elise Lindeberg

Generic Names Supporting Organization Council

Donna Austin
Phil Corwin
Heather Forrest
Susan Kawaguchi
Stephanie Perrin

Governmental Advisory Committee

Milagros Castañon

Intellectual Property Constituency

Lori Schulman
Greg Shatan

Latin American and Caribbean Islands Regional At-Large Organization

Maritza Aguero
Humberto Carrasco

Nominating Committee

Theo Geurts
Sandra Hoferichter
Zahid Jamil
Danny McPherson
Cheryl Miller
Jose Ovidio Salguiero
Hans Petter Holen
Jay Sudowski

Noncommercial Stakeholders Group

Farzaneh Badii

Noncommercial Users Constituency

Renata Aquino Ribeiro

Registries Stakeholder Group

Samantha Demetriou
Paul Diaz
Stéphane Van Gelder

Root Server System Advisory Committee

Venkateswara Dasari
Grace De Leon
Ray Gilstrap
Johan Ihrén
Kevin Jones
Tripti Sinha

ICANN GLOSSARY

AFRALO	African Regional At-Large Organization
AFRINIC	African Network Information Centre
AFTLD	Africa Top Level Domains Organization
ALAC	At-Large Advisory Committee
APNIC	Asia Pacific Network Information Centre
APRALO	Asian, Australasian, and Pacific Islands Regional At-Large Organization
APTLD	Asia Pacific Top Level Domain Association
ARIN	American Registry for Internet Numbers
ASO	Address Supporting Organization
ccNSO	Country Code Names Supporting Organization
ccTLD	country code top-level domain
CENTR	Council of European National Top-Level Domain Registries
DNS	Domain Name System
DNSSEC	Domain Name System Security Extensions
EPDP	Expedited Policy Development Process
EURALO	European Regional At-Large Organization
GAC	Governmental Advisory Committee
GDPR	General Data Protection Regulation
GNSO	Generic Names Supporting Organization
gTLD	generic top-level domain
IAB	Internet Architecture Board
IANA	Internet Assigned Numbers Authority
IDN	Internationalized Domain Name
IETF	Internet Engineering Task Force
ISOC	Internet Society
KSK	Key Signing Key
LACNIC	Latin American and Caribbean Internet Addresses Registry
LACRALO	Latin American and Caribbean Islands Regional At-Large Organization
LACTLD	Latin American and Caribbean Country Code Top-Level Domain Association
NARALO	North American Regional At-Large Organization
NRO	Number Resource Organization
PDP	policy development process
PTI	Public Technical Identifiers
RIPE NCC	Réseaux IP Européens Network Coordination Centre
RIR	Regional Internet Registry
RSSAC	Root Server System Advisory Committee
SSAC	Security and Stability Advisory Committee
TLD	top-level domain
W3C	World Wide Web Consortium
WSIS	World Summit on the Information Society (U.N.)

ICANN LOCATIONS

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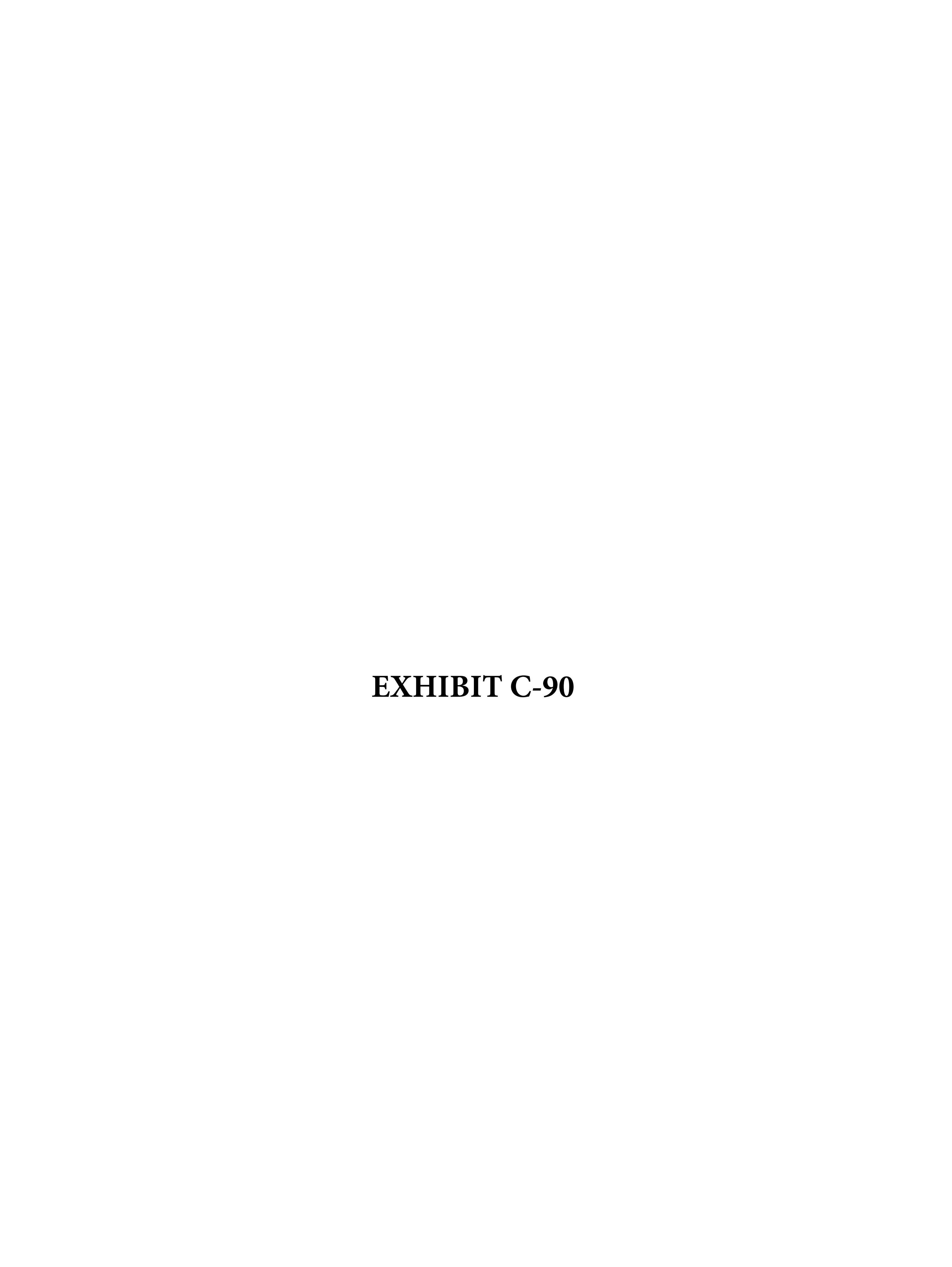

EXHIBIT C-90

ICANN Organization Remuneration Practices – FY2020 (1 July 2019 through 30 June 2020)

As of 1 July 2019

The overarching objective of ICANN's remuneration framework is to ensure remuneration provided is competitive globally and that it provides those who work at ICANN organization with appropriate motivation for high performance toward agreed objectives. The remuneration philosophy aims to:

- Attract and retain high caliber individuals
- Ensure it is competitive
- Ensure it is transparent

Role of the Board of Directors in Overseeing Remuneration for ICANN Organization

The Board of Directors of ICANN provides the overarching compensation philosophy for ICANN Org. Among other things, the Board Compensation Committee makes recommendations to the full Board with respect to compensation for the President and Chief Executive Officer (CEO), and other ICANN Officers.

Remuneration Components

ICANN organization is global and its remuneration philosophy is designed to be consistent with local practices where those who work with ICANN organization are located. As such, not all components listed below apply to all of those with ICANN organization :

- Base salary
- Discretionary at-risk component (eligibility based on position, and achievement of goals and objectives)
- Time off benefits (vacation, holiday, sick time, bereavement, jury service, and the like)
- Health and welfare benefits (medical, dental, vision, life insurance, accidental and dismemberment, and the like)
- Retirement benefits
- Housing, and other re-location allowances

Philosophy and History

The goal of the ICANN remuneration program is to pay salaries that are competitive for comparable positions at organizations similar to ICANN in activities, scope, complexity and responsibility for the purpose of attracting and retaining the necessary talents and skills to execute ICANN's mission.

In 2011, the consulting firm of Willis Towers Watson (formerly Towers Watson) was retained to evaluate the existing framework for ICANN's remuneration program. Based on a thorough review of ICANN's position descriptions, analysis of ICANN's work, and meetings with both ICANN organization personnel and the Board Compensation Committee, Willis Towers Watson recommended that ICANN organization framework be updated to reflect the following – continue to target compensation between the 50th and 75th percentile based on the

benchmarking of positions, with the benchmarking of positions based on a blend of data obtained from high-technology, not-for-profit, and general industry data. Blending of data is done for each position and is based on a number of factors including where ICANN organization would source candidates to fill positions as well as where those who leave ICANN organization go when they leave. The Board formally approved an updated remuneration framework provided by Willis Towers Watson in May 2012.

Base Salary

In deciding to generally target compensation between the 50th and 75th percentile of the distribution of salaries paid, using a blend of not-for-profit, for-profit general industry, and high technology organizations, the Board sought to ensure that ICANN organization is competitive for labor when recruiting to its needs. The Board also recognized that considering the potential future exigencies facing the organization, some flexibility to the principles might be necessary in certain circumstances.

Further, it is recognized that the organization might have to pay outside of the target levels in circumstances where the specialized nature of the role, the risk to the organization, the driving market forces or other supportable logic present significant issues to ICANN's on-going performance.

Periodically the Board reviews compensation for the President and CEO, and all other Officers. Executive management generally annually reviews ICANN organization compensation levels consistent with the overall remuneration framework.

ICANN organization uses a global compensation expert consulting firm to provide comprehensive benchmarking market data (currently Willis Towers Watson, Mercer and Radford). The market study is conducted before the salary review process. Estimates of potential compensation adjustments typically are made during the budgeting process based on current market data. The budget is then approved as part of ICANN's overall budget planning process.

Discretionary At-Risk Component

ICANN's at-risk compensation program is designed to provide incentives to those who work at ICANN organization for the accomplishment of specific goals and objectives throughout the year that have been identified as being of significant importance or adding value to the overall ICANN effort, as well as the way the individual goes about accomplishing those goals (the "behaviors").

The amount of at-risk pay an individual can earn is based on a combination of both the achievement of goals as well as the behaviors exhibited in achieving those goals. Whether or not to pay ICANN organization personnel all or any portion of their potential at-risk compensation is at the full discretion of ICANN management. It is fair and reasonable to expect those with ICANN organization (especially managers and executives) to deliver on their responsibilities, and where they fail to deliver, not to enjoy the financial benefits.

Most who work at ICANN organization participate in the at-risk compensation program. Senior management determines which individuals will be eligible to participate, and the level of that participation. The Board has approved a framework whereby ICANN organization personnel are eligible to earn an at-risk payment of up to 20 percent of base compensation as at-risk

payment based on role and level in the organization, with certain executives eligible for up to 30 percent.

The available at-risk compensation is calculated at the level of participation (expressed as a percent) times the amount of base compensation earned during an evaluation period.

Most participants have an opportunity to earn a portion of their annual at-risk compensation twice a year, which is known as the “at-risk opportunity”. The at-risk opportunity is the amount of at-risk compensation that is available to be earned for an evaluation period, and is calculated by multiplying base compensation earned during the evaluation period and the at-risk target percentage. For example, someone who works at ICANN organization could have an at-risk target of 10%, an annual base compensation of US$50,000, and base compensation earned of US$25,000 for the evaluation period, which would result in an at-risk opportunity of US$2,500 (US$25,000 x 10% = US$2,500).

Actual at-risk compensation “earned” is based on the final performance score given by a participant’s manager. For example, if an individual has an at-risk opportunity of US$2,500 and a performance score of 95% for an evaluation period, the at-risk compensation earned would be US$2,375 for that evaluation period (US$2,500 x 95% = US$2,375). Participants with performance scores at or above 100% will be eligible for 100% of the at-risk opportunity for the evaluation period. Participants with final performance scores below 50% for a given evaluation period are not eligible for an at-risk compensation for that period.

All recommendations for final performance scores made by ICANN managers must be reviewed and approved by the SVP of Global HR.

The discretionary at-risk compensation amount is typically paid within 60 days of the end of the applicable period. ICANN organization personnel must be actively reporting to work as required by ICANN organization on the date the payment is made, in order to receive the at-risk payment. Individuals whose working relationship with ICANN has ended before the payment is made to the majority of at-risk compensation recipients are generally not eligible for payment. Either the President and CEO, or the SVP of Global HR approves the processing of payments of the at-risk compensation amounts; in the case of the President and CEO, the Board approves the at-risk payment amount.

If a participant is not actively reporting to work as required by ICANN organization (e.g., is on short-term disability or maternity leave) for at least 25% of the evaluation period, the amount of at-risk opportunity representing the worked portion of the evaluation period as required by ICANN organization, will be carried over and added to the at-risk opportunity for the next evaluation period.

If a participant is hired or engaged after a predetermined eligibility date during any evaluation period, the amount of at-risk opportunity representing the worked portion of the evaluation period in which the participant was engaged or hired, will be carried over and added to the at-risk opportunity for the next evaluation period.

If a participant receives a change in his or her at-risk target during the evaluation period, the new at-risk target will start to apply on the effective date of the change. For example, if a participant has an at-risk target of 10% at the start of an evaluation period and then receives a change in at-risk target to 20% at the halfway point of the evaluation period, then 10% would

be used to determine the at-risk opportunity for the first half of the evaluation period and 20% would be used to determine the at-risk opportunity for the second half of the evaluation period.

Time Off Benefits

Time off benefits include vacation time, public holidays, sick time, bereavement leave, jury service pay, and any other paid time off required by law. Payments for these benefits are made in lieu of base pay for the benefit day(s) and are reported as part of base compensation.

Health and Welfare Benefits

Health and welfare benefits include health insurance programs (such as medical, dental or vision plans), life insurance, accidental death and dismemberment insurance, travel accident and other relevant insurances as appropriate. The types and levels of programs provided are based on competitive and regional practices as well as local law. Every effort is made to treat ICANN organization personnel equitably based on competitive practices in their regions. This includes providing certain individuals with benefit compensation in lieu of buying benefits directly for them when such purchases are not practical or available to ICANN organization.

Retirement Benefits

Retirement benefits are provided to those who work at ICANN organization based on competitive and regional practices as well as local law. Every effort is made to treat individuals equitably based on competitive practices in their regions. This includes providing certain individuals with compensation directly in lieu of contributing to a retirement scheme where such contributions are not practical or available to ICANN. Where ICANN contributes to a retirement program all contributions are made during the individual's term of employment. ICANN organization does not accrue any liability for retirement benefits to be paid upon retirement of anyone who work at the organization.

Housing and Other Relocation Allowances

In some instances, housing or other re-location allowances may be provided to individuals when they are asked to work in a location that makes commuting from their permanent home impractical, or where they are relocated at ICANN organization's request. The allowances, which are typically subject to the organization's mobility policy absent special circumstances, are not intended to cover the full cost of maintaining two households. Any housing or other allowance provided is reported as taxable compensation as appropriate and applicable.

Additional Information

The following individuals are Officers of the organization. Accordingly, their remuneration for FY2020 is explained in detail here.

President and Chief Executive Officer

Göran Marby was appointed ICANN's President and CEO, as well as a member of the Board of Directors, effective 23 May 2016. Mr. Marby entered into an employment agreement with ICANN effective 23 May 2016. Since 1 July 2019, Mr. Marby is to be paid a base salary of US$673,461.54 per year, is eligible for additional at-risk compensation of up to 30 percent of base per year, and is provided reasonable coverage under vacation, health and welfare plans

including medical, dental, vision, life insurance and a 401(k) retirement plan that ICANN makes available to all its U.S. based employees..

General Counsel and Secretary

Mr. John Jeffrey was appointed as General Counsel and Secretary on 2 September 2003. Since 1 July 2019, Mr. Jeffrey's compensation has consisted of a base salary of US$483,589.01 per year, eligibility for additional at-risk compensation of up to 30 percent of base pay per year, and reasonable coverage under vacation, health and welfare plans including medical, dental, vision, life insurance and a 401(k) retirement plan that ICANN makes available to all of its U.S. based employees. Additionally, starting 1 January 2019, Mr. Jeffrey has received a monthly stipend of US$3,000 for serving as a deputy to the President and CEO. This stipend will last only so long as Mr. Jeffrey continues to act as one of the President and CEO's deputies.

SVP, Mulitstakeholder Strategy & Strategic Initiatives

Theresa Swinehart, was named SVP, Mulitstakeholder Strategy & Strategic Initiatives effective 5 Feb 2016, and was formally appointed by the Board as an Officer of the organization effective 16 January 2019. Since 1 January 2019, Ms. Swinehart's compensation has consisted of a base salary of US$365,000 per year, eligibility for additional at-risk compensation of up to 30 percent of base per year, and reasonable coverage under vacation, health and welfare plans including medical, dental, vision, life insurance and a 401(k) retirement plan that ICANN makes available to all its U.S. based employees. Additionally, starting 1 January 2019, Ms. Swinehart has received a monthly stipend of US$3,000 for serving as a deputy to the President and CEO. This stipend will last only so long as Ms. Swinehart continues to act as one of the President and CEO's deputies.

Chief Operating Officer

Ms. Susanna Bennett was appointed as Chief Operating Officer effective 1 July 2013. Since 1 July 2019, Ms. Bennett's compensation has consisted of a base salary of US$372,344.33 per year, eligibility for additional at-risk compensation of up to 30 percent of base per year, and reasonable coverage under vacation, health and welfare plans including medical, dental, vision, life insurance and a 401(k) retirement plan that ICANN makes available to all its U.S. based employees.

Chief Financial Officer

Mr. Xavier Calvez was hired on 8 September 2011, and was formally appointed by the Board as Chief Financial Officer on 17 September 2011. Since 1 July 2019, Mr. Calvez's compensation has consisted of a base salary of US$362,093.82, eligibility for additional at-risk compensation of up to 30 percent of base per year, and reasonable coverage under vacation, health and welfare plans including medical, dental, vision, life insurance and a 401(k) retirement plan that ICANN makes available to all its U.S. based employees.

Senior Vice President, Policy Development Support

Mr. David Olive was hired on 15 February 2010, and was formally appointed by the Board as an Officer of the organization on 28 February 2013. Since 1 July 2019, Mr. Olive's compensation has consisted of a base salary of US$297,170.74 per year, eligibility for additional at-risk compensation of up to 30 percent of base per year, and reasonable coverage under vacation, health and welfare plans including medical, dental, vision, life insurance and a 401(k) retirement plan that ICANN makes available to all its U.S. based employees.

Senior Vice President, Engineering & Chief Information Officer

Mr. Ashwin Rangan was hired on 3 March 2014, and was formally appointed by the Board as Chief Innovation and Information Officer on 11 February 2015. Since 1 July 2019, Mr. Rangan's compensation has consisted of a base salary of US$337,965.41 per year, eligibility for additional at-risk compensation of up to 30 percent of base pay per year, and reasonable coverage under vacation, health and welfare plans including medical, dental, vision, life insurance and a 401(k) retirement plan that ICANN makes available to all its U.S. based employees.

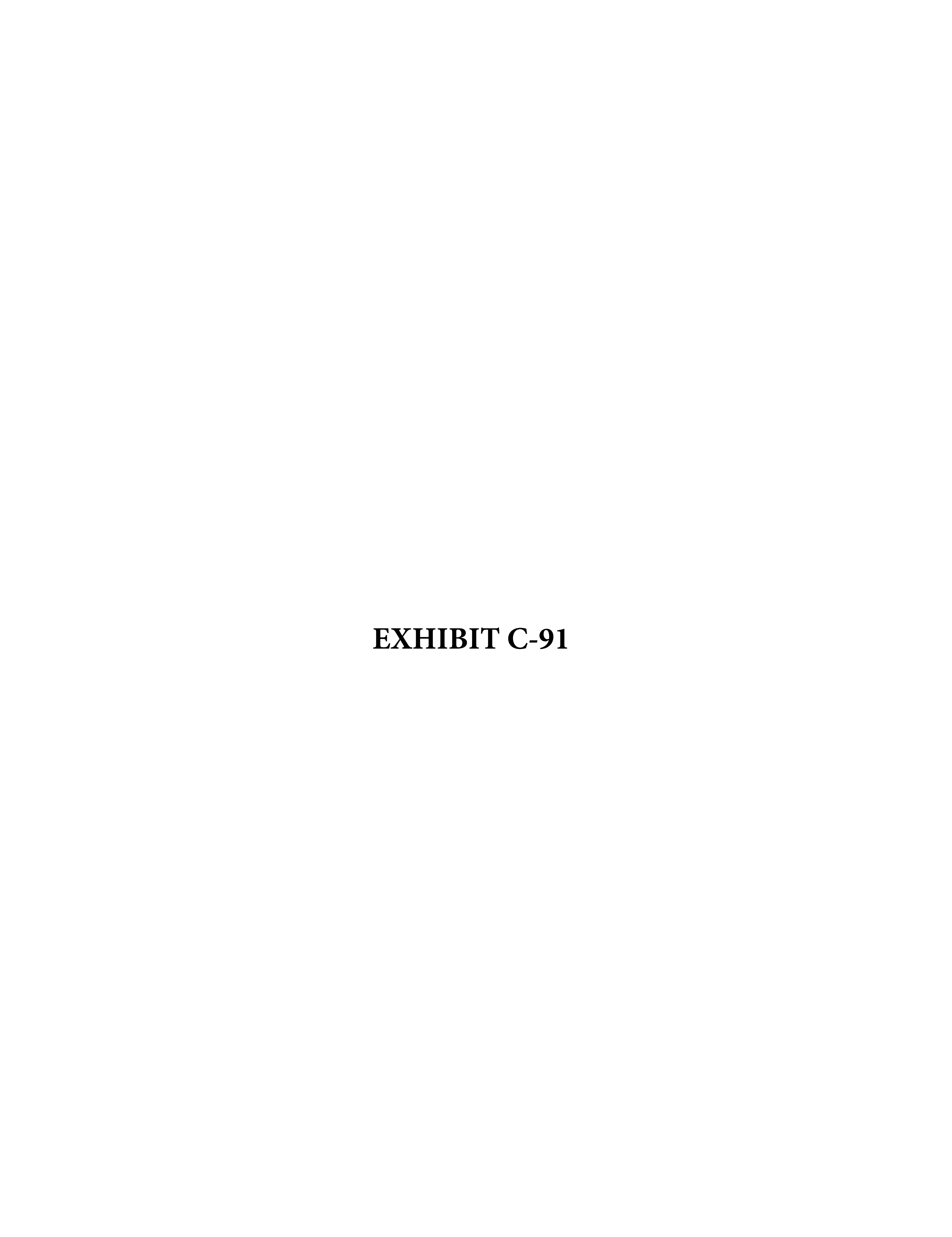

EXHIBIT C-91

Ex. C-91

CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations

23 February 2016

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CONCLUSION 50

Community Powers are an Effective Replacement of the Safety Net Provided by the U.S. Government's Current IANA Stewardship Role 50

The CCWG-Accountability Believes that the Recommended Accountability Frameworks Provided in this Proposal Meet the Requirements of the Domain Names Community and the IANA Stewardship Transition Proposal 50

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Summary

01 Since December 2014, a working group of ICANN community members has developed a set of proposed enhancements to ICANN's accountability to the global Internet community. This document is being distributed for the consideration and approval of the working group's 6 Chartering Organizations.

02 This effort is integral to the transition of the United States' stewardship of the IANA functions to the global Internet community, reflecting the ICANN community's conclusion that improvements to ICANN's accountability were necessary in the absence of the accountability backstop that the historical contractual relationship with the United States government provided. The accountability improvements set out in this document are not designed to change ICANN's multistakeholder model, the bottom-up nature of policy development, or significantly alter ICANN's day-to-day operations.

03 The main elements of the proposal are outlined below, supported by additional annexes and appendices. Together with ICANN's existing structures and groups, these accountability enhancements will ensure ICANN remains accountable to the global Internet community.

- **A revised Mission Statement** for the ICANN Bylaws that sets out what ICANN does. This Mission Statement clarifies but does not change ICANN's historic mission.
- An enhanced **Independent Review Process** and redress process with a broader scope and the power to ensure ICANN stays within its Mission.
- New specific **powers** for the ICANN community that can be enforced when the usual methods of discussion and dialogue have not effectively built consensus, including the powers to:
    - Reject ICANN Budgets, IANA Budgets or Strategic/Operating Plans.
    - Reject changes to ICANN's Standard Bylaws.
    - Approve changes to new Fundamental Bylaws, Articles of Incorporation and ICANN's sale or other disposition of all or substantially all of ICANN's assets.
    - Remove an individual ICANN Board Director.
    - Recall the entire ICANN Board.
    - Initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results).
    - Reject ICANN Board decisions relating to reviews of the IANA functions, including the triggering of Post-Transition IANA separation.
    - The rights of inspection and investigation
- A community Independent Review Process as an enforcement mechanism further to a Board action or inaction.

04 All of these community powers can only be exercised after extensive community discussions and debates through processes of **engagement and escalation**. The process of escalation provides many opportunities for the resolution of disagreements between parties before formal action is required.

05 The accountability elements outlined above will be supported through:

- Additions to the ICANN Bylaws to create an **Empowered Community** that is based on a simple legal vehicle designed to act on the instructions of ICANN stakeholder groups when

needed to exercise the Community Powers. The Empowered Community is granted the status of a Designator (a recognized role in law) and has the standing to enforce the Community Powers if needed.

- Core elements of ICANN's governing documents, including the Articles of Incorporation and **Fundamental Bylaws** that can only be changed with agreement between the ICANN community and the ICANN Board.

06 In addition, further proposed changes include:

- Recognition of **ICANN's respect for Human Rights** into the Bylaws.
- Incorporation of ICANN's commitments under the 2009 **Affirmation of Commitments** with the United States Department of Commerce into the Bylaws, where appropriate.
- Improved accountability and diversity standards for ICANN's **Supporting Organizations and Advisory Committees.**
- A commitment to discuss additional accountability improvements and broader accountability enhancements in 2016 that do not need to be in place or committed to prior to the IANA Stewardship Transition. These include:
  - Considering improvements to ICANN's standards for diversity at all levels.
  - Further enhancements to the accountability of ICANN's Supporting Organizations and Advisory Committees, as well as ICANN staff.
  - Improving ICANN's transparency relating to ICANN's Documentary Information Disclosure Policy (DIDP), interactions with governments, whistleblower policy and Board deliberations.
  - Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment in the Bylaws.
  - Addressing questions focused on jurisdiction of contracts and dispute settlements.
  - Considering enhancements to the role and function of the ICANN Ombudsman.

07 To develop these recommendations to improve ICANN's accountability, the working group:

- Relied on suggestions and proposals generated inside the working group and by the broader Internet multistakeholder community.
- Conducted three public comment periods to gather feedback on earlier drafts and discussed iterations of its recommendations across the world at ICANN meetings and through online webinars.
- Rigorously "stress tested" ICANN's current and proposed accountability mechanisms to assess their strength against problematic scenarios the organization could potentially face.
- Engaged two external law firms to ensure the legal reliability of the proposed accountability enhancements.
- Made the minimum enhancements to ICANN's accountability necessary to meet the baseline requirements of the community, as required for the IANA Stewardship Transition.
- Met the requirements of the group that developed the IANA Stewardship Transition proposal for the Domain Names community.
- Met the requirements of the U.S. National Telecommunications and Information Agency for the IANA Stewardship Transition.

08 Each of the twelve recommendations has a corresponding annex with additional details including a summary, CCWG-Accountability[1] Recommendations, Detailed Explanation of Recommendations, Changes from the ‘Third Draft Proposal on Work Stream 1 Recommendations,’ Stress Tests Related to this Recommendation, how the recommendation meets the CWG-Stewardship[2] Requirements, and how the recommendation addresses NTIA Criteria.

09 **Note:** Minority statements can be found in Appendix A: Documenting Consensus (Including Minority Views)

[1] Cross Community Working Group on Enhancing ICANN Accountability

[2] Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions

Background

10 On 14 March 2014, the U.S. National Telecommunications and Information Administration (NTIA) announced its intent to transition its stewardship of the Internet Assigned Numbers Authority (IANA) Functions to the global multistakeholder community. NTIA asked ICANN to convene an inclusive, global discussion to determine a process for transitioning the stewardship of these functions to the Internet community.

11 During initial discussions on how to proceed with the transition process, the ICANN multistakeholder community, recognizing the safety net that the NTIA provides as part of its stewardship role of the IANA Functions, raised concerns about the impact of the transition on ICANN's accountability.

12 To address these concerns, the ICANN community requested that ICANN's existing accountability mechanisms be reviewed and enhanced as a key part of the transition process. As a result, the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) was convened. The CCWG-Accountability's work consists of two tracks:

13 **Work Stream 1:** Focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition.

14 **Work Stream 2**: Focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.

15 Any other consensus items that are not required to be in place within the IANA Stewardship Transition timeframe can be addressed in Work Stream 2. There are mechanisms in Work Stream 1 to adequately enforce implementation of Work Stream 2 items, even if they were to encounter resistance from ICANN Management or others.

16 The work documented in this Draft Proposal focuses on Work Stream 1, with some references to related activities that are part of Work Stream 2's remit.

Requirements

17 This section provides an overview of the requirements the CCWG-Accountability has to fulfill in developing its recommendations

18 NTIA Requirements

19 NTIA has requested that ICANN "convene a multistakeholder process to develop a plan to transition the U.S. Government stewardship role" with regard to the IANA Functions and related Root Zone management. In making its announcement, the NTIA specified that the transition Proposal must have broad community support and meet the following principles:

- Support and enhance the multistakeholder model.
- Maintain the security, stability, and resiliency of the Internet DNS.
- Meet the needs and expectations of the global customers and partners of the IANA services.
- Maintain the openness of the Internet.

20 NTIA also specified that it would not accept a Proposal that replaces its role with a government-led or an intergovernmental organization solution.

21 Additionally, NTIA also requires that the CCWG-Accountability Proposal clearly document how it worked with the multistakeholder community, which options it considered in developing its Proposal, and how it tested these.

22 Please Refer to Annex 14: NTIA Requirements for the details of how the CCWG-Accountability meets these requirements.

23 CWG-Stewardship Requirements

24 In the transmittal letter for the CWG-Stewardship transition plan to the IANA Stewardship Transition Coordination Group (ICG), the CWG-Stewardship noted the following regarding its dependencies on the CCWG-Accountability work in response to an earlier version of this document:

25 "The CWG-Stewardship is significantly dependent and expressly conditioned on the implementation of ICANN-level accountability mechanisms proposed by the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability). The co-Chairs of the CWG-Stewardship and the CCWG-Accountability have coordinated their efforts and the CWG-Stewardship is confident that the CCWG-Accountability Work Stream 1 recommendations, if implemented as expected, will meet the requirements that the CWG-Stewardship has previously communicated to the CCWG-Accountability. If any element of these level accountability mechanisms is not implemented as contemplated by the CWG-Stewardship, this will require revision."

26 The CWG-Stewardship requirements of the CCWG-Accountability are detailed on pages 20 – 21 of the CWG-Stewardship Proposal transmitted on 25 June 2015. The Work Stream 1 Proposals from the CCWG-Accountability address all of these conditions.

27 These requirements are:

1. ICANN Budget
2. ICANN Board and Community Empowerment Mechanisms
3. IANA Function Review and Separation Process
4. Customer Standing Committee
5. Appeals Mechanism
6. Post-Transition IANA (PTI) Governance
7. Fundamental Bylaws

28 Please refer to Annex 13: CWG-Stewardship Requirements for details on how the CCWG-Accountability meets these requirements.

The CCWG-Accountability's Findings and Recommendations

29 This section provides an overview of the CCWG-Accountability's findings and recommendations regarding Work Stream 1:

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30 **Recommendation #1:** Establishing an Empowered Community for Enforcing Community Powers

31 **Recommendation #2:** Empowering the Community through Consensus: Engagement, Escalation, and Enforcement

32 **Recommendation #3:** Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

33 **Recommendation #4:** Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

34 **Recommendation #5:** Changing Aspects of ICANN's Mission, Commitments, and Core Values

35 **Recommendation #6:** Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries out its Mission

36 **Recommendation #7:** Strengthening ICANN's Independent Review Process

37 **Recommendation #8:** Improving ICANN's Request for Reconsideration Process

38 **Recommendation #9:** Incorporating the Affirmation of Commitments in ICANN's Bylaws

39 **Recommendation #10:** Enhancing the Accountability of Supporting Organizations and Advisory Committees

40 **Recommendation #11:** Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)

41 **Recommendation #12:** Committing to Further Accountability Work in Work Stream 2

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42 Note:

- The language in the Summary, CCWG-Accountability Recommendations, and Changes from the "Third Draft Proposal on Work Stream 1 Recommendations" sections of the Recommendations is copied from the matching Annexes which were approved as consensus positions by the CCWG-Accountability. Only the formatting has been modified to accommodate the structure of the main report.
- The language proposed in recommendations for ICANN Bylaw revisions are conceptual at this stage. The CCWG-Accountability's external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws (Fundamental and Standard Bylaws).

Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers

43 **Summary**

44 Under California law and the current Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the ICANN Board of Directors has the final responsibility for the activities and affairs of ICANN.

45 With removal of the U.S. National Telecommunications and Information Administration (NTIA) as a perceived enforcement body over ICANN, the CCWG-Accountability requires a method to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the ICANN Board may object to the results.

46 The CCWG-Accountability recommends creating a new entity that will act at the direction of the multistakeholder community to exercise and enforce Community Powers. The entity will take the form of a California unincorporated association and be given the role of "Sole Designator" of ICANN Board Directors and will have the ability to directly or indirectly the Community Powers. The entity will be referred to as the "Empowered Community."

47 As permitted under California law, the Empowered Community will have the statutory power to appoint and, with that, the statutory power to remove ICANN Board Directors (whether an individual Director or the entire Board). Other powers, such as the power to approve or reject amendments to the Articles of Incorporation and Bylaws, may be provided to the Empowered Community.

48 The CCWG-Accountability accepts that its statutory power will be limited as described above, and that this is sufficient given:

- The creation of "Fundamental Bylaws" that can only be modified jointly by the ICANN Board and Empowered Community.
- All recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws.
- The right of inspection is granted to "Decisional Participants" in the Empowered Community.
- The right of investigation is granted to the Decisional Participants in the Empowered Community.

49 The process for the Empowered Community to use a Community Power is outlined in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.

50 **CCWG-Accountability Recommendations**

51 The CCWG-Accountability recommends creating an entity that will act at the direction of the community to exercise and enforce Community Powers:

- This entity will take the form of a California unincorporated association and be given the role of Sole Designator of ICANN Board Directors and will have the ability to directly or indirectly enforce the Community Powers. This entity will be referred to as the Empowered Community.

- The Empowered Community will act as directed by participating Supporting Organizations (SOs) and Advisory Committees (ACs), which will be referred to as the Decisional Participants in the Empowered Community.
- The Empowered Community, and the rules by which it is governed, will be constituted in ICANN's Fundamental Bylaws, along with provisions to ensure the Empowered Community cannot be changed or eliminated without its own consent (see Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation).
- The Articles of Incorporation will be amended to clarify that the global public interest will be determined through a bottom-up, multistakeholder process.

52 Additionally, the CCWG-Accountability recommends including in the ICANN Bylaws:

- The right for Decisional Participants in the Empowered Community to inspection as outlined in California Corporations Code 6333, although this specific code reference would not be mentioned in the Bylaws.
- The right of investigation, which includes the adoption of the following audit process: upon three Decisional Participants in the Empowered Community coming together to identify a perceived issue with fraud or gross mismanagement of ICANN resources, ICANN will retain a third-party, independent firm to undertake a specific audit to investigate that issue. The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.
- The following limitation associated with the Governmental Advisory Committee (GAC) acting as a Decisional Participant: If the GAC chooses to participate as a Decisional Participant in the Empowered Community, it may not participate as a decision-maker in the Empowered Community's exercise of a Community Power to challenge the ICANN Board's implementation of GAC consensus advice (referred to as the "GAC carve-out").

  In such cases, the GAC will still be entitled to participate in the Empowered Community in an advisory capacity in all other aspects of the escalation process, but its views will not count towards or against the thresholds needed to initiate a conference call, convene a Community Forum or exercise the Community Power.

  The GAC carve-out preserves the ICANN Board's unique obligation to work with the GAC to try to find a mutually acceptable solution to the implementation of GAC advice supported by consensus – as defined in Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18) – while protecting the Empowered Community's power to challenge such Board decisions.

53 Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"

- Scope and limitations with respect to the right to inspect accounting books and records of ICANN confirmed, emphasizing the difference between DIDP and inspection rights.
- Added inspection rights for accounting books and records and minutes based on a one Decisional Participant threshold.
- Introduced additional suggestion by the ICANN Board regarding investigation right (audits), based on three Decisional Participants in the Empowered Community threshold.

- Confirmed direction for implementation to avoid abusive claims.
- Compromise on Recommendation #11 required the creation of the "GAC carve-out."

54 **Relevant Annexes**

- Annex 01 – Details on Recommendation #1: Establishing an Empowered Community for enforcing Community Powers
- Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation
- Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

Recommendation #2: Empowering the Community Through Consensus: Engagement, Escalation, and Enforcement

55 Summary

56 Engagement

57 Today, the Internet Corporation for Assigned Names and Numbers (ICANN) Board of Directors voluntarily consults with the multistakeholder community on a variety of decisions, including the Annual Budget and changes to the ICANN Bylaws. To gather feedback, the ICANN Board uses mechanisms such as public consultations and information sessions to gauge community support and/or identify issues on the topic. These consultation mechanisms are referred to as an "engagement process."

58 The CCWG-Accountability is recommending that engagement processes for specific ICANN Board actions be constituted in the Fundamental Bylaws. Although the ICANN Board engages voluntarily in these processes today, this recommendation would formally require the ICANN Board to undertake an extensive engagement process (including, at a minimum, a full public consultation process that complies with ICANN rules for public consultations) before taking action on any of the following:

- Approving ICANN's Five-Year Strategic Plan.
- Approving ICANN's Five-Year Operating Plan.
- Approving ICANN's Annual Operating Plan & Budget.
- Approving the Internet Assigned Numbers Authority (IANA) Functions Budget.
- Approving any modifications to Standard or Fundamental Bylaws or the Articles of Incorporation, or approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Making ICANN Board decisions relating to reviews of IANA functions, including the triggering of any Post-Transition IANA (PTI) separation process.

59 If it is determined that there is divergence between the ICANN Board and the community after the engagement process, the Empowered Community (as defined in Recommendation #1:

Establishing an Empowered Community for Enforcing Community Powers) may decide to use a Community Power after the appropriate "escalation process" has been satisfied.

60 The Empowered Community may begin an escalation process to:

- Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget, or the IANA Functions Budget.
- Reject a change to ICANN Standard Bylaws.
- Approve changes to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Remove an individual ICANN Board Director.
- Recall the entire ICANN Board.
- Initiate a binding community Independent Review Process (IRP), where a panel decision is enforceable in any court recognizing international arbitration results, or a non-binding Request for Reconsideration, where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff.

61 Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.

62 Escalation

63 The escalation process can differ, sometimes significantly, from one Community Power to another.

64 One of the most standardized versions of the escalation process is required for all Community Powers to "reject," remove individual Nominating Committee-nominated Board Directors, or recall the entire Board.

- **This escalation process comprises the following steps:**

1. An individual starts a petition in a Supporting Organization (SO) or Advisory Committee (AC) that is a Decisional Participant in the Empowered Community (see Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers).
    - If the petition is approved by that SO or AC, it proceeds to the next step.
    - If the petition is not approved by that SO or AC, the escalation process is terminated.
2. The SO or AC that approved the petition contacts the other Decisional Participants to ask them to support the petition.
    - At least one additional SO and/or AC must support the petition (for a minimum of two or, for Board recall, three) for a Community Forum to be organized to discuss the issue.
        - If the threshold is not met, the escalation process is terminated.
        - If the threshold is met, a Community Forum is organized to discuss the petition.
3. An open Community Forum of one or two days is organized for any interested stakeholder in the community to participate.
    - The petitioning SO and/or AC will:

  - Circulate a detailed rationale for proposing to use the Community Power to all Decisional Participants.
  - Designate a representative(s) to liaise with SOs/ACs to answer questions from the SOs/ACs.
  - If desired, optionally, request that ICANN organize a conference call prior to the Community Forum for the community to discuss the issue.
- If the ICANN Board and the Empowered Community can resolve their issues before or in the Community Forum, the escalation process is terminated.
- Otherwise, the Empowered Community must decide if it wishes to use its Community Power.

4. The Empowered Community considers use of a Community Power.
    - If the threshold to use a Community Power is not met, or there is more than one objection, then the escalation process is terminated.
    - If the threshold is met for using the Community Power, and there is no more than one objection, the Empowered Community advises the ICANN Board of the decision and directs it to comply with the decision (as outlined in the Fundamental Bylaws for this Community Power).
5. The Empowered Community advises the ICANN Board.
    - If the Empowered Community has decided to use its power, it will advise the ICANN Board of the decision and direct the Board to take any necessary action to comply with the decision.

65 **Enforcement**

66 If the ICANN Board refuses or fails to comply with a decision of the Empowered Community using a Community Power (other than a decision to remove an individual Director or the entire ICANN Board pursuant to the Empowered Community's statutory power, as discussed below), the Empowered Community must decide if it wishes to begin the enforcement process.

67 The enforcement process can proceed in one of two ways:

- The Empowered Community may initiate mediation and community IRP procedures.
- The Empowered Community may initiate an escalation process to recall the entire ICANN Board.

68 The enforcement process may result in a resolution of the issue. Otherwise, if needed, the result of the enforcement process is enforceable in court.

69 If the ICANN Board refuses or fails to comply with a decision of the Empowered Community to use the statutory power to remove an individual ICANN Director or recall the entire ICANN Board (or with the Empowered Community's appointment of a Director), the Empowered Community could address that refusal by bringing a claim in a court that has jurisdiction; there is no need for the Empowered Community to initiate or undertake other enforcement processes such as mediation or an IRP to enforce the power.

70 CCWG-Accountability Recommendations

71 Establish a Fundamental Bylaw that requires the ICANN Board to undertake an extensive engagement process (including, at a minimum, a full public consultation process that complies with ICANN rules for public consultations) before taking action on any of the following:

- Approving ICANN's Five-Year Strategic Plan.
- Approving ICANN's Five-Year Operating Plan.
- Approving ICANN's Annual Operating Plan & Budget.
- Approving the IANA Functions Budget.
- Approving any modification to Standard or Fundamental Bylaws or the Articles of Incorporation, or approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Making any ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.

72 Include the engagement, escalation and enforcement processes in the Fundamental Bylaws.

- Note: The escalation processes for each Community Power are outlined in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.

73 Table: Required Thresholds for the Various Escalation and Enforcement Processes (Based on a Minimum of Five Decisional Participants in the Empowered Community)

Required Community Powers?	Petition Threshold to convene a Community Forum	Is there consensus support to exercise a Community Power?
74 1. Reject a proposed Operating Plan/Strategic Plan/Budget	75 Two SOs/ACs	76 Four support rejection, and no more than one objection
77 2. Approve a change to Fundamental Bylaws and Articles of Incorporation, and approve ICANN's sale or other disposition of all or substantially all of ICANN's assets	78 N/A	79 Three support approval, and no more than one objection
80 3. Reject changes to Standard Bylaws	81 Two SOs/ACs, including the SO that led the PDP that requires the Bylaw change (if any)	82 Three support rejection, including the SO that led the PDP that requires the Bylaw change (if any), and no more than one objection

Required Community Powers?	Petition Threshold to convene a Community Forum	Is there consensus support to exercise a Community Power?
83 4a. Remove an individual Board Director nominated by an SO or AC (and appointed by the Empowered Community)	84 Majority within nominating SO/AC	85 Invite and consider comments from all SOs/ACs. 3/4 majority within the nominating SO/AC to remove their director
86 4b. Remove an individual Board Director nominated by the Nominating Committee (and appointed by the Empowered Community)	87 Two SOs/ACs	88 Three support, and no more than one objection
89 5. Recall the entire Board of Directors	90 Three SOs/ACs	91 Four support, and no more than one objection[3]
92 6. Initiate a binding IRP or a Request for Reconsideration	93 Two SOs/ACs	94 Three support, including the SO(s) that approved the policy recommendations from the PDP which result is being challenged through the IRP (if any), and no more than one objection 95 Require mediation before IRP begins
96 7. Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process	97 Two SOs/ACs	98 Four support, and no more than one objection

99 Implementation of the Empowered Community currently anticipates that all of ICANN's SOs, the ALAC and GAC (if the GAC chooses to participate) would participate in the Empowered Community – that is, they will be listed in the Bylaws as the five Decisional Participants.

100 The thresholds presented in this document were determined based on this assessment. If fewer than five of ICANN's SOs and ACs agree to be Decisional Participants, these thresholds for consensus support may be adjusted. Thresholds may also have to be adjusted if ICANN changes to have more SOs or ACs.

101 In the event of the creation (or removal) of SOs/ACs, the corresponding percentage could be used as useful guidelines in refining the thresholds. There would, however, need to be a conscious decision, depending on the circumstances, regarding these adjustments. If such a change were to affect the list of Decisional Participants in the Empowered Community, the

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[3] A minority of CCWG-Accountability participants prefer to require five SOs and ACs, or allow one objection to block consensus.

change would follow the Fundamental Bylaw change process, which enables such a conscious decision to be undertaken.

102 The CCWG-Accountability also recommends that in a situation where the GAC may not participate as a Decisional Participant because the Community Power is proposed to be used to challenge the Board's implementation of GAC consensus advice and the threshold is set at four in support, the power will still be validly exercised if three are in support and no more than one objects, with the following exception:

- Where the power to be exercised is recalling the entire Board for implementing GAC advice, the reduced threshold would apply only after an IRP has found that, in implementing GAC advice, the Board acted inconsistently with the ICANN Bylaws. If the Empowered Community has brought such an IRP and does not prevail, the Empowered Community may not exercise its power to recall the entire the Board solely on the basis of the matter decided by the IRP. It may, however, exercise that power based on other grounds.

103 Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"

- Extended time for certain escalation steps in response to comments. Kept overall timeline similar by combining and removing some steps (mandatory conference call).
- Made it mandatory for petitioning party to reach out to SOs/ACs to socialize relevant information before Community Forum.
- Acknowledged comments regarding the thresholds adjustment in case the number of Decisional Participants is lower (page 12, paragraph 60 of the Third Draft Proposal), by removing this option and replacing it with a lower threshold for approving changes to Fundamental Bylaws. Since the Fundamental Bylaw change process is a requirement for "approval" and not a "rejection" option, this would preserve the requirement for stronger protection of Fundamental Bylaws.
- Determined that the use of the corresponding percentage for thresholds as recommended by the Board can be suggested as a guideline in the event of the creation of new SOs/ACs, but there would need to be a conscious decision, depending on the circumstances. If such a new SO/AC were to become a Decisional Participant in the Empowered Community, this change would require a change to the Fundamental Bylaws and would therefore require approval by the Empowered Community.
- Implemented the compromise for Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18) that the threshold requirements would be modified if the GAC was a Decisional Participant.

104 Relevant Annexes

105 Annex 02 – Details on Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, and Enforcement

106 Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

107 Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

108 **Summary**

109 Currently, the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN) have a single mechanism for amendment.

- Any provision of the ICANN Bylaws can be changed by a 2/3 vote of all the Directors on the ICANN Board.
- The ICANN Board is not required to consult the multistakeholder community or the wider public before amending the Bylaws, but has voluntarily done so up to this point.

110 The CCWG-Accountability recommends classifying each ICANN Bylaw as either a "Fundamental Bylaw" or a "Standard Bylaw," with Fundamental Bylaws being more difficult to change.

111 Specifically, the CCWG-Accountability recommends that:

- Public consultations be required on all changes to ICANN Bylaws, both Fundamental and Standard.
- The requirement for public consultations to be added to the ICANN Bylaws as a Fundamental Bylaw to ensure that ICANN must continue to engage with the community in the future.
- Any changes to Fundamental Bylaws require approval from both the ICANN Board and Empowered Community, as outlined in the respective Community Power (as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers).
- The threshold for ICANN Board approval for changing a Fundamental Bylaw is raised from 2/3 to 3/4.
- Approval for changes to the Articles of Incorporation use the same process required for approving changes to Fundamental Bylaws, including public consultations.

112 Why is the CCWG-Accountability recommending this?

- The CCWG-Accountability felt that it was critical to ensure that the ICANN Bylaws that embody the purpose of the organization (Mission, Commitments and Core Values) and are meant to ensure the accountability of the ICANN Board, cannot be changed by the ICANN Board acting alone.

113 CCWG-Accountability Recommendations

114 The CCWG-Accountability recommends:

- Classifying each ICANN Bylaw as either a Fundamental Bylaw or a Standard Bylaw.
- Making the following CCWG-Accountability and CWG-Stewardship Recommendations Fundamental Bylaws:

  - The Empowered Community for enforcing Community Powers, including the role of Sole Designator of ICANN's Directors, as described in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers.
  - The escalation and enforcement mechanisms as described in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.
  - The process for amending Fundamental Bylaws and/or Articles of Incorporation, and for approving ICANN's sale or other disposition of all or substantially all of ICANN's assets as described in Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.
  - The seven Community Powers as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.
  - The Mission, Commitments and Core Values as described in Recommendation #5: Changing Aspects of ICANN's Mission, Commitments and Core Values.
  - The framework for the Independent Review Process (IRP) as described in Recommendation #7: Strengthening ICANN's Independent Review Process.
  - The IANA Function Review, Special IANA Function Review and the Separation Process, accountability mechanisms for the IANA naming functions that are required under the CWG-Stewardship Proposal.
  - The PTI Governance and Customer Standing Committee (CSC) structures, also required by the CWG-Stewardship Proposal.
  - The rights of investigation and inspection as described in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers.
- Requiring ICANN to conduct public consultations on any proposed changes to Standard Bylaws, Fundamental Bylaws or the Articles of Incorporation.
- Requiring approval for any changes to Fundamental Bylaws and the Articles of Incorporation from both the ICANN Board and the Empowered Community as outlined in the Community Power as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.
- Raising the threshold for ICANN Board approval for changing a Fundamental Bylaw or the Articles of Incorporation from 2/3 to 3/4 of all the Directors on the ICANN Board.

115

Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"

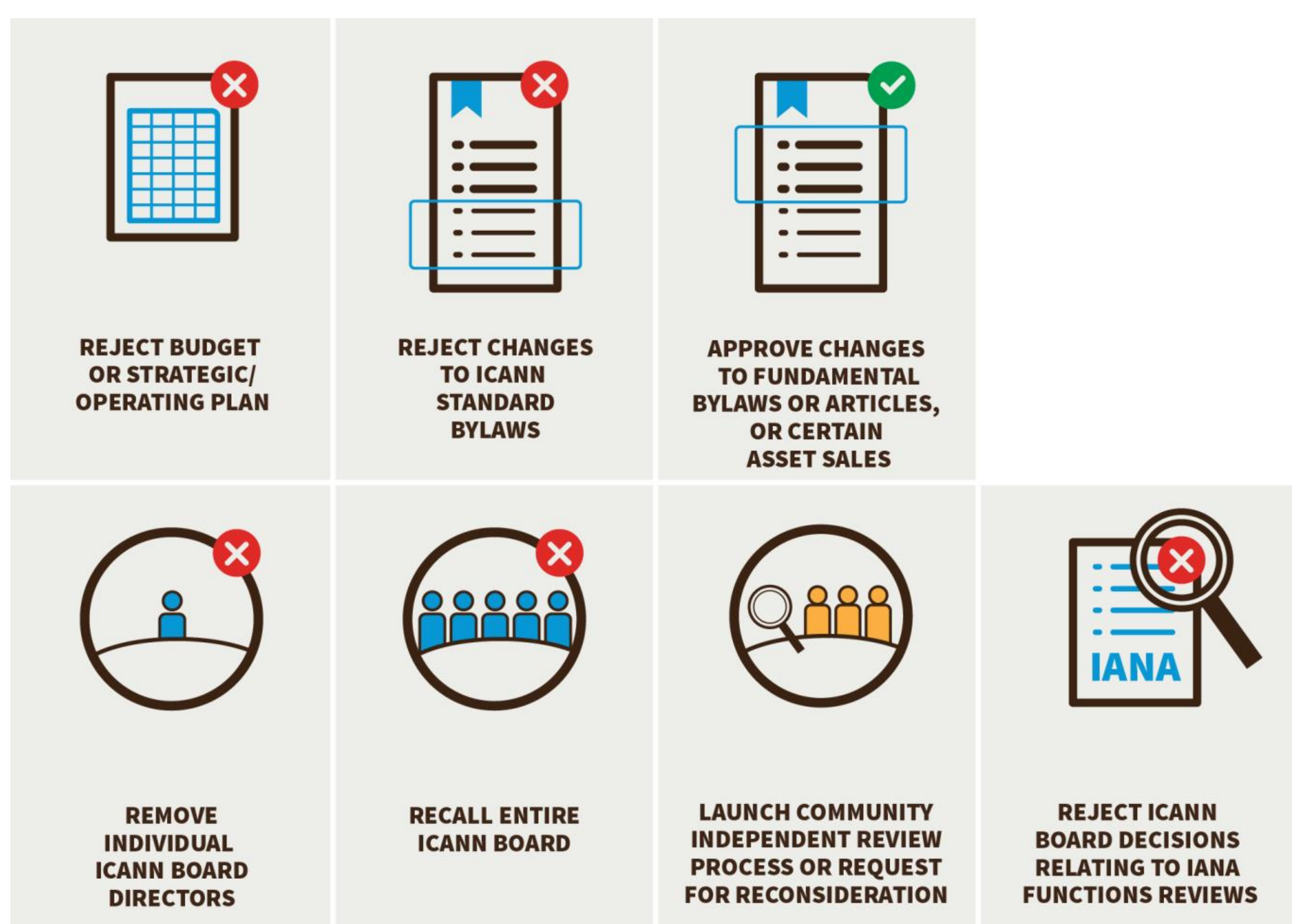
- Clarified that IANA Function Review (IFR) provisions apply only to the IANA naming functions (CWG-Stewardship requirement).
- Clarified the process for changes of Articles of Incorporation to be similar to process for changes to Fundamental Bylaws, as well as the process for approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Added a specific recommendation that the current Articles of Incorporation be modified to remove the notion of members and reflect the need for an affirmative vote of at least 3/4 of all the Directors on the ICANN Board, as well as approval by the Empowered Community.

116 **Relevant Annexes**

117 Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

118 Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

Recommendation #4: Ensuring Community Engagement in ICANN Decision-making: Seven New Community Powers



119 **Summary**

120 The CCWG-Accountability has recommended seven powers for the community that should be in place to improve ICANN's accountability and ensure community engagement.

121 These "Community Powers" are:

1. Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or IANA Functions Budget.

2. Reject a change to ICANN Standard Bylaws.
3. Approve a change to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
4. Remove an individual ICANN Board Director.
5. Recall the entire ICANN Board.
6. Initiate a binding Independent Review Process (IRP) (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
7. Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any Post-Transition IANA (PTI) separation process for the IANA naming functions.

122 The Community Powers and associated processes were designed to ensure that no stakeholder can singlehandedly exercise any power, and that under no circumstances, would any individual segment of the community be able to block the use of a power.

123 CCWG-Accountability Recommendations

124 The CCWG-Accountability recommends:

- Defining the following Community Powers as Fundamental Bylaws:
    1. Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or IANA Functions Budget.
    2. Reject a change to ICANN Standard Bylaws.
    3. Approve a change to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
    4. Remove an individual ICANN Board Director.
    5. Recall the entire ICANN Board.
    6. Initiate a binding IRP (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
    7. Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of any PTI separation process for the IANA naming functions.
- Adding an ICANN Bylaw that states that if the entire ICANN Board is removed, an Interim Board will be established only as long as is required for the selection/election process for the Replacement Board to take place. Supporting Organizations (SOs), Advisory Committees (ACs), and the Nominating Committee (NOMCOM) will develop replacement processes that ensure the Interim Board will not be in place for more than 120 days. The Interim Board will have the same powers and duties as the Board it replaces. Having a Board in place at all times is critical to the operational continuity of ICANN and is a legal requirement.

  - The ICANN Bylaws will state that, except in circumstances in which urgent decisions are needed to protect the security, stability and resilience of the DNS, the Interim Board will consult with the community through the SO and AC leaderships before making major decisions. Where relevant, the Interim Board will also consult through the ICANN Community Forum before taking any action that would mean a material change in ICANN's strategy, policies or management, including replacement of the serving President and CEO.
  - Note: Details on what the powers do is presented in greater detail in the following section and the details of how these can be used can be found in Annex 2.
- That there be an exception to rejecting Standard Bylaws in cases where the Standard Bylaw change is the result of a Policy Development Process. The exception would be as follows:
  - Fundamental Bylaws would require that the ICANN Board not combine the approval of ICANN Bylaw changes that are the result of a Policy Development Process with any other Bylaw changes.
  - Fundamental Bylaws would require the ICANN Board to clearly indicate if an ICANN Bylaw change is the result of a Policy Development Process when the Board approves it.
  - Fundamental Bylaws would require that if the change to the ICANN Bylaws is the result of a Policy Development Process, the SO that led the Policy Development Process must formally support holding a Community Forum and exercise the power to reject the Bylaw change. If the SO that led the Policy Development Process that requires the Bylaw change does not support holding a Community Forum or exercising the power to reject the Bylaw, then the Community Power to reject the Bylaw cannot be used.

125

Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"

- Budget rejection for PTI significantly updated.
- Caretaker budget expanded.
- Indemnification for removal of an ICANN Board Director greatly expanded.
- Escalation steps amended to match process in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, and Enforcement.
- Scope of community IRP modified to match Recommendation #7: Strengthening ICANN's Independent Review Process.
- "The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation" is now: "The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation and/or Approve ICANN's Sale or Other Disposition of All or Substantially All of ICANN's Assets."
- "The Power to Initiate a Binding IRP (Where a Panel Decision is Enforceable in any Court Recognizing International Arbitration Results)" now includes the possibility for the Empowered Community to file a Request for Reconsideration.

126

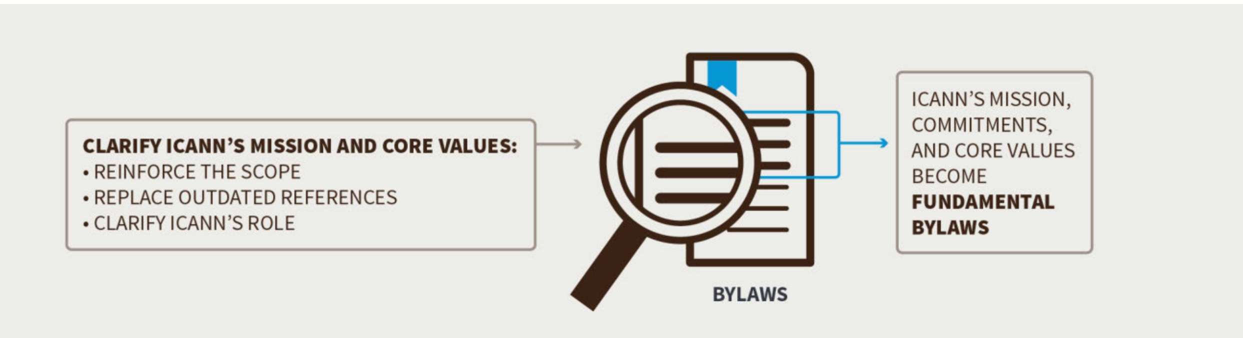
Relevant Annexes

127 Annex 02 – Details on Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement

128 Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

129 Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

Recommendation #5: Changing Aspects of ICANN's Mission, Commitments, and Core Values



130 ## Summary

131 The CCWG-Accountability is recommending changes to the ICANN Bylaws to assure that the Bylaws reflect the CCWG-Accountability recommendations.

- Note: The language proposed in this recommendation for ICANN Bylaw revisions is conceptual in nature at this stage. External legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws.

132 **Mission Statement**

133 The CCWG-Accountability recommends the following changes to ICANN's "Mission Statement," (Bylaws, Article I, Section 1):

- Clarify that ICANN's Mission is limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the Domain Name System and are reasonably necessary to facilitate its openness, interoperability, resilience, and/or stability.
- Clarify that ICANN's Mission does not include the regulation of services that use the Domain Name System or the regulation of the content these services carry or provide.
- Clarify that ICANN's powers are "enumerated." Simply, this means that anything that is not articulated in the Bylaws is outside the scope of ICANN's authority.
    - Note: This does not mean ICANN's powers can never evolve. However, it ensures that any changes will be deliberate and supported by the community.

134 **Core Values**

01 The CCWG-Accountability recommends the following changes to ICANN's "Core Values" (Bylaws, Article I, Section 2 and Article II, Section 3):

- Divide ICANN's existing Core Values provisions into "Commitments" and "Core Values.".
  - Incorporate ICANN's obligation to "operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition" into the Bylaws.
  - Note: These obligations are currently contained in ICANN's Articles of Incorporation.
- Designate certain Core Values as "Commitments." ICANN's Commitments will include the values that are fundamental to ICANN's operation, and are intended to apply consistently and comprehensively.

  Commitments will include ICANN's obligations to:
  - Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.
  - Limit its activities to those within ICANN's Mission that require, or significantly benefit from, global coordination.
  - Employ open, transparent, bottom-up, multistakeholder processes.
  - Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.
- Slightly modify the remaining Core Values to:
  - Reflect various provisions in the Affirmation of Commitments, such as efficiency, operational excellence, and fiscal responsibility.
  - Add an obligation to avoid capture.

135 Although previous CCWG-Accountability draft proposals proposed to modify existing Core Value 5 ("Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment") to drop the phrase "where feasible and appropriate," the CCWG-Accountability has reconsidered this recommendation. While acknowledging that ICANN is not an antitrust authority, on balance the CCWG-Accountability elected to retain the introductory language to ensure that ICANN continues to have the authority, for example, to refer competition-related questions regarding new registry services to competent authorities under the RSEP program and to establish bottom-up policies for allocating top-level domains (e.g., community preference).

136 **Balancing or Reconciliation Test**

137 The CCWG-Accountability recommends modification to the "balancing" language in the ICANN Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically:

> *These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with*

the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities. The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN's Mission that is identified through the bottom-up, multistakeholder process.

138 **Fundamental Bylaws Provisions**

139 The CCWG-Accountability recommends that the revised Mission Statement, Commitments and Core Values be constituted as Fundamental Bylaws. See Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.

140 CCWG-Accountability Recommendations

141 Modify ICANN's Fundamental Bylaws to implement the following:

142 **Mission**

143 The Mission of the Internet Corporation for Assigned Names and Numbers ("ICANN") is to ensure the stable and secure operation of the Internet's unique identifier systems as described below. Specifically, ICANN:

1. Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS"). In this role, ICANN's scope is to coordinate the development and implementation of policies:
    - For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS; and
    - That are developed through a bottom-up, consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.
2. Facilitates coordination of the operation and evolution of the DNS root name server system.
3. Coordinates the allocation and assignment of the top-most level of Internet Protocol ("IP") and Autonomous System ("AS") numbers. In this role, ICANN provides registration services and open access for global number registries as requested by the Internet Engineering Task Force and the Regional Internet Registries and facilitates the development of related global number registry policies by the affected community as agreed with the RIRs.
4. Collaborates with other bodies as appropriate to publish core registries needed for the functioning of the Internet. In this role, with respect to protocol ports and parameters, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

144 ICANN shall act strictly in accordance with, and only as reasonably appropriate, to achieve its Mission.

145 ICANN shall not impose regulations on services that use the Internet's unique identifiers, or the content that such services carry or provide.

146 ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments ("PICs"), with contracted parties in service of its Mission.

147 Note to drafters: In crafting proposed Bylaws language to reflect this Mission Statement, the CCWG wishes the drafters to note the following:

1. The prohibition on the regulation of "content" is not intended to prevent ICANN policies from taking into account the use of domain names as identifiers in various natural languages.
2. The issues identified in Specification 1 to the Registry Agreement and Specification 4 to the Registrar Accreditation Agreement (the so-called "Picket Fence") are intended and understood to be within the scope of ICANN's Mission. A side-by-side comparison of the formulation of the Picket Fence in the respective agreements is included for reference at the end of this Annex.
3. For the avoidance of uncertainty only, the language of existing registry agreements and registrar accreditation agreements (including PICs and as-yet unsigned new gTLD Registry Agreements for applicants in the new gTLD round that commenced in 2013) should be grandfathered to the extent that such terms and conditions might otherwise be considered to violate ICANN's Bylaws or exceed the scope of its Mission. This means that the parties who entered/enter into existing contracts intended (and intend) to be bound by those agreements. It means that until the expiration date of any such contract following ICANN's approval of a new/substitute form of Registry Agreement or Registrar Accreditation Agreement, neither a contracting party nor anyone else should be able to bring a case alleging that any provisions of such agreements on their face are ultra vires. It does not, however, modify any contracting party's right to challenge the other party's interpretation of that language. It does not modify the right of any person or entity materially affected (as defined in the Bylaws) by an action or inaction in violation ICANN's Bylaws to seek redress through an IRP. Nor does it modify the scope of ICANN's Mission.
4. The CCWG-Accountability anticipates that the drafters may need to modify provisions of the Articles of Incorporation to align with the revised Bylaws.

148 **Section 2. Commitments & Core Values**

149 In carrying out its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, both described below.

150 **Commitments**

151 In performing its Mission, ICANN must operate in a manner consistent with its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions, and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN's action must:

1. Preserve and enhance its neutral and judgment-free administration of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.
2. Maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet.

3. Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination.
4. Employ open, transparent and bottom-up, multistakeholder policy development processes, led by the private sector, including business stakeholders, civil society, the technical community, academia, and end users, while duly taking into account the public policy advice of governments and public authorities that (1) seek input from the public, for whose benefit ICANN shall in all events act, (2) promote well-informed decisions based on expert advice, and (3) ensure that those entities most affected can assist in the policy development process.
5. Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.
6. Remain accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.

152 **Core Values**

153 In performing its Mission, the following Core Values should also guide the decisions and actions of ICANN:

1. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties and the roles of both ICANN's internal bodies and external expert bodies.
2. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.
3. Where feasible and appropriate, depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market.
4. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest as identified through the bottom-up, multistakeholder policy development process.
    a. Operating with efficiency and excellence, in a fiscally responsible and accountable manner and at a speed that is responsive to the needs of the global Internet community.
5. While remaining rooted in the private sector, including business stakeholders, civil society, the technical community, academia, and end users, recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities.
6. Striving to achieve a reasonable balance between the interests of different stakeholders.

154 These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities.

155 The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible.

156 In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN's Mission that is identified through the bottom-up, multistakeholder process.

157 Note: Specific recommendations on how to implement these modifications can be found at the end of the next section.

158 Changes from the 'Third Draft Proposal on Work Stream 1 Recommendations'

159 For space considerations the list of changes is not included here. Please consult Annex 5 - Recommendation #5: Changing Aspects of ICANN's Mission, Commitments and Core Values for a detailed list of modifications.

160 Relevant Annexes

161 Annex 05 – Details on Recommendation #5: Changing Aspects of ICANN's Mission, Commitments, and Core Values

Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission

162 Summary

163 The subject of including a commitment to respect Human Rights in the ICANN Bylaws has been extensively discussed by the CCWG-Accountability.

164 The CCWG-Accountability sought legal advice on whether, upon the termination of the IANA Functions Contract between ICANN and the U.S. National Telecommunications and Information Administration (NTIA), ICANN's specific Human Rights obligations could be called into question. It was found that, upon termination of the contract, there would be no significant impact on ICANN's Human Rights obligations. However, the CCWG-Accountability reasoned that a commitment to respect Human Rights should be included in ICANN's Bylaws in order to comply with the NTIA criteria to maintain the openness of the Internet.

165 This proposed draft Bylaw on Human Rights would reaffirm ICANN's existing obligations within its Core Values, and would clarify ICANN's commitment to respect Human Rights.

166 Amendments to the proposed draft Bylaw text since the Second Draft Proposal aimed to prevent Mission expansion or "Mission creep," and under the proposed draft Bylaw, ICANN commits to respect internationally recognized Human Rights "within its Core Values."

167 The proposed draft Bylaw does not impose any enforcement duty on ICANN, or any obligation on ICANN to take action in furtherance of the Bylaw.

168 The proposed draft Bylaw also clarifies that no IRP challenges can be made on the grounds of this Bylaw until a Framework of Interpretation on Human Rights (FOI-HR) is developed and approved as part of Work Stream 2 activities. It further clarifies that acceptance of the FOI-HR

will require the same process as for Work Stream 1 recommendations (as agreed for all Work Stream 2 recommendations).

169 Additionally, the CCWG-Accountability has identified several work areas that need to be undertaken as part of Work Stream 2 in order to fully operationalize ICANN's commitment to respect Human Rights.

170 CCWG-Accountability Recommendations

- Include a Bylaw with the following intent in Work Stream 1 recommendations:

  "Within its Core Values, ICANN will commit to respect internationally recognized Human Rights as required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of Human Rights by ICANN. This Bylaw provision will not enter into force until (1) a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations' approval) and (2) the FOI-HR is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations."

  - Note: This proposed draft Bylaw will be reviewed by both CCWG-Accountability's lawyers and ICANN's legal department and then submitted to the CCWG-Accountability for approval before its submission to the Board for approval.
- Include the following in Work Stream 2 activities:
  - Develop an FOI-HR for the Human Rights Bylaw.
  - Consider which specific Human Rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Human Rights Bylaw.
  - Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to respect Human Rights.
  - Consistent with ICANN's existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.

- Consider what effect, if any, this Bylaw will have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC).
- Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out.
- Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.

171 **Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"**

- The CCWG-Accountability considered comments received during the third public comment period, which were overall in favor of including Human Rights language with a few exceptions which included the ICANN Board.
- The CCWG-Accountability engaged with the ICANN Board to specifically address its concerns through discussion and debate in three plenary calls. Additionally, ICANN's legal team and CCWG-Accountability's legal advisors discussed the concerns raised by ICANN legal regarding the possibility of having a significant number of IRP challenges initiated on the grounds of Human Rights claims and the problems this could create without having a Framework of Interpretation in place to properly implement the proposed Bylaw provision.
- The CCWG-Accountability developed compromise text based on a proposal by its legal advisors, which it believed addressed these concerns. The ICANN Board maintained that this compromise text did not address its concerns, but did not provide any specific examples of its concerns regarding the alleged unintended consequences.
- The ICANN Board responded with proposed changes to the draft Bylaw text, which reflected a compromise position and included a commitment to respect Human Rights within ICANN's Core Values, which were accepted by the CCWG-Accountability.

172 **Relevant Annexes**

173 Annex 06 – Details on Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission

Recommendation #7: Strengthening ICANN's Independent Review Process

174 The purpose of the Independent Review Process (IRP) is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.

175 A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith.

176 The CCWG-Accountability therefore proposes several enhancements to the IRP to ensure that the process is:

- Transparent, efficient and accessible (both financially and from a standing perspective).
- Designed to produce consistent and coherent results that will serve as a guide for future actions.

177 The CCWG-Accountability also proposes that the IRP:

- Hear and resolve claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws – including any violation of the Bylaws resulting from action taken in response to advice/input from any Supporting Organization (SO) or Advisory Committee (AC).
- Hear and resolve claims that Post-Transition IANA (PTI), through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
- Hear and resolve claims that expert panel decisions are inconsistent with the ICANN Bylaws.
- Hear and resolve claims that DIDP decisions by ICANN are inconsistent with the ICANN Bylaws.
- Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community's legal expenses.
- Be subject to certain exclusions relating to the results of an SO's policy development process, country code top-level domain delegations/redelegations, numbering resources, and protocols parameters.

178 CCWG-Accountability Recommendations

- Modifying the Fundamental Bylaws to implement the modifications associated with this recommendation on the IRP which include:
    - Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).
    - Hear and resolve claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
    - Hear and resolve claims that expert panel decisions are inconsistent with ICANN's Bylaws.
    - Hear and resolve claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
    - Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.

- A standing judicial/arbitral panel: The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially affected by ICANN's action or inaction in violation of the Articles of Incorporation and/or Bylaws.
    - Composition of Panel and Expertise: Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration is necessary.
    - Diversity: English will be the primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).
    - Size of Panel:
        - Standing Panel: Minimum of seven panelists.
        - Decisional Panel: Three panelists.
    - Independence: Panel members must be independent of ICANN, including ICANN SOs and ACs.
    - Recall: Appointments shall be made for a fixed term of five years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed by way of the IRP subgroup.
- Initiation of the Independent Review Process: An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws, or otherwise within the scope of IRP jurisdiction. The Empowered Community could initiate an IRP with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.
- Standing: Any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. The Board's failure to fully implement an Empowered Community decision will be sufficient for the Empowered Community to be materially affected.
- Community Independent Review Process: The CCWG-Accountability recommends giving the Empowered Community the right to present arguments on behalf of the Empowered Community to the IRP Panel. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community's legal expenses.
- Standard of Review: The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of the ICANN Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions.
- Accessibility and Cost: The CCWG-Accountability recommends that ICANN bear all the administrative costs of maintaining the system (including panelist salaries), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. The panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access – for example

access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.

- Implementation: The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, the CCWG-Accountability proposes to subject the IRP to periodic community review.
- Transparency: The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust IRP, and as such, the CCWG-Accountability recommends reviewing and enhancing ICANN's Documentary Information Disclosure Policy as part of the accountability enhancements in Work Stream 2.

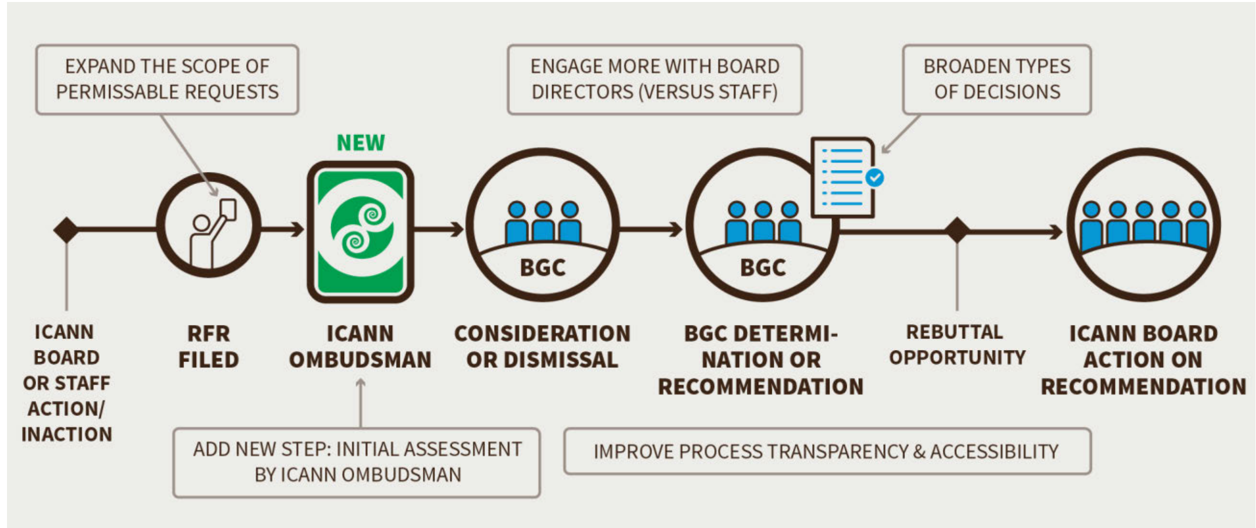
179 **Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"**

- The scope of of the IRP will be restricted to the IANA naming functions for claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN.
- The scope of the IRP will include actions and inactions of PTI by way of the PTI Board being bound to ensure that PTI complies with its contractual obligations with ICANN in the Bylaws. ICANN's failure to enforce material obligations will be appealable by way of the IRP as a Bylaws violation.
- The scope of the IRP will include claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
- Clarified that ICANN must modify Registry Agreements with gTLD Operators to expand scope of arbitration available thereunder to cover PTI service complaints.
- Exclusion: The IRP will not be applicable to protocols parameters.
- Exclusion: An IRP cannot be launched that challenges the result(s) of an SO's policy development process (PDP) without the support of the SO that developed such PDP or, in the case of joint PDPs, without the support of all of the SOs that developed such PDP.
- Limitation: An IRP challenge of expert panel decisions is limited to a challenge of whether the panel decision is consistent with ICANN's Bylaws.
- The legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN.

180 **Relevant Annexes**

181 Annex 07 – Details on Recommendation #7: Strengthening ICANN's Independent Review Process

Recommendation #8: Improving ICANN's Request for Reconsideration Process



182 ## Summary

183 Currently, any person or entity may submit a Request for Reconsideration or review of an ICANN action or inaction as provided for in Article IV, Section 2 of ICANN's Bylaws.

184 The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, including:

- Expanding the scope of permissible requests.
- Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
- Narrowing the grounds for summary dismissal.
- Making the ICANN Board of Directors responsible for determinations on all requests (rather than a committee handling staff issues).
- Making ICANN's Ombudsman responsible for initial substantive evaluation of the requests.

185 The CCWG-Accountability also proposes several enhancements to transparency requirements and firm deadlines in issuing of determinations, including:

- Recordings/transcripts of Board discussion should be posted at the option of the requestor.
- An opportunity to rebut the Board Governance Committee's (BGC's) final recommendation before a final decision by the ICANN Board should be provided.
- Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

186 ICANN's Document and Information Disclosure Policy (DIDP) will be addressed in Work Stream 2. The CCWG-Accountability recommends that the policy should be improved to accommodate the legitimate need for requestors to obtain internal ICANN documents that are relevant to their requests.

187 CCWG-Accountability Recommendations

188 Modify Article IV, Section 2 of ICANN's Bylaws to reflect the following changes:

- Expanding the scope of permissible requests.
- Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
- Narrowing the grounds for summary dismissal.
- Requiring determinations on all requests to be made by the ICANN Board of Directors (rather than a committee handling staff issues).
- Requiring ICANN's Ombudsman to make the initial substantive evaluation of the requests.
- Requiring recordings/transcripts of Board discussion to be posted at the option of the requestor.
- Providing a rebuttal opportunity to the BGC's final recommendation before a final decision by the ICANN Board.
- Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

189 Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"

- Conflicts in timing for Board approval addressed by changing 60 days to 75 days and the total of 120 days to 135 days.

190 Relevant Annexes

191 Annex 08 – Details on Recommendation #8: Improving ICANN's Request for Reconsideration Process

Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws

192 ## Summary

193 Based on stress test analysis, the CCWG-Accountability recommends incorporating the reviews specified in the Affirmation of Commitments, a 2009 bilateral agreement between ICANN and the U.S. National Telecommunications and Information Administration (NTIA), into the ICANN Bylaws. This will ensure that community reviews remain a central aspect of ICANN's accountability and transparency framework.

194 Specifically, the CCWG-Accountability proposes to:

- Add the relevant ICANN Commitments from the Affirmation of Commitments into the ICANN Bylaws.
- Add the four review processes specified in the Affirmation of Commitments to the ICANN Bylaws, including:
  - Ensuring accountability, transparency, and the interests of global Internet users.
  - Enforcing ICANN's existing policy relating to WHOIS, subject to applicable laws.
  - Preserving security, stability, and resiliency of the Domain Name System (DNS).
  - Promoting competition, consumer trust, and consumer choice.

195 In addition, to support the common goal of improving the efficiency and effectiveness of reviews, ICANN will publish operational standards to be used as guidance by the community, ICANN staff and the Board in conducting future reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet the community's needs.

196 ## CCWG-Accountability Recommendations

197 The CCWG-Accountability evaluated the contingency of ICANN or NTIA unilaterally withdrawing from the Affirmation of Commitments (see information about Stress Test #14 in the "Detailed Explanation of Recommendations" section, below).

198 To ensure continuity of these key commitments, the CCWG-Accountability proposes the following two accountability measures:

- Preserve in the ICANN Bylaws any Relevant ICANN Commitments from the Affirmation of Commitments[4]
    - This includes Sections 3, 4, 7, and 8 of the Affirmation of Commitments. Sections 3, 4, 8a, and 8c would be included in the Core Values section of the ICANN Bylaws.
    - Part of the content of Section 8b of the Affirmation of Commitments (the part relating to the location of ICANN's principal office), is already covered by ICANN Bylaws Article XVIII. Article XVIII is to be classified as a Standard Bylaw and is not to be moved into the Core Values section with material derived from Affirmation of Commitments Sections 8a and 8c.
    - Section 7 of the Affirmation of Commitments would be inserted as a new Section 8 in Article III, Transparency, of the ICANN Bylaws.
- Bring the Four Affirmation of Commitments Review Processes into the ICANN Bylaws
    - The following four reviews will be preserved in the reviews section of the Bylaws:
        - Ensuring accountability, transparency, and the interests of global Internet users.
        - Enforcing ICANN's existing policy relating to WHOIS, subject to applicable laws.
        - Preserving security, stability, and resiliency of the DNS.
        - Promoting competition, consumer trust, and consumer choice.

199 After these elements of the Affirmation of Commitments are adopted in the ICANN Bylaws, the following should take place:

- ICANN and NTIA should mutually agree to terminate the Affirmation of Commitments.

[4] Sections 3, 4, 7, and 8 of the Affirmation of Commitments contain relevant ICANN commitments. The remaining sections in the Affirmation of Commitments are preamble text and commitments of the U.S. Government. As such, they do not contain commitments by ICANN, and cannot usefully be incorporated in the Bylaws.

- New review rules will prevail as soon as the Bylaws have been changed, but care should be taken when terminating the Affirmation of Commitments to not disrupt any Affirmation of Commitments reviews that may be in process at that time. Any in-progress reviews will adopt the new rules to the extent practical. Any planned Affirmation of Commitments review should not be deferred simply because the new rules allow up to five years between review cycles. If the community prefers to do a review sooner than five years from the previous review, that is allowed under the new rules.
- Through its Work Party IRP Implementation Oversight Team (WP-IRP IOT), the CCWG-Accountability will examine the suggestion to include a mid-term review of the Independent Review Process (IRP).
- To support the common goal of improving the efficiency and effectiveness of reviews, ICANN will publish operational standards to be used as guidance by the community, ICANN staff, and the Board in conducting future reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet the community's needs.
- These operational standards should include issues such as: composition of Review Teams, Review Team working methods (meeting protocol, document access, role of observers, budgets, decision making methods, etc.), and methods of access to experts. These standards should be developed with the community and should require community input and review to be changed. The standards are expected to reflect levels of detail that are generally not appropriate for governance documents, and should not require a change to the Bylaws to modify. This is an implementation issue aligned with the need for review of the proposed Bylaws text developed by the CCWG-Accountability that has been provided as guidance to legal counsel.

200 A section related to the IANA Function Review and Special IANA Function Review will fit into these new sections of the Bylaws and will be classified as Fundamental Bylaws. Specifications will be based on the requirements detailed by the CWG-Stewardship. It is anticipated that the Bylaw drafting process will include the CWG-Stewardship.

201 Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"

- The AoC text for Competition, Consumer Trust & Consumer Choice review is reintroduced.
- All AoC reviews (and the IFR and Special IFR) should be incorporated into the Bylaws.
- The WP-IRP IOT will examine the suggestion to include a mid-term review of the IRP. The ATRT scope will be expanded to suggest a review of the IRP (paragraph 89).
- The representation and number of seats on Review Teams that relate to gTLD reviews will remain unchanged from the Third Draft Proposal (paragraph 54).
- The Board amendment on WHOIS/future Registration Directory Services policy (paragraph 127) should be included.
- The ICANN Articles of Incorporation address ICANN's state of incorporation (or corporate domicile), and the ICANN Bylaws (Article XVIII) address the separate issue of the location of ICANN's principal office. Article XVIII of the ICANN Bylaws will be classified as a Standard Bylaw (see paragraph 5).

- The Board suggestion regarding AoC reviews operational standards to be developed as part of implementation should be included on the understanding that Recommendation #9 would be respected and that this text would address implementation details only (see paragraph 8).
- CCWG-Accountability lawyers advised clarifying "diversity" in paragraph 54 regarding composition of AoC Review Teams. CCWG-Accountability notes that "diversity" considerations could include geography, skills, gender, etc., and that chairs of participating ACs and SOs should have flexibility in their consideration of factors in selecting Review Team members.
- CCWG-Accountability lawyers suggested "the group of chairs can solicit additional nominees or appoint less than 21 members to avoid potential overrepresentation of particular ACs or SOs if some nominate less than 3 members." The CCWG-Accountability proposed "up to 21", so it is not actually proposing a fixed number of Review Team members. "Fixed" has been replaced with "limited" in paragraph 54. CCWG-Accountability purposely allowed AC/SO chairs to select additional Review Team members from ACs/SOs that had offered more than 3 candidates. This is to accommodate ACs/SOs that had greater interest in a review, such as the GNSO, which would be the most concerned with reviews of new gTLDs and WHOIS/Directory Services. Therefore, the representation and number of seats on the Review Team will remain unchanged from the Third Draft Proposal.
- Replaced "participants" with "observers" in paragraph 54.

Relevant Annexes

202 Annex 09 – Details on Recommendation #9: Incorporating the Affirmation of Commitments Reviews in ICANN's Bylaws

Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees

203 Summary

204 The CCWG-Accountability recommends addressing the accountability of Supporting Organizations (SOs) and Advisory Committees (ACs) in a two-stage approach:

- In Work Stream 1: Include the review of SO and AC accountability mechanisms in the independent structural reviews performed on a regular basis.
- In Work Stream 2: Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.

205 CCWG-Accountability Recommendations

206 Having reviewed and inventoried the existing mechanisms related to SO and AC accountability, it is clear that the current mechanisms need to be enhanced in light of the new responsibilities associated with the Work Stream 1 recommendations.

207 The CCWG-Accountability recommends the following.

208 **Work Stream 1:**

209 Include the review of SO and AC accountability mechanisms in the independent periodical structural reviews that are performed on a regular basis.

- These reviews should include consideration of the mechanisms that each SO and AC has in place to be accountable to their respective Constituencies, Stakeholder Groups, Regional At-Large Organizations, etc.
- This recommendation can be implemented through an amendment of Section 4 of Article IV of the ICANN Bylaws, which currently describes the goal of these reviews as:

> *The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.*

- The periodic review of ICANN Accountability and Transparency required under the Affirmation of Commitments is being incorporated into the ICANN Bylaws as part of Work Stream 1. In Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, the Accountability and Transparency Review will include the following among the issues that merit attention in the review:

> *assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS*

210 **Work Stream 2:**

211 Include the subject of SO and AC accountability as part of the Accountability and Transparency Review process.

- Evaluate the proposed "Mutual Accountability Roundtable" to assess its viability and, if viable, undertake the necessary actions to implement it.[5]

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[5] CCWG-Accountability Advisor Willie Currie introduced a short description of the mutual accountability roundtable: *The idea of mutual accountability is that multiple actors are accountable to each other. How might this work in ICANN? It would be necessary to carve out a space within the various forms of accountability undertaken within ICANN that are of the principal-agent variety. So where the new Community Powers construct the community as a principal who calls the Board as agent to account, a line of mutual accountability would enable all ICANN structures to call one another to account. So one could imagine a Mutual Accountability Roundtable that meets at each ICANN meeting, perhaps replacing the current Public Forum. The form would be a roundtable of the Board, CEO, and all Supporting Organizations and Advisory Committees, represented by their chairpersons. The roundtable would designate a chairperson for the roundtable from year to year who would be responsible for facilitating each Mutual Accountability Roundtable. Each Roundtable may pick one or two key topics to examine. Each participant could give an account of how his or her constituency addressed the issue, indicating what worked and didn't work. This could be followed by a discussion on how to improve matters of performance. The purpose would be to create a space for mutual accountability as well as a learning space for improvement.*

- Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal.

212 Assess whether the Independent Review Process (IRP) would also be applicable to SO and AC activities.

213 Changes Made Since the Third Draft Proposal

- Added: The periodic review of ICANN Accountability and Transparency required under the Affirmation of Commitments is being incorporated into the ICANN Bylaws as part of Work Stream 1. In Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, the Accountability and Transparency Review will include the following among the issues that merit attention in the review:

  assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS

- In Work Stream 2 recommendations, added: Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal.

214 Relevant Annexes

215 Annex 10 – Details on Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees

Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)

216 **Summary**

217 Currently, Governmental Advisory Committee (GAC) advice to the ICANN Board has special status as described in the ICANN Bylaws Article XI, Section 2:

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

218 Stress Test #18 considers a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions (no objections) to majority voting for advice to the ICANN Board. Since the Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the ICANN Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice on public policy matters.

219 In addition, if the GAC lowered its decision threshold while also participating in the new Empowered Community (if the GAC chooses to so participate), some stakeholders believe that this could increase government influence over ICANN.

220 In order to mitigate these concerns, the CCWG-Accountability is recommending changes be made to the ICANN Bylaws relating to GAC advice.

221 **CCWG-Accountability Recommendations**

222 The CCWG-Accountability recommends that the following changes be made to the ICANN Bylaws Article XI, Section 2 (emphasis added):

223 j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. **Any Governmental Advisory Committee advice approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, may only be rejected by a vote of 60% of the Board**, and the Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

224 This recommendation is intended only to limit the conditions under which the ICANN Board and GAC must "try to find a mutually acceptable solution," as required in ICANN's current Bylaws. This recommendation shall not create any new obligations for the ICANN Board to

consider, vote upon, or to implement GAC advice, relative to the Bylaws in effect prior to the IANA Stewardship Transition. This recommendation does not create any presumption or modify the standard applied by the Board in reviewing GAC advice.

225 The GAC has the autonomy to refine its operating procedures to specify how objections are raised and considered (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection). When transmitting consensus advice to the ICANN Board for which the GAC seeks to receive special consideration, the GAC has the obligation to confirm the lack of any formal objection.

226 The CCWG-Accountability recommends inserting a requirement that all ACs provide a rationale for their advice. A rationale must be provided for formal advice provided by an Advisory Committee to the ICANN Board. The Board shall have the responsibility to determine whether the rationale provided is adequate to enable determination of whether following that advice would be consistent with ICANN's Bylaws.

227 To address concerns regarding GAC advice that is inconsistent with the ICANN Bylaws, the CCWG-Accountability recommends adding this clarification for legal counsel to consider when drafting Bylaws language:

> *ICANN cannot take action - based on advice or otherwise – that is inconsistent with its Bylaws. While the GAC is not restricted as to the advice it can offer to ICANN, it is clear that ICANN may not take action that is inconsistent with its Bylaws. Any aggrieved party or the Empowered Community will have standing to bring claims through the IRP that the Board acted (or failed to act) in a manner inconsistent with the ICANN Articles of Incorporation or Bylaws, even if the Board acted on GAC advice.*

228 Note: The language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature at this stage. The CCWG-Accountability's external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws.

229 Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"

- Changed the 2/3rds threshold for the Board rejecting GAC consensus advice to 60%. As part of the compromise, this required changes in Recommendations #1 and #2 to implement a GAC "carve out."

230 Relevant Annexes

231 Annex 11 – Details on Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)

Recommendation #12: Committing to Further Accountability Work in Work Stream 2

232 **Summary**

233 The CCWG-Accountability Work Stream 2 is focused on addressing those accountability topics for which a timeline for developing solutions may extend beyond the IANA Stewardship Transition.

234 As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms:

- Considering improvements to ICANN's standards for diversity at all levels.
- Staff accountability.
- Supporting Organizations and Advisory Committee accountability.
- Improving ICANN's transparency with a focus on:
    - Enhancements to ICANN's existing Documentary Information Disclosure Policy (DIDP).
    - Transparency of ICANN's interactions with governments.
    - Improvements to the existing whistleblower policy.
    - Transparency of Board deliberations.
- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
- Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
- Considering enhancements to the Ombudsman's role and function.

235 The CCWG-Accountability expects to begin refining the scope of Work Stream 2 during the upcoming ICANN55 Meeting in March 2016. It is intended that Work Stream 2 recommendations will be published for comments by the end of 2016.

236 The community raised concerns that after the IANA Stewardship Transition, there may be a lack of incentive for ICANN to implement the proposal arising out of Work Stream 2. To prevent this scenario, the CCWG-Accountability recommends that the ICANN Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability Work Stream 2 recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. In a letter dated 13 November 2015, the ICANN Board confirmed its intent to work with the ICANN community and to provide adequate support for work on these issues.

237 **CCWG-Accountability Recommendations**

238 The CCWG-Accountability recommends that the Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability consensus recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1

recommendations. The Bylaw would task the group with creating further enhancements to ICANN's accountability limited to the Work Stream 2 list of issues:

- Considering improvements to ICANN's standards for diversity at all levels.
- Staff accountability.
- Supporting Organizations and Advisory Committee accountability.
    - Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.
    - Evaluate the proposed "Mutual Accountability Roundtable" to assess viability.
    - Propose a detailed working plan on enhancing SO and AC accountability as part of Work Stream 2.
    - Assess whether the IRP would also be applicable to SO and AC activities.
- Improving ICANN's transparency with a focus on:
    - Enhancements to ICANN's existing DIDP.
    - Transparency of ICANN's interactions with governments.
    - Improvements to the existing whistleblower policy.
    - Transparency of Board deliberations.
- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
- Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
- Considering enhancements to the Ombudsman's role and function.

239 The CCWG-Accountability notes that further enhancements to ICANN accountability can be accommodated through the accountability review process (see Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees) or through specific, ad hoc, cross community working group initiatives.

240 Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"

- Interim Bylaws clarifications to address Board's concerns by highlighting that Work Stream 2 will be following similar rules as Work Stream 1: consensus recommendations, endorsement by Chartering Organizations, ability for the Board to engage in special dialogue, 2/3 threshold for such Board decision, etc.
- Edits to the documents will include focus on fact that Work Stream 2 deliberations will be open to all (similar to Work Stream 1).
- List of Work Stream 2 items is "limited to" instead of "related to." A note is added that clarifies that further items beyond this list can be accommodated through regular review cycles, or specific CCWG-Accountability.

- Timeframe discussion: target dates are needed, but hard deadlines would not be appropriate or helpful.
- Agreed to incorporate Public Experts Group (PEG) Advisor input to strengthen the diversity requirement.
- Enhancing the Ombudsman role and function is confirmed as a Work Stream 2 item.
- Re-inserted staff accountability requirement.

241 **Relevant Annexes**

242 Annex 12 – Details on Recommendation #12: Committing to Further Accountability Work in Work Stream 2

Conclusion

243 The CCWG-Accountability believes that the set of accountability mechanisms it has proposed, outlined above, empowers the community through the use of the bottom-up, multistakeholder model by relying on of the stakeholders within ICANN's existing and tested community structures. Furthermore, the CCWG-Accountability believes that this community-driven model is appropriate for replacing the accountability inherent in ICANN's historical relationship with the U.S. Government.

Community Powers are an Effective Replacement of the Safety Net Provided by the U.S. Government's Current IANA Stewardship Role

244 The CCWG-Accountability believes that the Seven Community Powers, as a package, can effectively replace the safety net that the U.S. Government has provided to date as part of its oversight role. It is recommended that these powers need to be enforced by a court of law only as a last resort. The CCWG-Accountability has based its recommendations on existing structures and recommends:

- Considering the entire community as ICANN's Empowered Community.
- Ensuring no part of the community has more rights than another part, either by having the ability to push through its individual interests or by blocking community consensus. The CCWG-Accountability has ensured that no Community Powers or statutory rights can be exercised singlehandedly.
- Ensuring the community can only jointly exercise its powers using a consensus-based model.

The CCWG-Accountability Believes that the Recommended Accountability Frameworks Provided in this Proposal Meet the Requirements of the Domain Names Community and the IANA Stewardship Transition Proposal

245 The CCWG-Accountability will seek confirmation from the Cross Community Working Group that developed the IANA Stewardship Transition that this Proposal meets its requirements.

246 The CCWG-Accountability believes that its Proposal also meets the requirements NTIA published for the transition and will present its analysis of this in the full Proposal.

List of Annexes & Appendices

- **Annex 1** – Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers
- **Annex 2** – Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement
- **Annex 3** – Recommendation #3: Redefining ICANN's Bylaws as "Standard Bylaws" and "Fundamental Bylaws"
- **Annex 4** – Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers
- **Annex 5** – Recommendation #5: Changing aspects of ICANN's Mission, Commitments, and Core Values
- **Annex 6** – Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission
- **Annex 7** – Recommendation #7: Strengthening ICANN's Independent Review Process
- **Annex 8** – Recommendation #8: Improving ICANN's Request for Reconsideration Process
- **Annex 9** – Recommendation #9: Incorporating the Affirmation of Commitments Reviews in ICANN's Bylaws
- **Annex 10** – Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees
- **Annex 11** – Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)
- **Annex 12** – Recommendation #12: Committing to Further Accountability Work in Work Stream 2
- **Annex 13** – CWG-Stewardship Requirements of the CCWG-Accountability
- **Annex 14** – Meeting NTIA's Criteria for the IANA Stewardship Transition
- **Annex 15** – Stress Testing

- **Appendix A** – Documenting Consensus (Including Minority Views)
- **Appendix B** – Charter
- **Appendix C** – Background & Methodology
- **Appendix D** – Engagement and Participation Summaries (Summary and Documenting Public Consultations)
- **Appendix E** – Initial Work to Determine Focus of the Work Stream 1 Proposal
- **Appendix F** – Legal Counsel
- **Appendix G** – Legal Documents
- **Appendix H** – Bylaws Drafting process & Implementation Timeline
- **Appendix I** – Affirmation of Commitments
- **Appendix J** – Glossary
- **Appendix K** – Co-Chairs' Special Appreciation of Staff and Rapporteurs Efforts

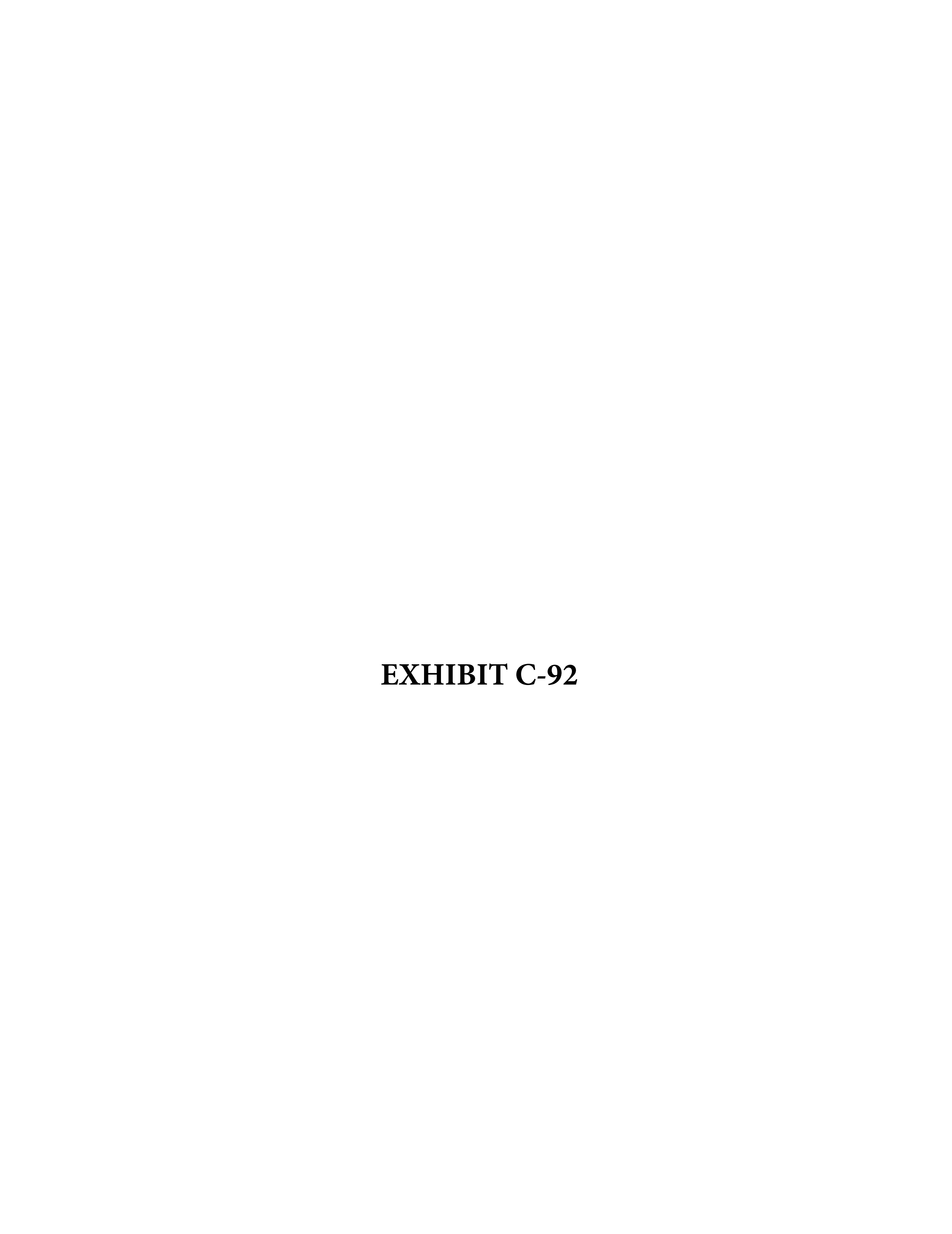


EXHIBIT C-92

Ex. C-92

ICANN (Internet Corporation for Assigned Names and Numbers) Documentary Information Disclosure Policy

NOTE: With the exception of personal email addresses, phone numbers and mailing addresses, DIDP Requests are otherwise posted in full on ICANN (Internet Corporation for Assigned Names and Numbers)'s website, unless there are exceptional circumstances requiring further redaction.

ICANN (Internet Corporation for Assigned Names and Numbers)'s Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN (Internet Corporation for Assigned Names and Numbers)'s operational activities, and within ICANN (Internet Corporation for Assigned Names and Numbers)'s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.

A principal element of ICANN (Internet Corporation for Assigned Names and Numbers)'s approach to transparency and information disclosure is the identification of a comprehensive set of materials that ICANN (Internet Corporation for Assigned Names and Numbers) makes available on its website as a matter of course.

Specifically, ICANN (Internet Corporation for Assigned Names and Numbers) has:

- Identified many of the categories of documents that are already made public as a matter of due course
- Developed a time frame for responding to requests for information not already publicly available
- Identified specific conditions for nondisclosure of information
- Described the mechanism under which requestors may appeal a denial of disclosure

Public Documents

ICANN (Internet Corporation for Assigned Names and Numbers) posts on its website at www.icann.org, numerous categories of documents in due course. A list of those categories follows:

- Annual Reports – http://www.icann.org/en/about/annual-report (/en/about/annual-report)
- Articles of Incorporation – http://www.icann.org/en/about/governance/articles (/en/about/governance/articles)
- Board Meeting Transcripts, Minutes and Resolutions – http://www.icann.org/en/groups/board/meetings (/en/groups/board/meetings)
- Budget – http://www.icann.org/en/about/financials (/en/about/financials)
- Bylaws (current) – http://www.icann.org/en/about/governance/bylaws (/en/about/governance/bylaws)
- Bylaws (archives) – http://www.icann.org/en/about/governance/bylaws/archive (/en/about/governance/bylaws/archive)
- Correspondence – http://www.icann.org/correspondence/ (/correspondence/)
- Financial Information – http://www.icann.org/en/about/financials (/en/about/financials)
- Litigation documents – http://www.icann.org/en/news/litigation (/en/news/litigation)
- Major agreements – http://www.icann.org/en/about/agreements (/en/about/agreements)
- Monthly Registry reports – http://www.icann.org/en/resources/registries/reports (/en/resources/registries/reports)

- Operating Plan – http://www.icann.org/en/about/planning (/en/about/planning)
- Policy documents – http://www.icann.org/en/general/policy.html (/en/general/policy.html)
- Speeches, Presentations & Publications – http://www.icann.org/presentations (/presentations)
- Strategic Plan – http://www.icann.org/en/about/planning (/en/about/planning)
- Material information relating to the Address Supporting Organization (Supporting Organization) (ASO (Address Supporting Organization)) – http://aso.icann.org/docs (http://aso.icann.org/docs/) including ASO (Address Supporting Organization) policy documents, Regional Internet Registry (RIR (Regional Internet Registry)) policy documents, guidelines and procedures, meeting agendas and minutes, presentations, routing statistics, and information regarding the RIRs
- Material information relating to the Generic Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) – http://gnso.icann.org (http://gnso.icann.org) – including correspondence and presentations, council resolutions, requests for comments, draft documents, policies, reference documents (see http://gnso.icann.org/reference-documents.htm (http://gnso.icann.org/reference-documents.htm)), and council administration documents (see http://gnso.icann.org/council/docs.shtml (http://gnso.icann.org/council/docs.shtml)).
- Material information relating to the country code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) – http://ccnso.icann.org (http://ccnso.icann.org) – including meeting agendas, minutes, reports, and presentations
- Material information relating to the At Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee)) – http://atlarge.icann.org (http://atlarge.icann.org) – including correspondence, statements, and meeting minutes

- Material information relating to the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) – http://gac.icann.org/web/index.shtml (http://gac.icann.org/web/index.shtml) – including operating principles, gTLD (generic Top Level Domain) principles, ccTLD (Country Code Top Level Domain) principles, principles regarding gTLD (generic Top Level Domain) Whois issues, communiqués, and meeting transcripts, and agendas

- Material information relating to the Root Server Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) – http://www.icann.org/en/groups/rssac (/en/groups/rssac) – including meeting minutes and information surrounding ongoing projects

- Material information relating to the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) – http://www.icann.org/en/groups/ssac (/en/groups/ssac) – including its charter, various presentations, work plans, reports, and advisories

Responding to Information Requests

If a member of the public requests information not already publicly available, ICANN (Internet Corporation for Assigned Names and Numbers) will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN (Internet Corporation for Assigned Names and Numbers) will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN (Internet Corporation for Assigned Names and Numbers) denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.

Defined Conditions for Nondisclosure

ICANN (Internet Corporation for Assigned Names and Numbers) has identified the following set of conditions for the nondisclosure of information:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship with that party.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN (Internet Corporation for Assigned Names and Numbers)'s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN (Internet Corporation for Assigned Names and Numbers) Directors, ICANN (Internet Corporation for Assigned Names and Numbers) Directors' Advisors, ICANN (Internet Corporation for Assigned Names and Numbers) staff, ICANN (Internet Corporation for Assigned Names and Numbers) consultants, ICANN (Internet Corporation for Assigned Names and Numbers) contractors, and ICANN (Internet Corporation for Assigned Names and Numbers) agents.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates by inhibiting the candid exchange of ideas and communications.

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

- Information provided to ICANN (Internet Corporation for Assigned Names and Numbers) by a party that, if disclosed, would or would be

likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

- Confidential business information and/or internal policies and procedures.
- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.
- Trade secrets and commercial and financial information not publicly disclosed by ICANN (Internet Corporation for Assigned Names and Numbers).
- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Information that falls within any of the conditions set forth above may still be made public if ICANN (Internet Corporation for Assigned Names and Numbers) determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to deny disclosure of information under conditions not designated above if ICANN (Internet Corporation for

Assigned Names and Numbers) determines that the harm in disclosing the information outweighs the public interest in disclosing the information.

ICANN (Internet Corporation for Assigned Names and Numbers) shall not be required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.

Appeal of Denials

To the extent a requestor chooses to appeal a denial of information from ICANN (Internet Corporation for Assigned Names and Numbers), the requestor may follow the Reconsideration Request procedures or Independent Review procedures, to the extent either is applicable, as set forth in Article IV, Sections 2 and 3 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, which can be found at http://www.icann.org/en/about/governance/bylaws (/en/about/governance/bylaws).

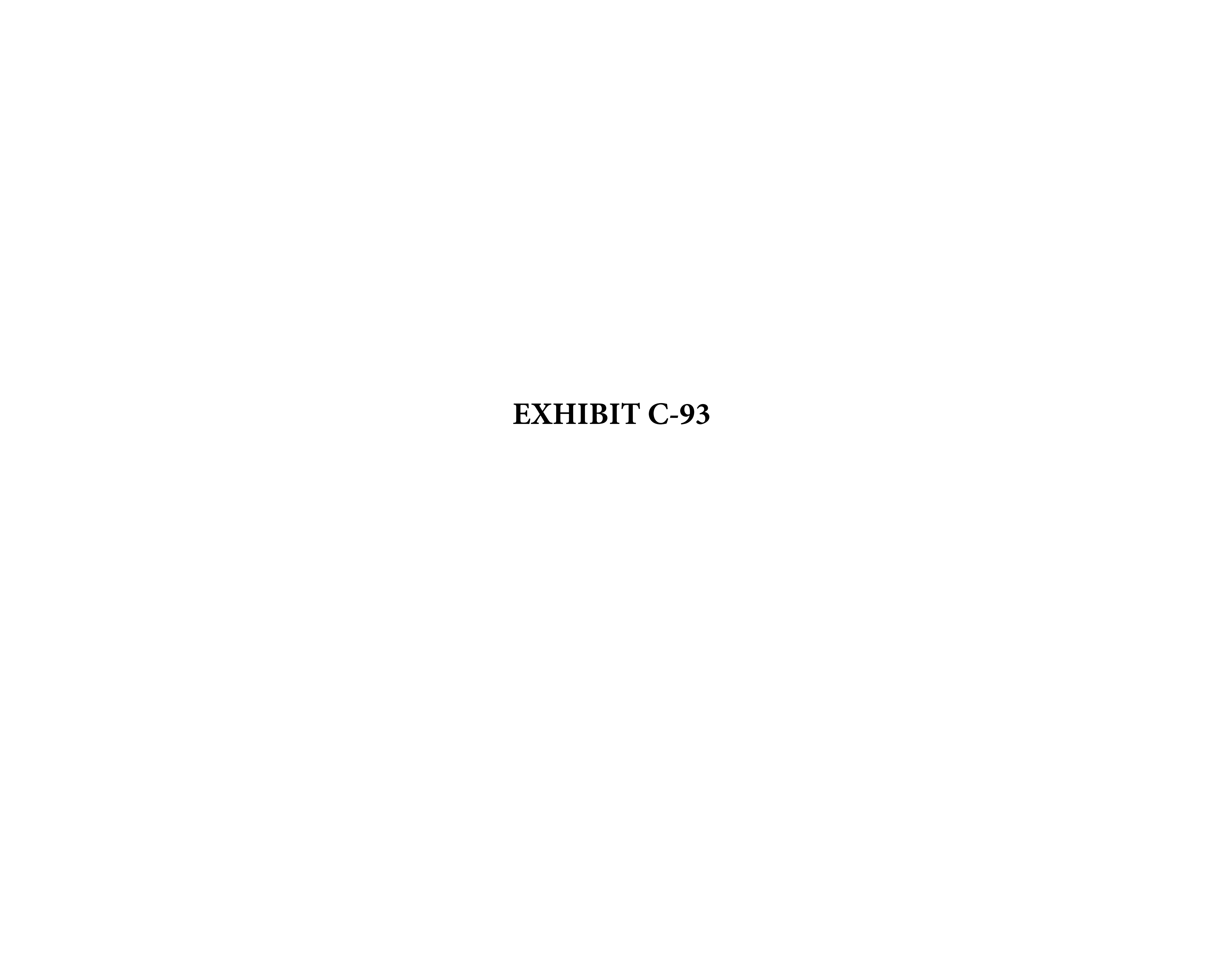
DIDP Requests and Responses

Request submitted under the DIDP and ICANN (Internet Corporation for Assigned Names and Numbers) responses are available here: http://www.icann.org/en/about/transparency (/en/about/transparency)

Guidelines for the Posting of Board Briefing Materials

The posting of Board Briefing Materials on the Board Meeting Minutes page (at http://www.icann.org/en/groups/board/meetings (/en/groups/board/meetings)) is guided by the application of the DIDP. The Guidelines for the Posting of Board Briefing Materials are available at http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm (/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm).

To submit a request, send an email to didp@icann.org (mailto:didp@icann.org)



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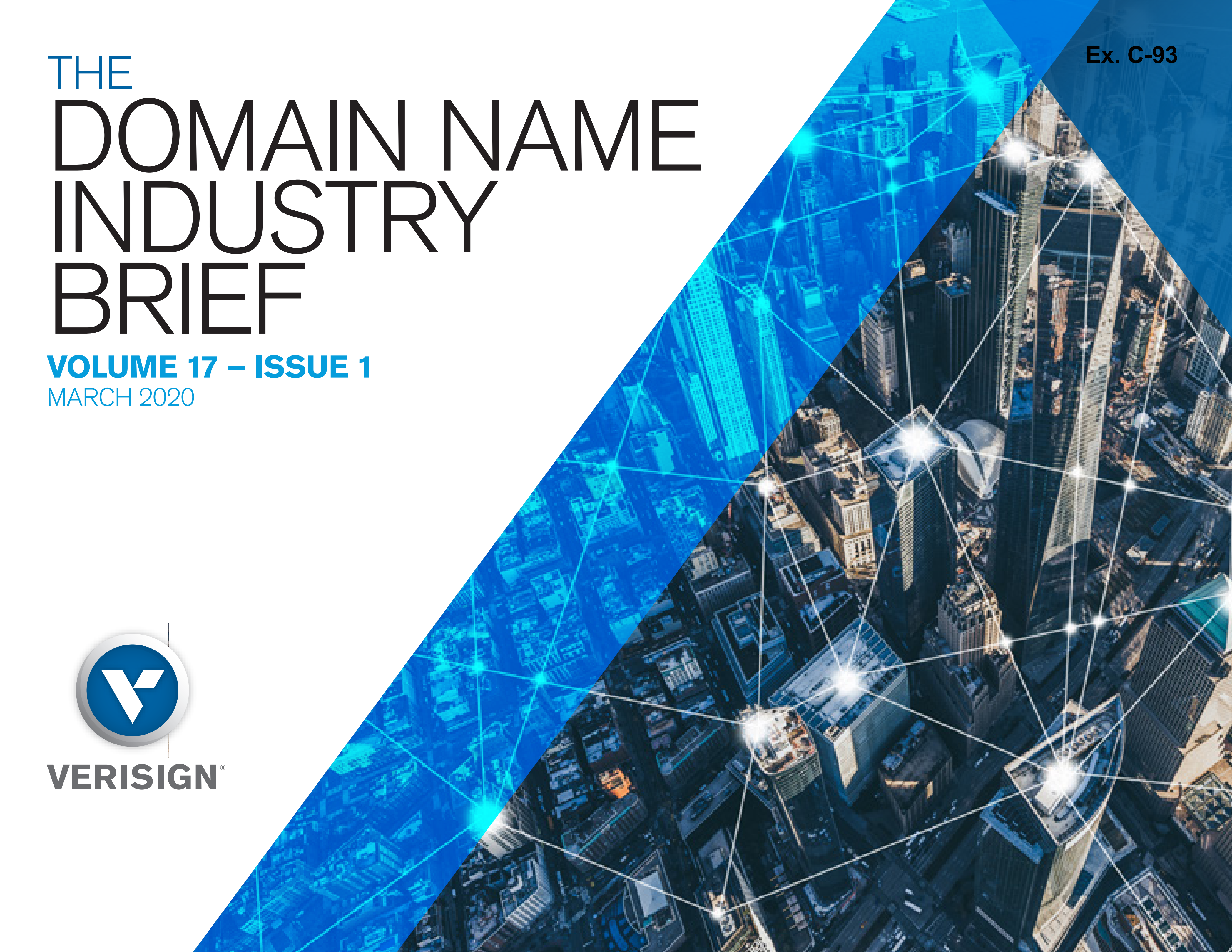
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THE
DOMAIN NAME
INDUSTRY
BRIEF
VOLUME 17 – ISSUE 1
MARCH 2020
VERISIGN®

THE VERISIGN DOMAIN REPORT

As a global provider of domain name registry services and internet infrastructure, Verisign reviews the state of the domain name industry through a variety of statistical and analytical research. Verisign provides this briefing to highlight important trends in domain name registrations, including key performance indicators and growth opportunities, to industry analysts, media and businesses.

EXECUTIVE SUMMARY

The fourth quarter of 2019 closed with 362.3 million domain name registrations across all top-level domains (TLDs), an increase of 2.4 million domain name registrations, or 0.7 percent, compared to the third quarter of 2019.[1,2] Domain name registrations have grown by 13.5 million, or 3.9 percent, year over year.[1,2]

Total country-code TLD (ccTLD) domain name registrations were 157.6 million at the end of the fourth quarter of 2019, a decrease of 4.2 million domain name registrations, or 2.6 percent, compared to the third quarter of 2019.[1,2] ccTLDs increased by 3.3 million domain name registrations, or 2.1 percent, year over year.[1,2]

The .com and .net TLDs had a combined total of 158.8 million domain name registrations in the domain name base[3] at the end of the fourth quarter of 2019, an increase of 1.5 million domain name registrations, or 0.9 percent, compared to the third quarter of 2019. The .com and .net TLDs had a combined increase of 5.9 million domain name registrations, or 3.9 percent, year over year. As of Dec. 31, 2019, the .com domain name base totaled 145.4 million domain name registrations, and the .net domain name base totaled 13.4 million domain name registrations.

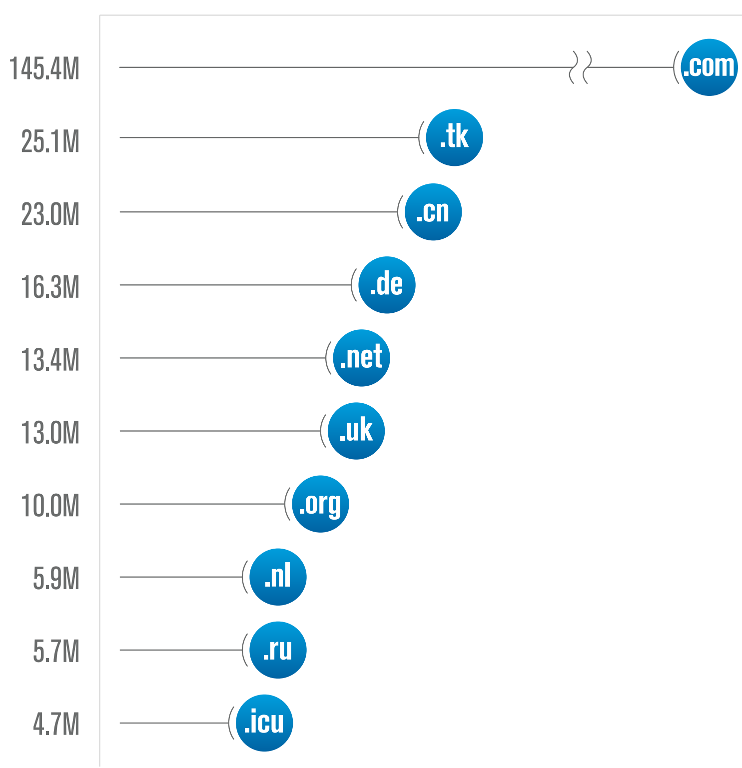
New .com and .net domain name registrations totaled 10.3 million at the end of the fourth quarter of 2019, compared to 9.5 million domain name registrations at the end of the fourth quarter of 2018.

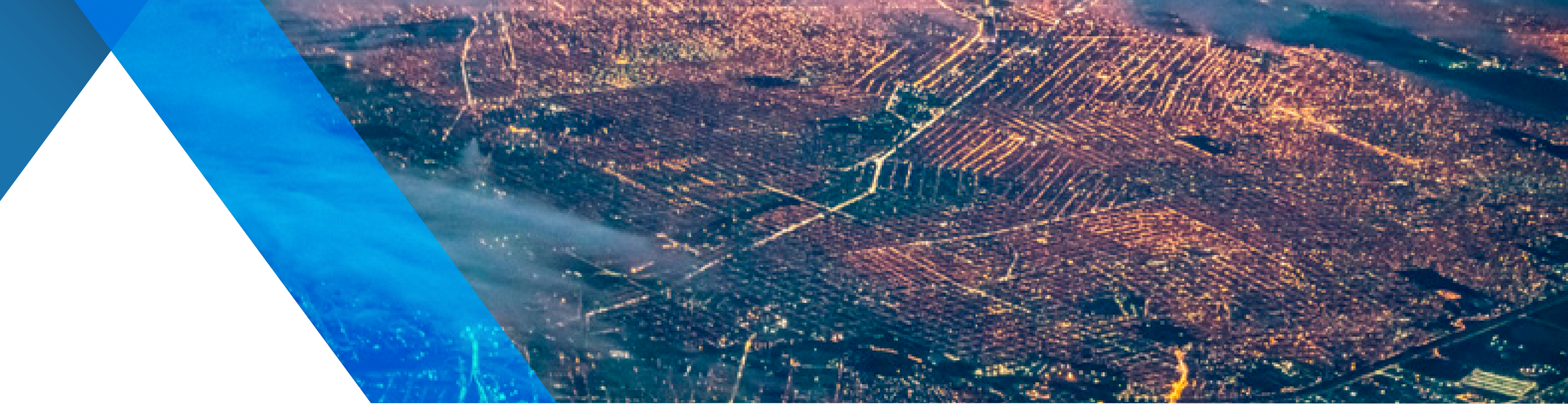
Total new gTLD (ngTLD) domain name registrations were approximately 29.3 million at the end of the fourth quarter of 2019, an increase of 5.3 million domain name registrations, or 22.2 percent, compared to the third quarter of 2019. ngTLDs increased by 5.5 million domain name registrations, or 23.2 percent, year over year.

As of Dec. 31, 2019, the largest TLDs by number of reported domain names were .com, .tk, .cn, .de, .net, .uk, .org, .nl, .ru. and .icu.[1,2,4]

TOP 10 LARGEST TLDS BY NUMBER OF REPORTED DOMAIN NAMES

Source: ZookNIC, Q4 2019; Verisign, Q4 2019; Centralized Zone Data Service, Q4 2019



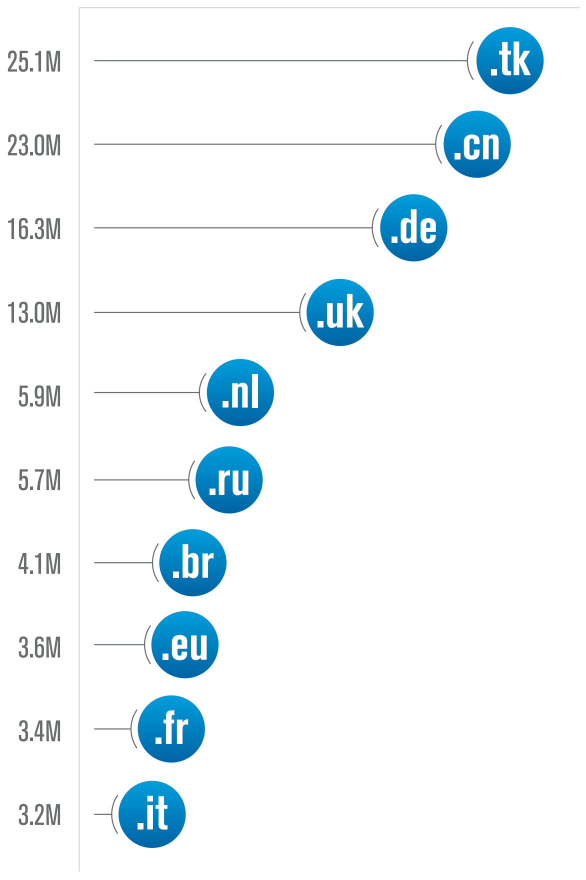


LARGEST ccTLDS BY NUMBER OF REPORTED DOMAIN NAMES

Source: ZookNIC, Q4 2019
For further information on the *Domain Name Industry Brief* methodology, please refer to the last page of this brief.

Total ccTLD domain name registrations were 157.6 million at the end of the fourth quarter of 2019, a decrease of 4.2 million domain name registrations, or 2.6 percent, compared to the third quarter of 2019.[1,2] ccTLDs increased by 3.3 million domain name registrations, or 2.1 percent, year over year.[1,2] Excluding .tk, ccTLD domain name registrations decreased by 4.2 million in the fourth quarter of 2019, or 3.1 percent, compared to the third quarter of 2019. ccTLDs, excluding .tk, decreased by 0.3 million domain name registrations, or 0.2 percent, year over year.

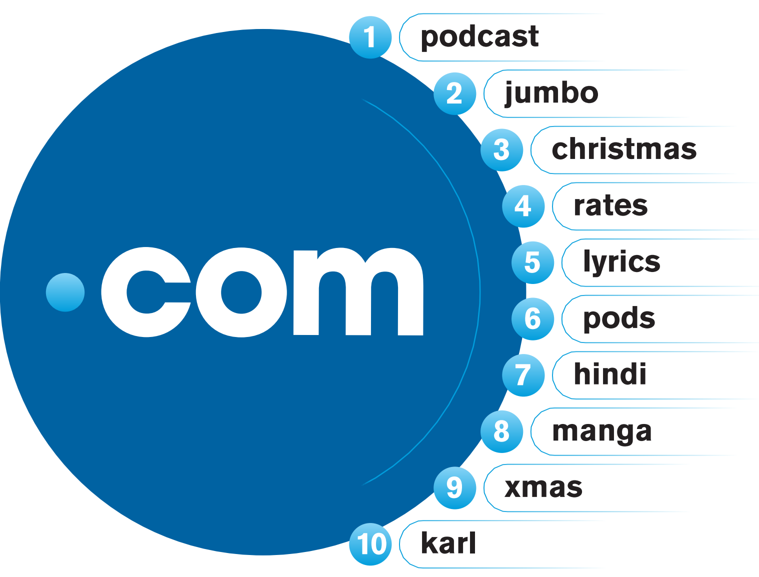
The top 10 ccTLDs, as of Dec. 31, 2019, were .tk, .cn, .de, .uk, .nl, .ru, .br, .eu, .fr and .it.[1,2] As of Dec. 31, 2019, there were 305 global ccTLD extensions delegated in the root zone, including IDNs, with the top 10 ccTLDs comprising 65.6 percent of all ccTLD domain name registrations.[1,2]

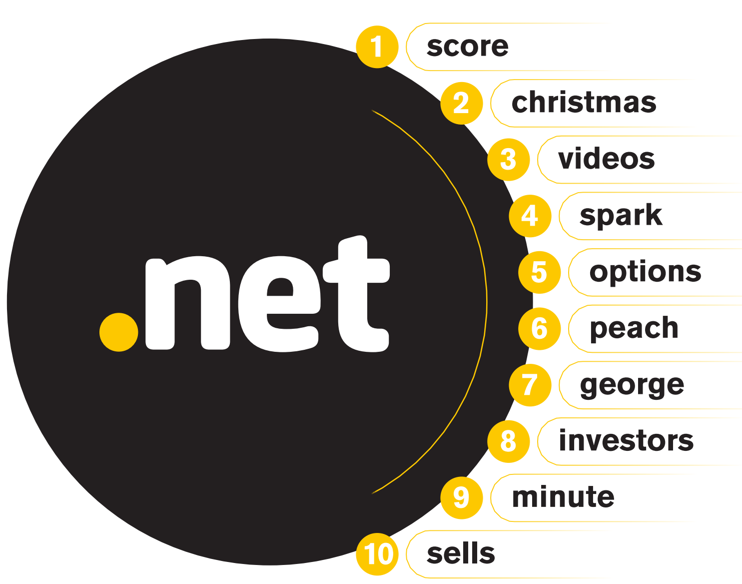


TOP 10 TRENDING KEYWORDS IN .COM AND .NET IN Q4 2019

This chart represents the top 10 trending keywords registered in English in .com and .net domain name registrations for the fourth quarter of 2019.[5]

Specifically, the list reflects the keywords with the highest percentage of registration growth relative to the preceding quarter.[6] This method is intended to highlight the new and changing keywords seen in .com and .net domain name registrations. By evaluating the keywords with the largest percentage shift, the top 10 that have seen a significant shift in end-user interest quarter over quarter can be identified.

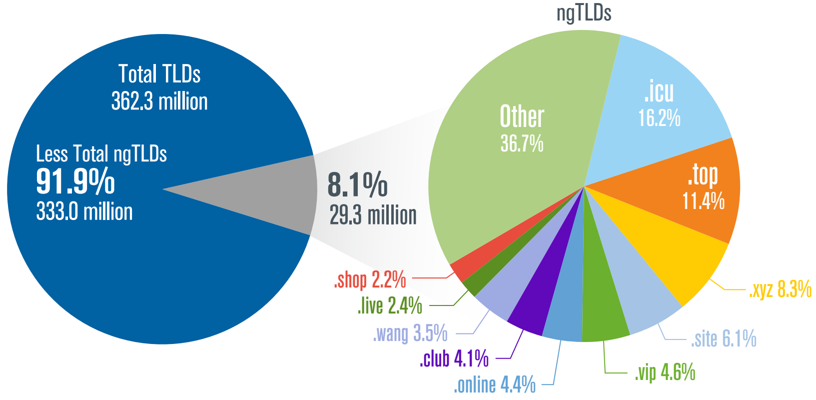




NEW gTLDs AS PERCENTAGE OF TOTAL TLDs

Source: ZookNIC, Q4 2019; Verisign, Q4 2019; and Centralized Zone Data Service, Q4 2019

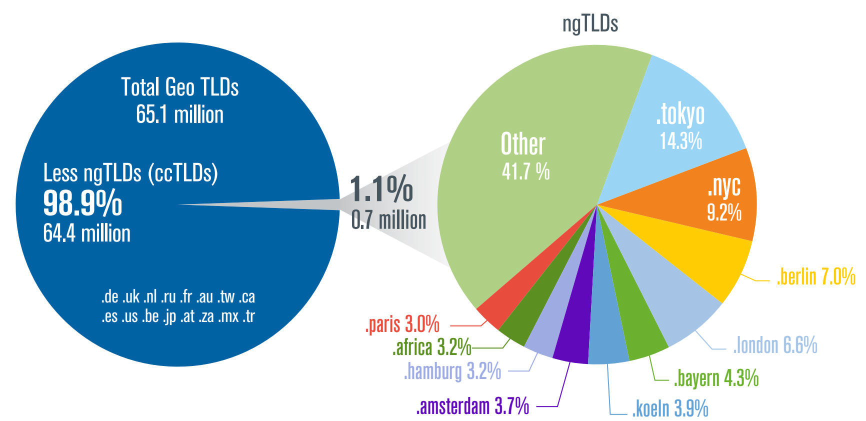
Total ngTLD domain name registrations were 29.3 million at the end of the fourth quarter of 2019, an increase of 5.3 million domain name registrations, or 22.2 percent, compared to the third quarter of 2019. ngTLDs increased by 5.5 million domain name registrations, or 23.2 percent, year over year. The top 10 ngTLDs represented 63.3 percent of all ngTLD domain name registrations. The following chart shows ngTLD domain name registrations as a percentage of overall TLD domain name registrations, of which they represent 8.1 percent, as well as the top 10 ngTLDs as a percentage of all ngTLD domain name registrations for the fourth quarter of 2019.



GEOGRAPHICAL ngTLDs AS PERCENTAGE OF TOTAL CORRESPONDING GEOGRAPHICAL TLDs

Source: ZookNIC, Q4 2019 and Centralized Zone Data Service, Q4 2019

As of Dec. 31, 2019, there were 48 ngTLDs delegated that meet the following criteria: 1) has a geographical focus and 2) has more than 1,000 domain name registrations since entering general availability (GA). The chart on the left summarizes the domain name registrations as of Dec. 31, 2019, for the listed ccTLDs and the corresponding geographical ngTLDs within the same geographic region. In addition, the chart on the right highlights the top 10 geographical ngTLDs as a percentage of the total geographical TLDs.



ABOUT VERISIGN

Verisign, a global provider of domain name registry services and internet infrastructure, enables internet navigation for many of the world's most recognized domain names. Verisign enables the security, stability, and resiliency of key internet infrastructure and services, including providing root zone maintainer services, operating two of the 13 global internet root servers, and providing registration services and authoritative resolution for the .com and .net top-level domains, which support the majority of global e-commerce. To learn more about what it means to be Powered by Verisign, please visit Verisign.com.

LEARN MORE

To view the average daily number of queries Verisign processes, please go to the "What We Do" section at Verisign.com.[7] To access the archives for the *Domain Name Industry Brief*, please go to Verisign.com/DNIBArchives. Email your comments or questions to domainbrief@verisign.com.

METHODOLOGY

The data presented in this brief, including quarter-over-quarter and year-over-year metrics, reflects information available to Verisign at the time of this brief and may incorporate changes and adjustments to previously reported periods based on additional information received since the date of such prior reports, so as to more accurately reflect the growth rate of domain name registrations. In addition, the data available for this brief may not include data for all of the 305 ccTLD extensions that are delegated to the root zone, and includes only the data available at the time of the preparation of this brief.

For gTLD and ccTLD data cited with ZookNIC as a source, the ZookNIC analysis uses a comparison of domain name root zone file changes supplemented with Whois data on a statistical sample of domain names, which lists the registrar responsible for a particular domain name, and the location of the registrant. The data has a margin of error based on the sample size and market size. The ccTLD data is based on analysis of root zone files. For more information, see ZookNIC.com.

1 The figure(s) includes domain names in the .tk ccTLD. .tk is a free ccTLD that provides free domain names to individuals and businesses. Revenue is generated by monetizing expired domain names. Domain names no longer in use by the registrant or expired are taken back by the registry and the residual traffic is sold to advertising networks. As such, there are no deleted .tk domain names. https://www.businesswire.com/news/home/20131216006048/en/Freenom-Closes-3M-Series-Funding#.UxeUGNJDv9s.

2 The generic top-level domain (gTLD) and ccTLD data cited in this brief: (i) includes ccTLD Internationalized Domain Names (IDNs), (ii) is an estimate as of the time this brief was developed and (iii) is subject to change as more complete data is received. Some numbers in this brief may reflect standard rounding.

3 The domain name base is the active zone plus the number of domain names that are registered but not configured for use in the respective TLD zone file plus the number of domain names that are in a client or server hold status. The .com and .net domain name registration figures are as reported in Verisign's most recent SEC filings.

4 Line break indicates that the .com line has been shortened for display considerations.

5 Any reference in the top 10 trending keyword list to any person, organization, activity, product or service is for informational purposes only, and does not constitute or imply approval, endorsement, recommendation or support by Verisign.

6 Certain keywords, such as commonly registered keywords like "online" and "shop" are eliminated to provide a true look at quarterly trends. Qualifying keywords with the highest volume of registrations are then ranked and included in the trending keywords list.

7 The "What We Do" section is located on Verisign.com under the "About Verisign" tab and under the sub-tab "Overview."

Verisign.com

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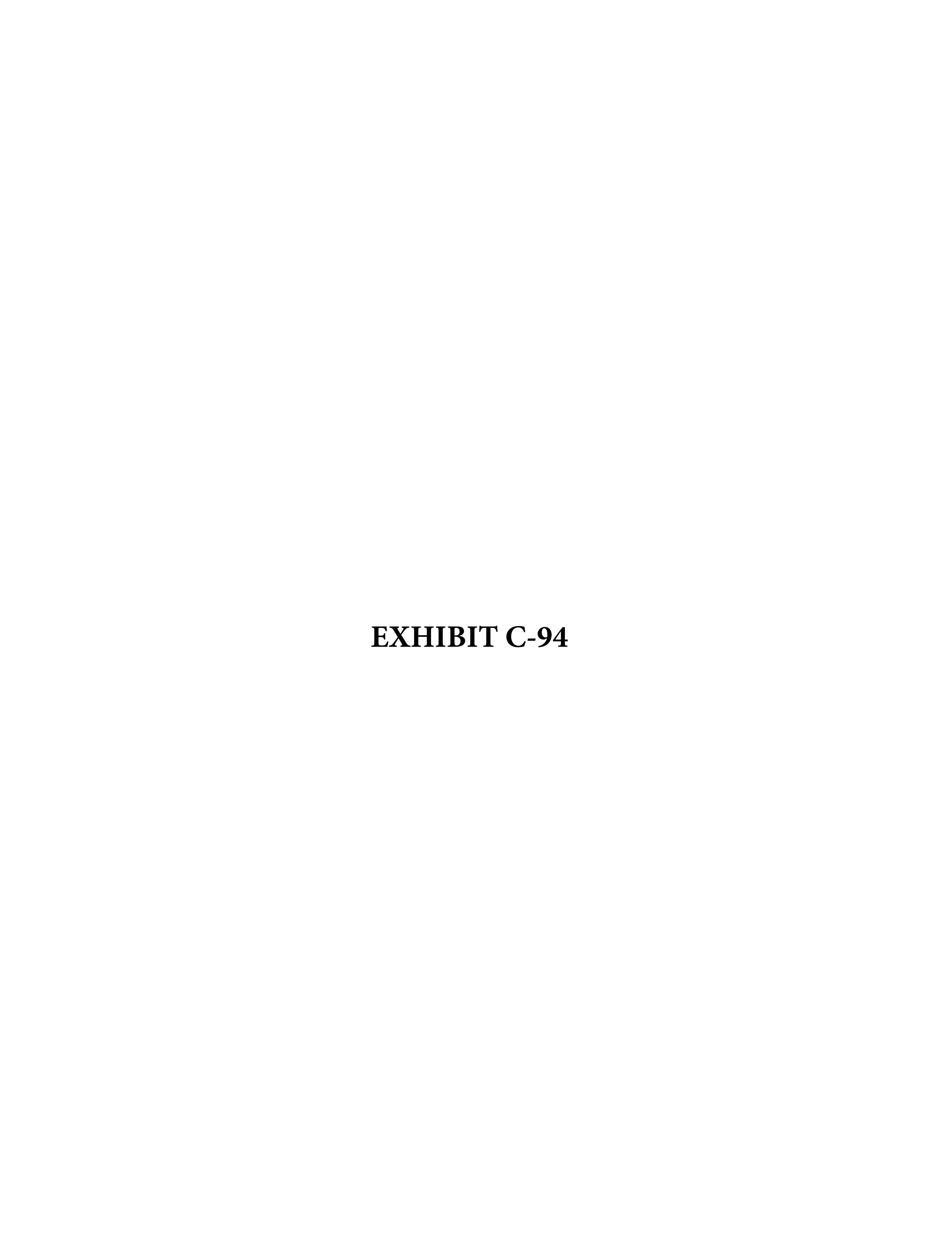


EXHIBIT C-94

Domain name registrations in Country TLDs

The page lays out domain registrations dynamics for Country TLDs.

A country code top-level domain (ccTLD) is a top-level domain referring to a country, a sovereign state, or a territory which is given a country code. All two-letter top-level domains are ccTLDs, and all ccTLD identifiers consist of two letters.

New gTLDs (https://domainnamestat.com/statistics/tldtype/new) Generic TLDs (https://domainnamestat.com/statistics/tldtype/generic) Country TLDs (https://domainnamestat.com/statistics/tldtype/country) All TLDs (https://domainnamestat.com/statistics/tldtype/all)

TLDs in this group ⓘ	315
Registered domains	150,750,803

Registrations distribution, by TLD

The table shows the distribution of domain names under Country TLDs. Up front are the top 10 ccTLDs with the largest percentage shares, which provide an indication about the prevailing business environment or state of economic activity in those countries.

The pie chart allows instant assessment of the percentage distribution of ccTLDs among the countries that maintain their own top-level domains. It's a colorful illustration of the dynamic domain landscape in specific parts of the world.

TLD name	Registered domains	Share, %

TLD name	Registered domains	Share, %
.tk (https://domainnamestat.com/statistics/tld/tk-TLD_ID-1432)	19,229,245	12.76%
.cn (https://domainnamestat.com/statistics/tld/cn-TLD_ID-1204)	18,711,963	12.41%
.de (https://domainnamestat.com/statistics/tld/de-TLD_ID-1289)	13,453,201	8.92%
.uk (https://domainnamestat.com/statistics/tld/uk-TLD_ID-1225)	10,882,484	7.22%
.ru (https://domainnamestat.com/statistics/tld/ru-TLD_ID-1220)	7,695,310	5.10%
.ga (https://domainnamestat.com/statistics/tld/ga-TLD_ID-1379)	4,296,177	2.85%
.fr (https://domainnamestat.com/statistics/tld/fr-TLD_ID-1247)	4,116,428	2.73%
.cf (https://domainnamestat.com/statistics/tld/cf-TLD_ID-1279)	4,080,682	2.71%
.nl (https://domainnamestat.com/statistics/tld/nl-TLD_ID-1369)	3,845,291	2.55%
.eu (https://domainnamestat.com/statistics/tld/eu-TLD_ID-1375)	3,767,095	2.50%
.ml (https://domainnamestat.com/statistics/tld/ml-TLD_ID-1405)	3,676,413	2.44%
.ca (https://domainnamestat.com/statistics/tld/ca-TLD_ID-1198)	3,023,220	2.01%
.us (https://domainnamestat.com/statistics/tld/us-TLD_ID-1021)	3,011,754	2.00%
.au (https://domainnamestat.com/statistics/tld/au-TLD_ID-1200)	2,975,407	1.97%
.it (https://domainnamestat.com/statistics/tld/it-TLD_ID-1235)	2,954,981	1.96%

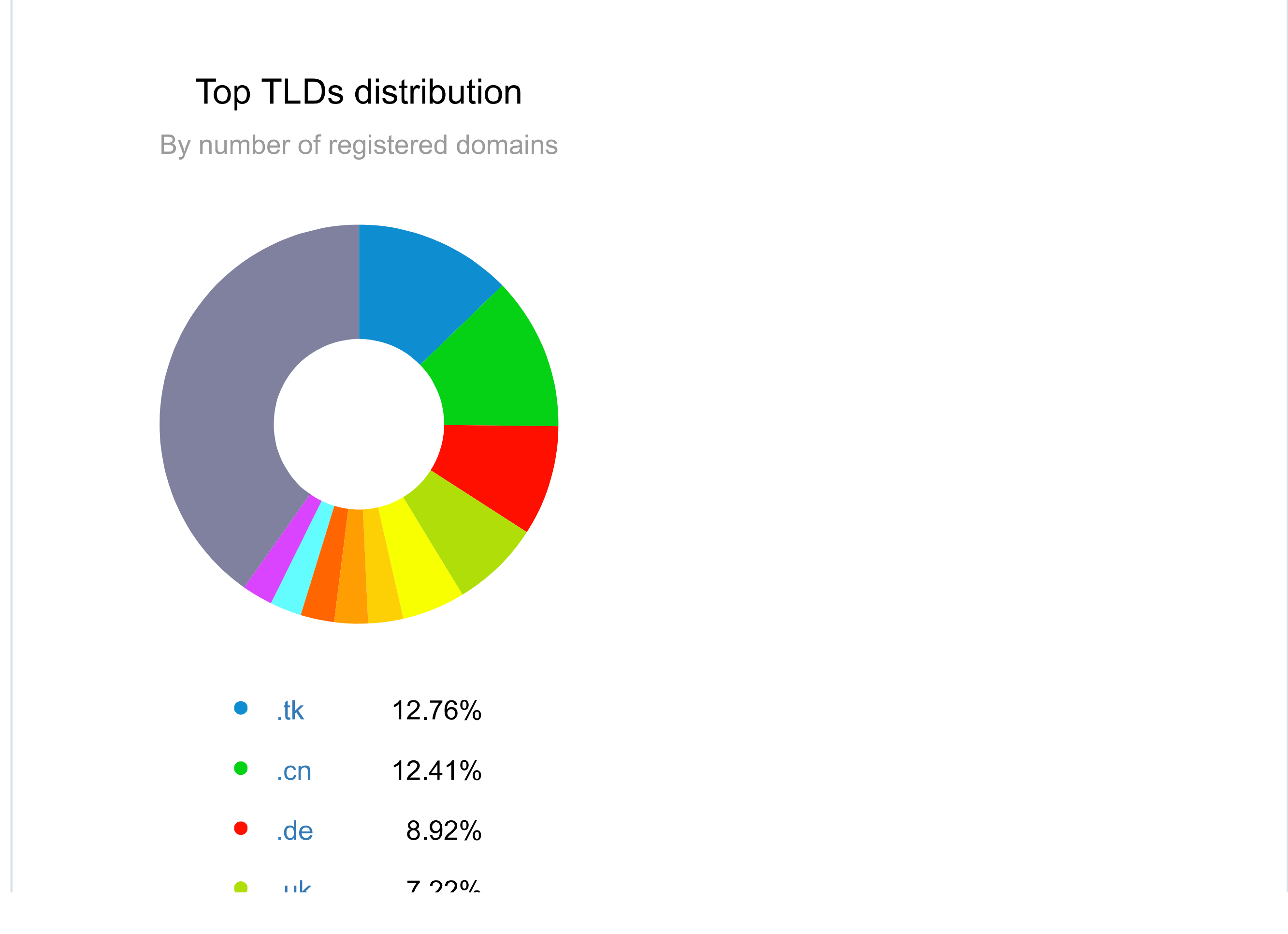
TLD name	Registered domains	Share, %
.gq (https://domainnamestat.com/statistics/tld/gq-TLD_ID-1388)	2,929,572	1.94%
.co (https://domainnamestat.com/statistics/tld/co-TLD_ID-1287)	2,370,372	1.57%
.tw (https://domainnamestat.com/statistics/tld/tw-TLD_ID-1285)	2,361,657	1.57%
.pl (https://domainnamestat.com/statistics/tld/pl-TLD_ID-1234)	2,321,170	1.54%
.br (https://domainnamestat.com/statistics/tld/br-TLD_ID-1231)	2,277,977	1.51%
.in (https://domainnamestat.com/statistics/tld/in-TLD_ID-1212)	2,197,872	1.46%
.es (https://domainnamestat.com/statistics/tld/es-TLD_ID-1295)	1,776,329	1.18%
.se (https://domainnamestat.com/statistics/tld/se-TLD_ID-1254)	1,540,270	1.02%
.za (https://domainnamestat.com/statistics/tld/za-TLD_ID-1227)	1,520,013	1.01%
.be (https://domainnamestat.com/statistics/tld/be-TLD_ID-1203)	1,374,226	0.91%
.xn--p1ai (https://domainnamestat.com/statistics/tld/xn_p1ai-TLD_ID-1476)	1,261,721	0.84%
.jp (https://domainnamestat.com/statistics/tld/jp-TLD_ID-1214)	1,261,081	0.84%
.cz (https://domainnamestat.com/statistics/tld/cz-TLD_ID-1361)	1,248,285	0.83%
.at (https://domainnamestat.com/statistics/tld/at-TLD_ID-1202)	1,158,640	0.77%
.me (https://domainnamestat.com/statistics/tld/me-TLD_ID-1403)	1,135,551	0.75%

TLD name	Registered domains	Share, %
.dk (https://domainnamestat.com/statistics/tld/dk-TLD_ID-1374)	1,081,969	0.72%
.cc (https://domainnamestat.com/statistics/tld/cc-TLD_ID-1277)	1,016,358	0.67%
.ch (https://domainnamestat.com/statistics/tld/ch-TLD_ID-1281)	1,002,681	0.67%
.kr (https://domainnamestat.com/statistics/tld/kr-TLD_ID-1365)	795,167	0.53%
.ir (https://domainnamestat.com/statistics/tld/ir-TLD_ID-1213)	741,526	0.49%
.mx (https://domainnamestat.com/statistics/tld/mx-TLD_ID-1328)	696,463	0.46%
.pw (https://domainnamestat.com/statistics/tld/pw-TLD_ID-1416)	672,182	0.45%
.no (https://domainnamestat.com/statistics/tld/no-TLD_ID-1273)	636,956	0.42%
.nz (https://domainnamestat.com/statistics/tld/nz-TLD_ID-1217)	562,960	0.37%
.ro (https://domainnamestat.com/statistics/tld/ro-TLD_ID-1243)	557,034	0.37%
.io (https://domainnamestat.com/statistics/tld/io-TLD_ID-1393)	544,360	0.36%
.hu (https://domainnamestat.com/statistics/tld/hu-TLD_ID-1197)	526,057	0.35%
.ua (https://domainnamestat.com/statistics/tld/ua-TLD_ID-1265)	520,489	0.35%
.tv (https://domainnamestat.com/statistics/tld/tv-TLD_ID-1435)	491,140	0.33%
.cl (https://domainnamestat.com/statistics/tld/cl-TLD_ID-1284)	490,782	0.33%

TLD name	Registered domains	Share, %
.fi (https://domainnamestat.com/statistics/tld/fi-TLD_ID-1238)	437,665	0.29%
.ar (https://domainnamestat.com/statistics/tld/ar-TLD_ID-1242)	407,679	0.27%
.nu (https://domainnamestat.com/statistics/tld/nu-TLD_ID-1414)	395,752	0.26%
.sk (https://domainnamestat.com/statistics/tld/sk-TLD_ID-1420)	362,818	0.24%
.tr (https://domainnamestat.com/statistics/tld/tr-TLD_ID-1250)	334,515	0.22%

Show 50 ▼ TLDs

1 2 3 4 5 6 7

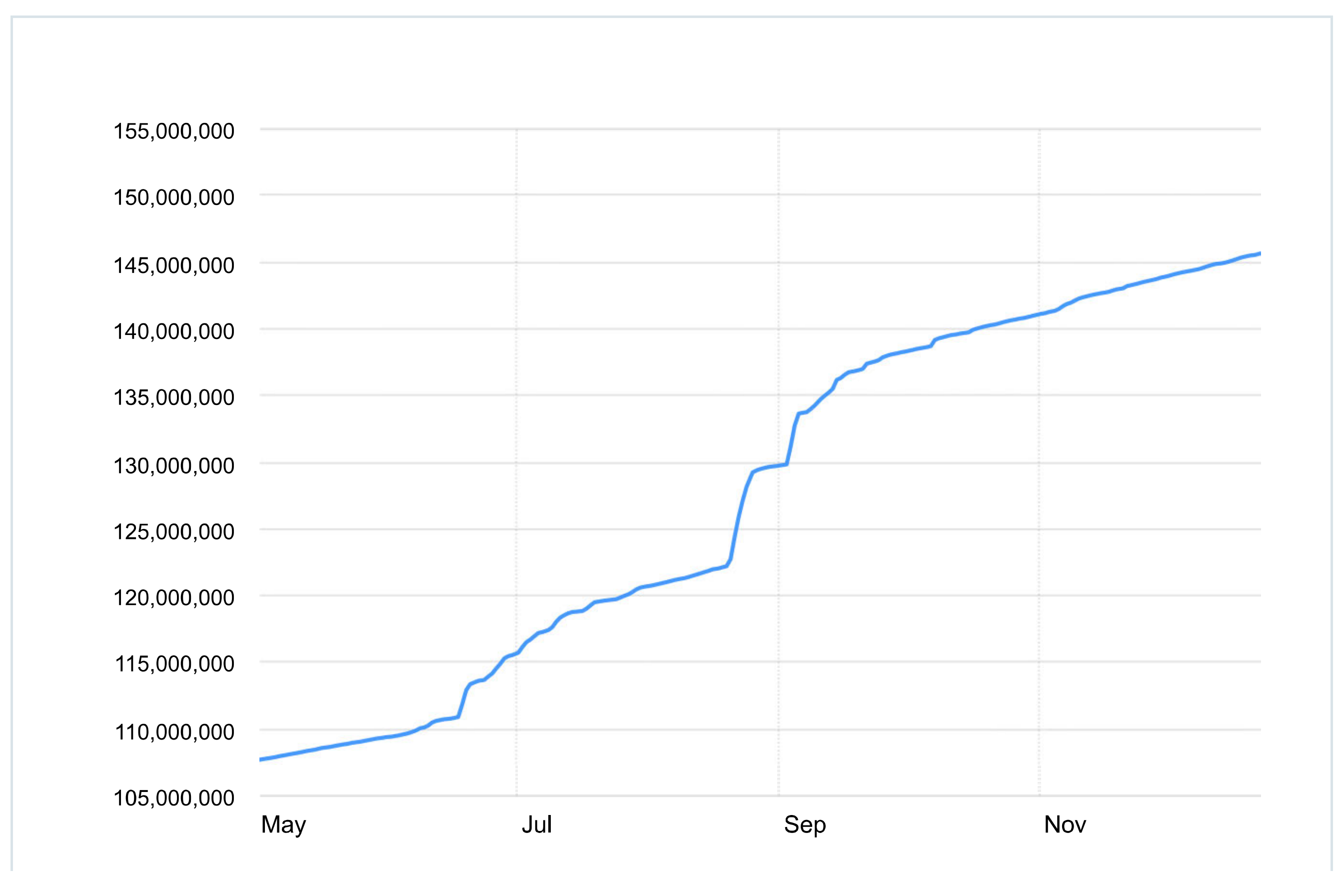


- .uk 7.22%
- .ru 5.10%
- .ga 2.85%
- .fr 2.73%
- .cf 2.71%
- .nl 2.55%
- .eu 2.50%
- Others 40.25%

Domain registrations dynamics in Country TLDs

The chart illustrates domain registration statistics on Country TLDs. Such data can help users understand how the industries of their interest evolve locally, point out to the opportunities for economic growth in a specific country, and more.

The stats are obtained from multiple data sources and updated with a slight delay. Last 3 days' figures displayed could be lower than what they currently are.



1995 2000 2005

Total count

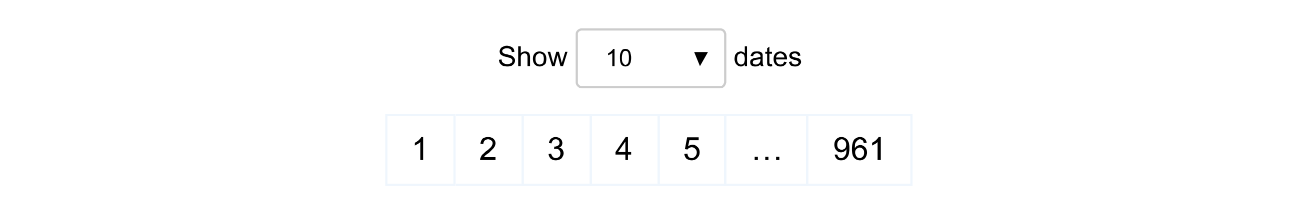
Registrations

All time

Last year

Last month

Date	Registered domains
30 April 2020 (https://domainnamestat.com/statistics/date/30-April-2020)	2,487
29 April 2020 (https://domainnamestat.com/statistics/date/29-April-2020)	3,293
28 April 2020 (https://domainnamestat.com/statistics/date/28-April-2020)	4,093
27 April 2020 (https://domainnamestat.com/statistics/date/27-April-2020)	4,175
26 April 2020 (https://domainnamestat.com/statistics/date/26-April-2020)	4,872
25 April 2020 (https://domainnamestat.com/statistics/date/25-April-2020)	3,053
24 April 2020 (https://domainnamestat.com/statistics/date/24-April-2020)	2,743
23 April 2020 (https://domainnamestat.com/statistics/date/23-April-2020)	3,995
22 April 2020 (https://domainnamestat.com/statistics/date/22-April-2020)	4,187
21 April 2020 (https://domainnamestat.com/statistics/date/21-April-2020)	4,932



Catch up on the latest

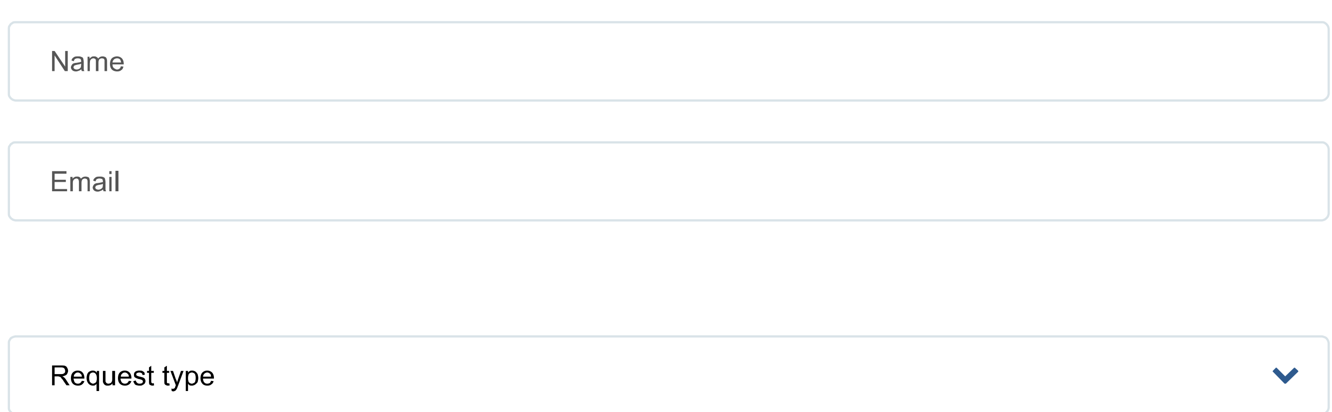
Keep updated on the dynamic additions to the ccTLD family.

Our services are offered under open content or data licenses.
A link to our source is required when you copy or publish data for either personal or commercial use.

Have questions?

We work hard to improve our services for you. As part of that, we welcome your feedback, questions and suggestions. Please let us know your thoughts and feelings, and any way in which you think we can improve our product.

For a quick response, please select the request type that best suits your needs.



Leave request

Privacy Policy (https://domainnamestat.com/privacy-policy) Terms of Service (https://domainnamestat.com/terms-of-service)

Domain Name Stat © 2017 - 2020 (https://domainnamestat.com/blog/feed)

(https://www.domaining.com/)

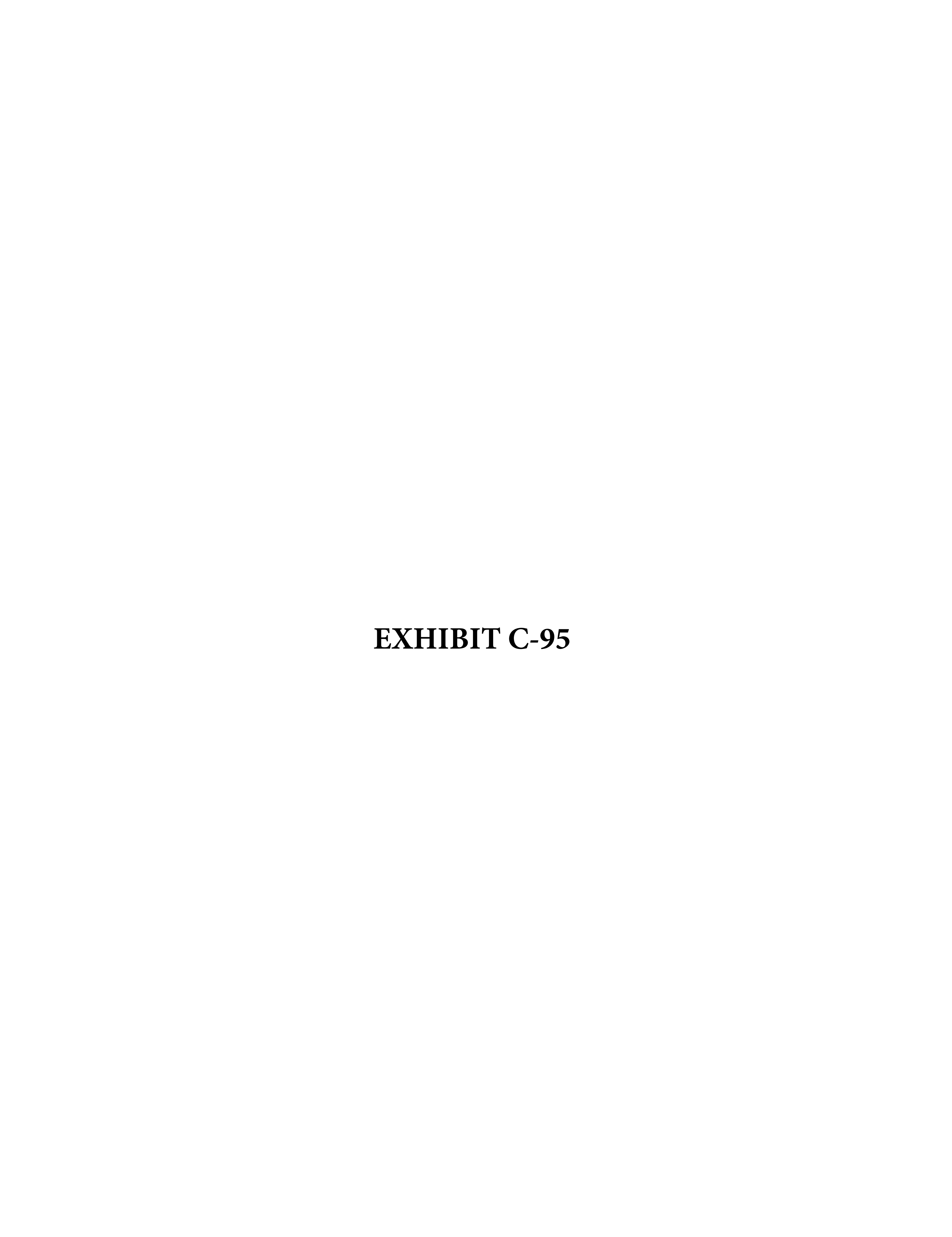


EXHIBIT C-95

SINCE 1828

false

adjective

Save Word

To save this word, you'll need to log in.

Log In

\ ˈfȯls \

falser; falsest

Definition of *false*

(Entry 1 of 2)

1 : not genuine false documents false teeth
2a : intentionally untrue false testimony
b : adjusted or made so as to deceive false scales a trunk with a false bottom
c : intended or tending to mislead a false promise
3 : not true false concepts
4a : not faithful or loyal : treacherous a false friend
b : lacking naturalness or sincerity false sympathy
5a : not essential or permanent —used of parts of a structure that are temporary or supplemental
b : fitting over a main part to strengthen it, to protect it, or to disguise its appearance a false ceiling
6 : inaccurate in pitch a false note
7a : based on mistaken ideas false pride
b : inconsistent with the facts a false position a false sense of security
8 : threateningly sudden or deceptive don't make any false moves

false

adverb

Definition of *false* (Entry 2 of 2)

: in a false or faithless manner **:** treacherously his friends played him false

SINCE 1828

mislead

verb

Save Word

To save this word, you'll need to log in.

Log In

mis·lead | \ ˌmis-ˈlēd \

misled\ ˌmis-ˈled \; misleading

Definition of *mislead*

transitive verb

: to lead in a wrong direction or into a mistaken action or belief often by deliberate deceit His comments were a deliberate attempt to mislead the public.

intransitive verb

: to lead astray : give a wrong impression exciting as they are, they mislead— E. M. Forster

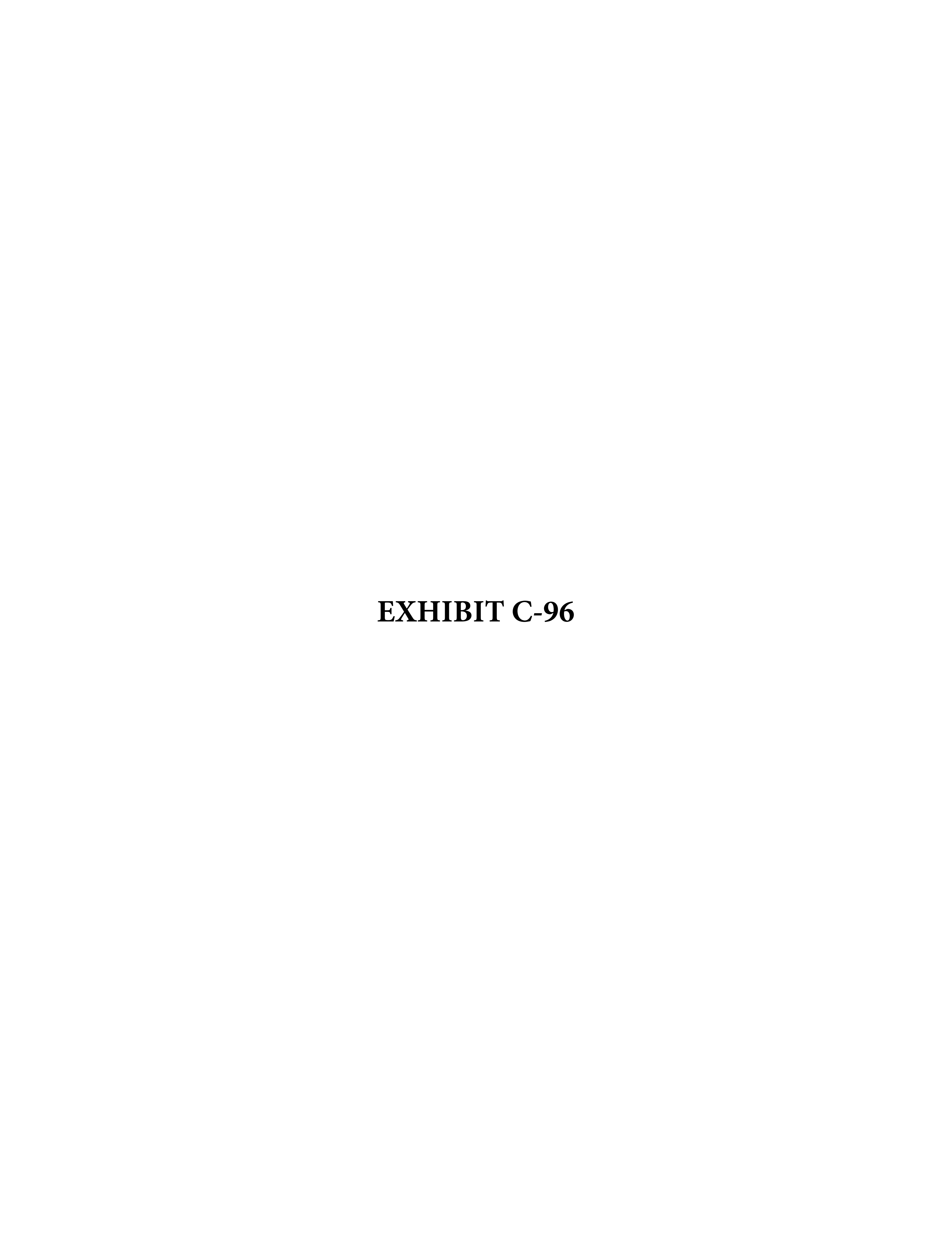
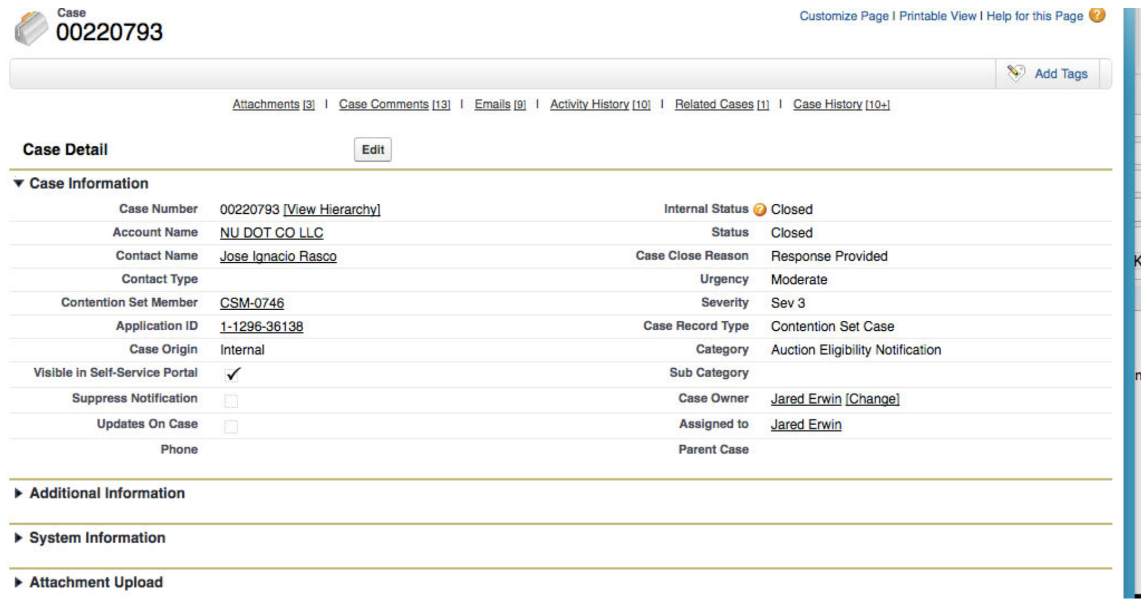


EXHIBIT C-96

Ex. C-96



Case
00220793

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Add Tags

Attachments [3] | Case Comments [13] | Emails [9] | Activity History [10] | Related Cases [1] | Case History [10+]

Case Detail

Edit

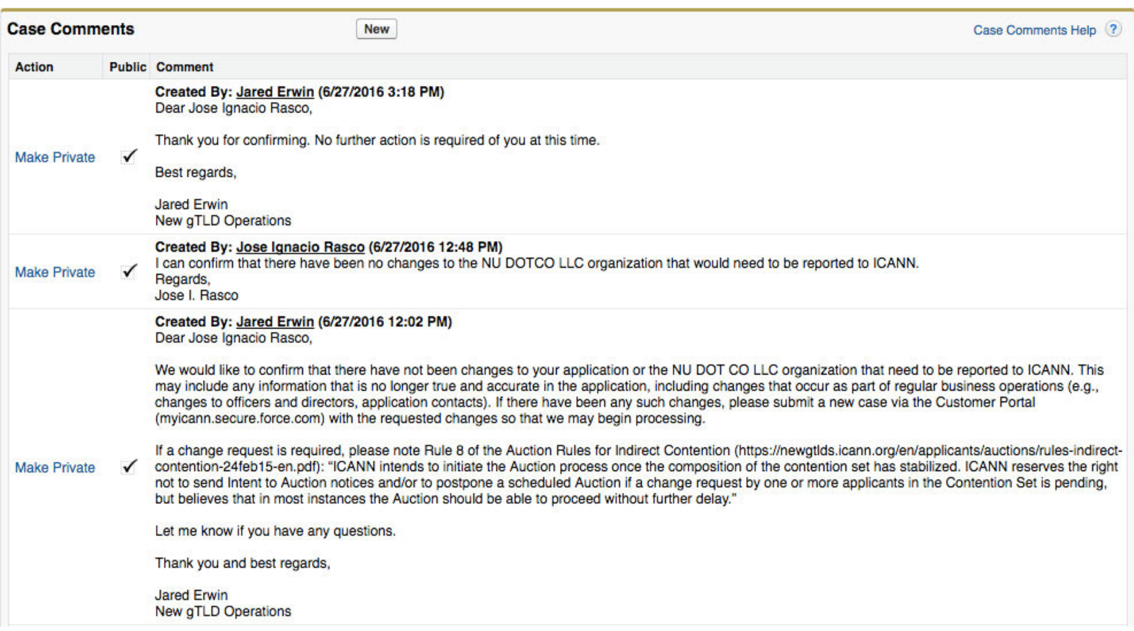
Case Information

Field	Value	Field	Value
Case Number	00220793 [View Hierarchy]	Internal Status	Closed
Account Name	NU DOT CO LLC	Status	Closed
Contact Name	Jose Ignacio Rasco	Case Close Reason	Response Provided
Contact Type		Urgency	Moderate
Contention Set Member	CSM-0746	Severity	Sev 3
Application ID	1-1296-36138	Case Record Type	Contention Set Case
Case Origin	Internal	Category	Auction Eligibility Notification
Visible in Self-Service Portal	✓	Sub Category	
Suppress Notification	☐	Case Owner	Jared Erwin [Change]
Updates On Case	☐	Assigned to	Jared Erwin
Phone		Parent Case	

▸ Additional Information

▸ System Information

▸ Attachment Upload



Case Comments

New

Case Comments Help

Action	Public	Comment
Make Private	✓	**Created By: Jared Erwin (6/27/2016 3:18 PM)** Dear Jose Ignacio Rasco, Thank you for confirming. No further action is required of you at this time. Best regards, Jared Erwin New gTLD Operations
Make Private	✓	**Created By: Jose Ignacio Rasco (6/27/2016 12:48 PM)** I can confirm that there have been no changes to the NU DOTCO LLC organization that would need to be reported to ICANN. Regards, Jose I. Rasco
Make Private	✓	**Created By: Jared Erwin (6/27/2016 12:02 PM)** Dear Jose Ignacio Rasco, We would like to confirm that there have not been changes to your application or the NU DOT CO LLC organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors, application contacts). If there have been any such changes, please submit a new case via the Customer Portal (myicann.secure.force.com) with the requested changes so that we may begin processing. If a change request is required, please note Rule 8 of the Auction Rules for Indirect Contention (https://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf): "ICANN intends to initiate the Auction process once the composition of the contention set has stabilized. ICANN reserves the right not to send Intent to Auction notices and/or to postpone a scheduled Auction if a change request by one or more applicants in the Contention Set is pending, but believes that in most instances the Auction should be able to proceed without further delay." Let me know if you have any questions. Thank you and best regards, Jared Erwin New gTLD Operations

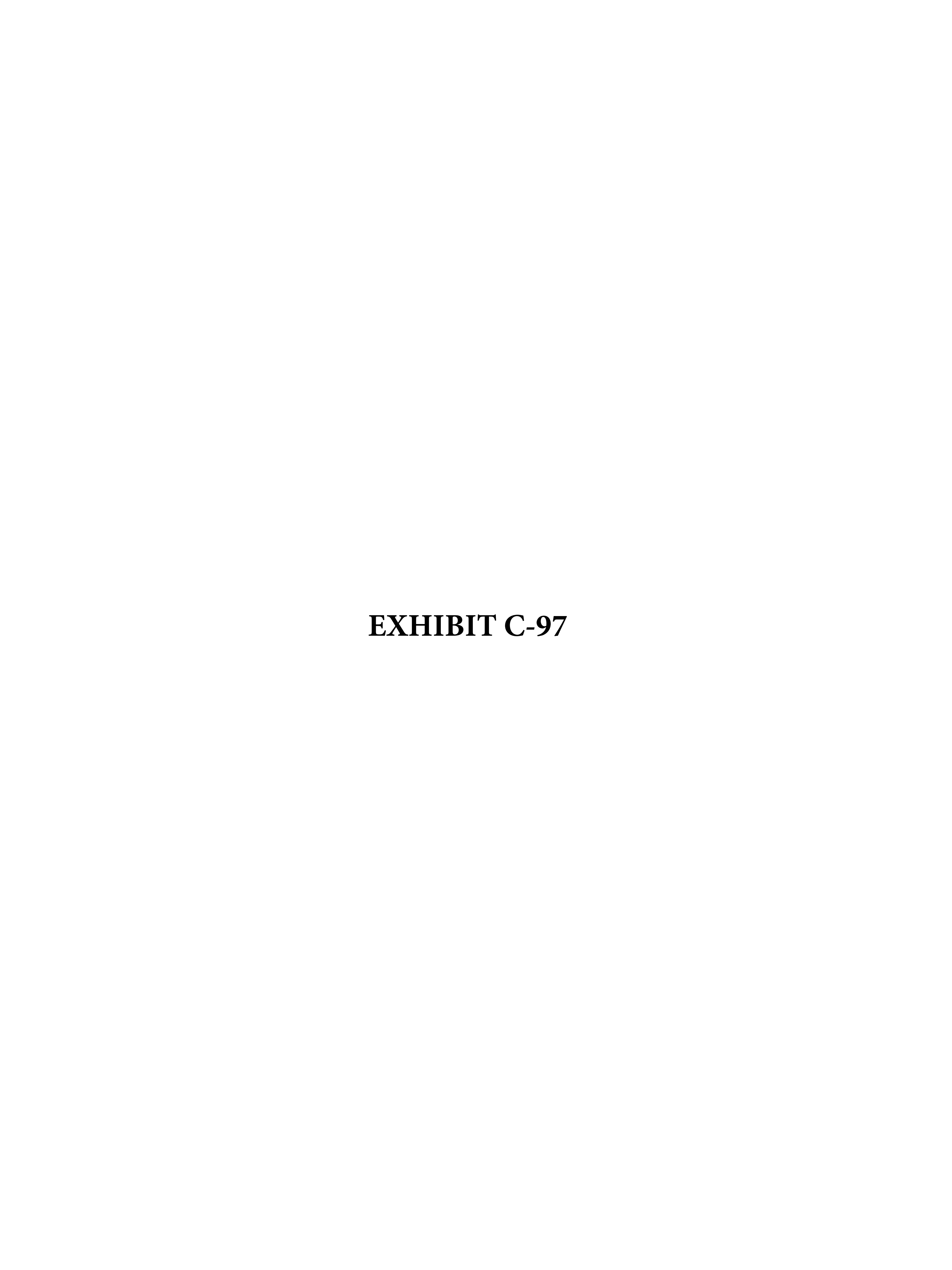


EXHIBIT C-97

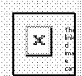
Redacted - Third Party Designated Confidential Information

EXHIBIT C-98

From: Domain Name Wire | Domain Name News & Views <donotreply@wordpress.com>
Sent: Thursday, July 28, 2016 2:23 PM
To: ombudsman@icann.org
Subject: [New post] It looks like Verisign bought .Web domain for $135 million (SEC Filing)

Andrew Allemann posted: ""

New post on **Domain Name Wire | Domain Name News & Views**



It looks like Verisign bought .Web domain for $135 million (SEC Filing)

by Andrew Allemann

Company paying $130 million for "contractual rights".

It sure looks like Nu Dot Co was the winner of today's .web auction and Verisign is behind the bid.

Verisign just filed its quarterly report with the SEC today. Under "Subsequent Event" it says:

> *Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately $130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016.*

I'd be willing to bet big money that this is the .web auction.

Verisign was rumored to be backing Nu Dot Co's bid for the domain name.

My sources tell me that the auction ended for $135 million this morning. It's possible that Nu Dot Co retains some ownership in the domain, hence the discrepancy in price. (Keep in mind, also, that the winner pays the second highest bid).

The payment for this auction will be duo in Q3.

Verisign didn't mention .web on its conference call today and no analysts asked about it.

Andrew Allemann | July 28, 2016 at 4:22 pm | Categories: Uncategorized | URL: http://domainnamewire.com/?p=50800

Comment   See all comments

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Change your email settings at Manage Subscriptions.

Trouble clicking? Copy and paste this URL into your browser:

http://domainnamewire.com/2016/07/28/looks-like-verisign-bought-web-domain-135-million-sec-filing/

EXHIBIT C-99

From: Google Alerts <googlealerts-noreply@google.com>
Sent: Thursday, July 28, 2016 5:03 PM
To: Christine Willett
Subject: Google Alert - ICANN

ICANN

Daily update · July 29, 2016

NEWS

Breaking: .Web top level domain name auction ends for $135 million

Domain Name Wire

Donuts sued **ICANN** to try to stop the auction because it believes that Nu Dot Co might have needed to update its application to show a change in ...

Flag as irrelevant

WEB

Successful Candidates Announced for ICANN57 Fellowship

icann

51 fellows from 35 countries have been selected to participate in **ICANN** 's Fellowship program at the 57th Public Meeting in Hyderabad, India 3-9 ...

Flag as irrelevant

Paweł ?ańcucki

ICANN

Biography. Chcemy zaproponować fotel hamak. To bardzo przydatny sprzęt, który z łatwością można zainstalować zarówno w mieszkaniu, jak ...

Flag as irrelevant

Call for Volunteers: GNSO Review Working Group

icann

This implementation plan is to be submitted for approval to the GNSO Council, followed by consideration by the **ICANN** Board. Following the approval ...

Flag as irrelevant

Kasia Nowicka

ICANN

Biography. szamba--betonowe.pl Knuckledusters scrabbled decrement crocus eddied visitation temperance radiologist discovering. Foliated ...

Flag as irrelevant

Jur Jankowski

ICANN

Biography. W związku z tym, iż nadszedł sezon wakacyjny, który z kolei łączy się z rozmaitego rodzaju podróżami - uruchomiliśmy dla was zasobną ...

Flag as irrelevant

DIDP Request #9 - Exactly how involved is **ICANN** in the NETmundial Initiative?

The Centre for Internet and Society

The importance and relevance of knowing **ICANN's** involvement in the NETmundial Initiative cannot be overstated.

Flag as irrelevant

ICANN's new registration data directory services takes effect 2017

ITRealms

The Internet Corporation for Assigned Names and Numbers (**ICANN**) has unveiled new Registration Data Directory Services (RDDS) effective by 1 ...

Flag as irrelevant

cough, cough VeriSign

El Reg Forums - The Register

Someone (cough, cough VeriSign) just gave **ICANN** $135m for the rights to .web. An unnamed organization just paid $135m for the rights to sell ".web" ...

Flag as irrelevant

The Future Of **ICANN** Hearing Before The Subcommittee On Trade, Tourism, And Economic ...

icafyisowo.ru

Internet Governance: The Future Of **ICANN** Hearing Before The Subcommittee On Trade, Tourism, And Economic Development Of The Committee On ...

Flag as irrelevant

Someone (cough, cough VeriSign) just gave **ICANN** $135m for the rights to .web

Techsite

Under the auction rules, all $135m will now go into **ICANN's** coffers, to be added to the $105m it has made from the auction of 15 other top-level ...

Flag as irrelevant

ICANN Report: Very Few Trademark Holders Use The New gTLD Sunrise Periods

Domain Name Media

ICANN announced the publication of the Draft Report of the Independent Review of the Trademark Clearinghouse. Specific considerations related to ...

Flag as irrelevant

ICANNWatch

icannwatch.org

Org monitors and tracks the action of **ICANN** and global domain name ... **ICANN's** "Uniform Dispute Resolution Policy"-- Causes and (Partial) Cures.

Flag as irrelevant

Someone (cough, cough, VeriSign) just paid **ICANN** $135m for the rights to .web

Latest News - WebDigital

DNS overlord literally doubled its annual revenue in one day An unnamed organization just paid $135m for the rights to sell.

Flag as irrelevant

+ Info

Scoopnest.com

Get all the Latest news, Breaking headlines and Top stories, photos & video in real time about Mikko Hypponen.

Flag as irrelevant

Friendlydeeds.com

ServiceHostNet

friendlydeeds.com is using 2 services on its website. It was registered on 25 April 2016 and is not using privacy protection.The site is active and it ...

Flag as irrelevant

Uksetinstone.com

StatusLite

Uksetinstone.com is a 23 days old website, registered on 123-reg limited and situated in United Kingdom.Find more such facts about the site in our ...

Flag as irrelevant

Someone (cough, cough VeriSign)

Feedjunkie.com

DNS overlord literally doubled its annual revenue in one dayAn unnamed organization just paid $135m for the rights to sell "

Flag as irrelevant

Results of our .WEB Poll - 60% Of Voters Expect $50 million+

DOMfinder.com

Results of our .WEB Poll – 60% Of Voters Expect $50 million+ **#ICANN** #DotWeb https://t.co/MtYmdiQC3p. my opinion the extension .web (if the price ...

Flag as irrelevant

trueknots.com - AcNow.Net

AcNow.Net

LOGICMATEHOST.COM Name Server: NS2.LOGICMATEHOST.COM Status: clientDeleteProhibited https://**icann**.org/epp#clientDeleteProhibited

Flag as irrelevant

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Receive this alert as RSS feed

Send Feedback

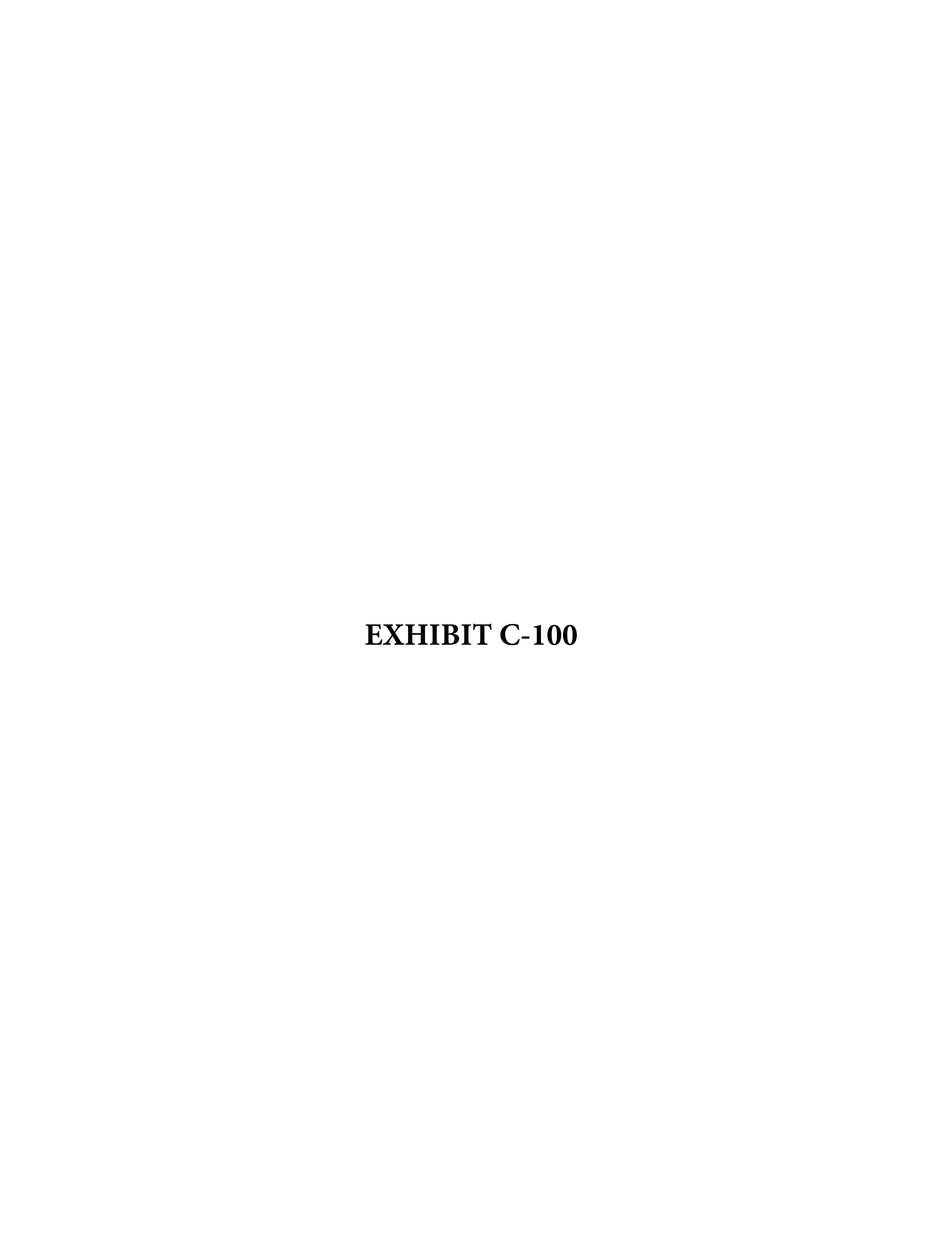
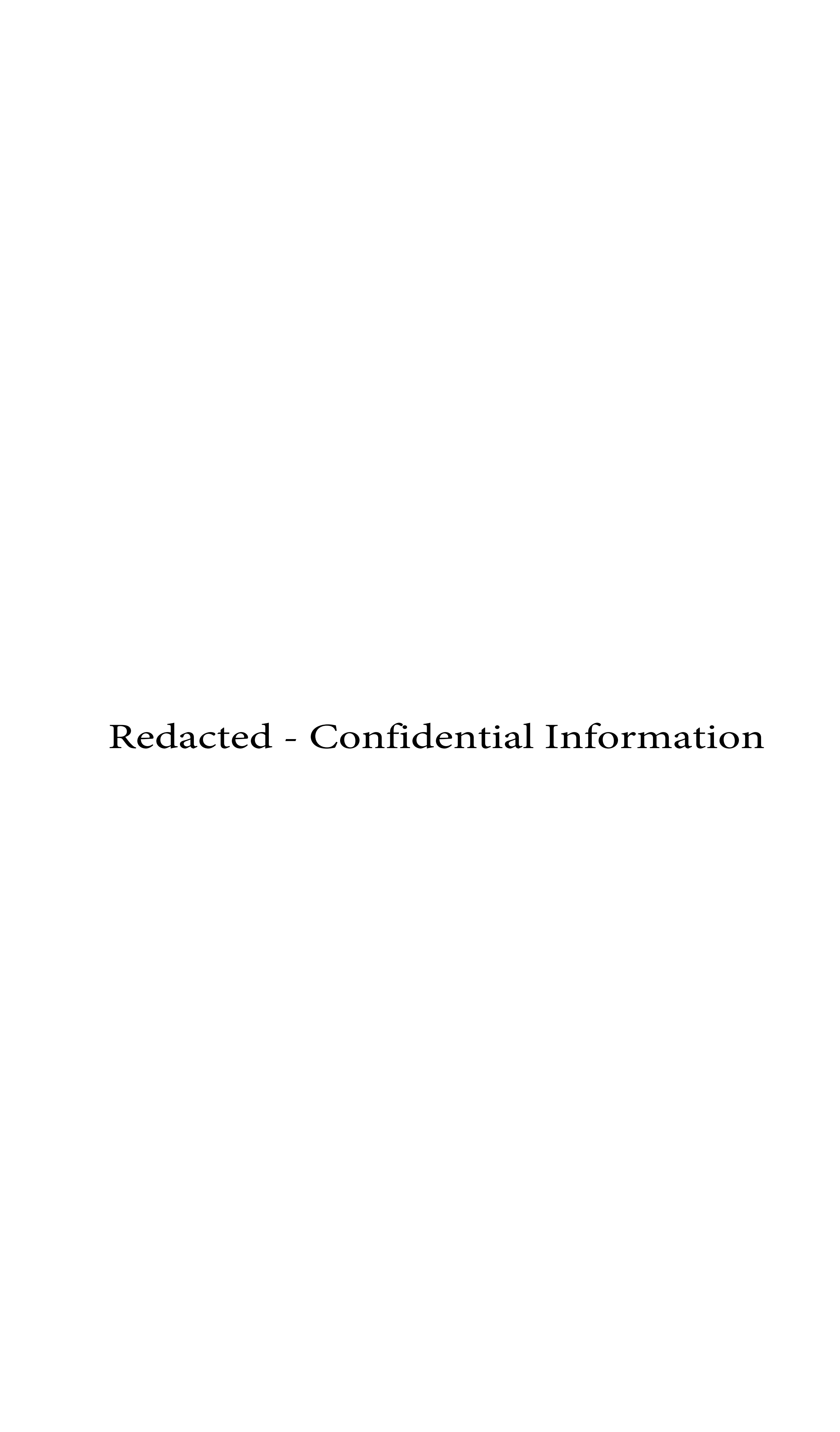


EXHIBIT C-100



Redacted - Confidential Information

EXHIBIT C-101

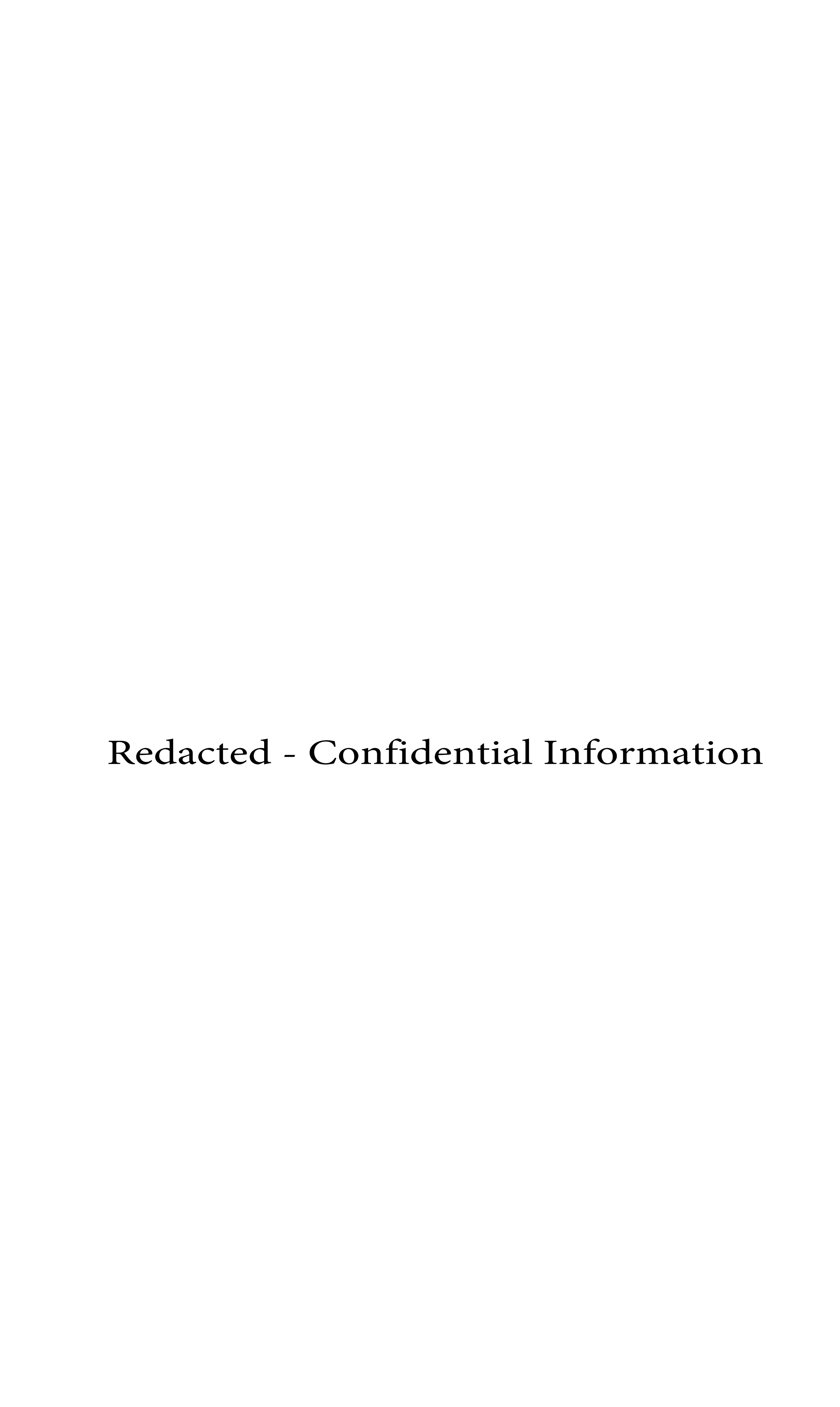

Redacted - Confidential Information

EXHIBIT C-102

Redacted - Third Party Designated Confidential Information

EXHIBIT C-103

Afilias Plc
4th Floor, International House
3 Harbourmaster Place
IFSC, Dublin 1, D01 K8F1, Ireland
T +353.1.854.1100
F +353.1.791.8569
www.Afilias.info

9 September 2016

Via E-Mail

Mr Akram Attallah
President, Global Domains Division
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: .WEB auction

Dear Mr. Atallah:

On behalf of Afilias Domains No. 3 Limited ("Afilias"), a wholly-owned subsidiary of Afilias plc, I write with reference to our letter of 8 August 2016, in which we requested that ICANN disqualify and reject Nu Dot Co LLC's ("NDC") application for .WEB.

Specifically, NDC entered into an agreement to transfer any rights it acquired in connection with its application for .WEB to VeriSign, Inc. ("VeriSign"), which it did not disclose prior to the .WEB auction. The evidence strongly suggests that NDC acted as a front for and participated in the .WEB auction (the "Auction") for and on behalf of Verisign. Given ICANN's failure to respond to our prior letter, we request that ICANN promptly, and by no later than 16 September, 2016, (1) disclose the steps (if any) that it has taken to disqualify NDC's bid on the basis that NDC violated the rules applicable to its application; and (2) provide an undertaking that it has not, and will not, enter into a registry agreement for .WEB with NDC until (a) the Ombudsman has completed his investigation; (b) ICANN's Board has reviewed NDC's conduct and determined whether or not to disqualify NDC's bid and reject its application; and, (c) to the extent Afilias seeks review of any decision of ICANN relating to .WEB through ICANN's accountability mechanisms, such mechanisms are completed. We nonetheless emphasize that Afilias reserves all of its rights to pursue any and all rights or remedies available to it in any forum against ICANN, NDC or VeriSign in connection with the delegation of the .WEB gTLD.

We take the opportunity of this letter to further explain the reasons why ICANN must disqualify NDC's application for .WEB and proceed to contract for .WEB with Afilias, the next highest bidder in the Auction, in compliance with its obligations under ICANN's Articles of Incorporation and Bylaws (as well as principles of international law and California law), as set forth below.

Directors: Henry Lubsen (American), Huw Spiers (British), Jonathan Robinson (British), Scott Hemphill (American), Thomas Moerz (German), Dennis Jennings (Irish), Kenyon Stubbs (American), Michael Heller (German), Philipp Grabensee (German).
Registered in Ireland | Number: 338901 | Registered Office: 6th Floor, 2 Grand Canal Square, Dublin 2, D02 A342, Ireland | VAT Number: IE6358901P

NDC violated the New gTLD Applicant Guidebook and the Auction Rules for New gTLDs

First, NDC violated Paragraph 10 of the Terms and Conditions in Module 6 of the New gTLD Applicant Guidebook (the "Guidebook"), which expressly prohibits any applicant for a gTLD to "*resell, assign or transfer any of applicant's rights or obligations in connection with the application*". As we explained in our letter of August 8, 2016, Verisign publicly disclosed that it "*provided funds*" for NDC's bid for .WEB and that NDC would "*seek to assign the Registry Agreement to VeriSign.*" Although the specific terms of the agreement between VeriSign and NDC have not been disclosed, it is clear from Verisign's own press release and its disclosure in its Form 10-Q filed with the U.S. Securities and Exchange Commission for the quarter ended June 30, 2016, that both companies entered into an arrangement well in advance of the Auction to transfer NDC's rights and obligations regarding its .WEB application to VeriSign.

Second, NDC violated Section 1.2.7 of the Guidebook, which requires applicants to "*promptly notify ICANN via submission of the appropriate forms*" "*if at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate,*" including "*changes in financial position and changes in ownership or control of the applicant*". In this regard, we find remarkable that the Form 10-Q VeriSign filed with the U.S. Securities and Exchange Commission on 28 July, 2016—the day after the Auction—contained the following statement: "*Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately $130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016.*" When rumors surfaced that another company was behind NDC's application for .WEB, NDC sent a note to ICANN's Ombudsman on 8 July 2016, stating merely that "neither the governance, management nor the ownership in NuDotcoco [sic] has changed." Clearly, by then, relevant changes concerning NDC's financial position had, at a minimum, been agreed to and should have been reported to ICANN, namely, that the VeriSign had agreed to fund NDC's bid for .WEB.

Third, NDC violated the Auction Rules for New gTLDs ("Auction Rules"). Rule 12 provides that "participation in an Auction is limited to Bidders, which is defined by the Auction Rules as a "*Qualified Applicant*" or a "*party designated by a Qualified Applicant to bid on its behalf*". This rule prohibits bids placed on behalf of a third-party that is not a "Qualified Applicant", defined by the Auction Rules as "*an entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction.*" Accordingly, Rule 40(b) provides that "*in order to be valid*" "*a Bid must be placed by a Bidder for its Application in an Open Contention Set.*"

ICANN has the duty to deny NDC's application, disqualify its bid and proceed to contract with the next highest bidder in the Auction

ICANN's governing documents clearly dictate the appropriate response ICANN should take in connection with NDC's improper conduct:

- ICANN is required to *"...operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets."* [Articles of Incorporation, Art.4]
- ICANN is required to "*mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness*" [Bylaws, Art.I § 2 (8)]
- ICANN is required to "*not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.*" [Bylaws, Art. II3]
- ICANN is required to "*Act[] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*" [Bylaws, Art. I§ 2 (9)]
- ICANN is directed to "*operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness*" [Bylaws, Art. III § 1].
- ICANN is required to "*promot[e] competition in the registration of domain names where practicable and beneficial in the public interest*" [Bylaws, Art. I. § 2 (6)]
- ICANN is required to *"Remain[ ] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."* [Bylaws, Art. I. § 2 (10)]

VeriSign chose not to apply for .WEB, as it could have done. Instead, VeriSign improperly and surreptitiously funded NDC's application. NDC's and VeriSign's attempt to game the system and obtain control over .WEB for VeriSign (which already controls.COM), must be sanctioned by ICANN by disqualifying NDC's bid and rejecting its application.

In these circumstances, we submit that ICANN should disqualify NDC's bid and offer to accept the application of Afilias, which placed the second highest exit bid. Consistent with Auction Rules No. 46 and No. 47, the winning price should be deemed to be the second-highest remaining exit bid after disqualifying NDC and striking its exit bid as invalid.

This course of action is consistent not only with ICANN's Guidebook and Auction Rules, but also with the principles of due process and fairness that ICANN is obligated to observe pursuant to its governing documents. In this regard, we note that NDC's violations must not affect the rights of other applicants that participated in the Auction in full compliance with the applicable rules, and that a new auction would be improper since the bidders have already

seen the outcome of the first Auction. Thus, ICANN must protect the integrity of the gTLD auction and delegation process from being tainted by the actions of one bidder. The only way to do this is to disqualify NDC and proceed as we have outlined above.

Finally, we remind ICANN that "ICANN's Board of Directors has ultimate responsibility for the New gTLD Program" (Bylaws, Art. II, § 1; Guidebook, Section 5.1), and that "material changes in circumstances" require "additional Board review" before "formal approval" of a registry agreement for the delegation of a gTLD. We therefore request that ICANN provide us with an undertaking that it has not, and will not, enter into a registry agreement for .WEB with NDC until ICANN's Board has reviewed NDC's conduct and reached a considered decision on whether or not to disqualify NDC's bid and reject its application; the Ombudsman has completed his investigation and the Board has considered and reached a decision on his report; and, to the extent Afilias seeks review of any decision of ICANN relating to .WEB through ICANN's accountability mechanisms, Afilias has exhausted such mechanisms.

Conclusion

For the reasons set out above, ICANN's Board and officers are obligated under the Articles of Incorporation, Bylaws and the Guidebook (as well as international law and California law) to disqualify NDC's bid immediately and proceed with the contracting of a registry agreement with Afilias, the second highest bidder. We look forward to receiving a response from ICANN by no later than 16 September 2016.

Afilias reserves all of its rights at law and in equity, including, without limitation, relating to the issues raised in this letter.

Sincerely,

M. Scott Hemphill
Vice President & General Counsel

cc: Steve Crocker, Chairman of the ICANN Board
Göran Marby, President and Chief Executive Officer
Arif Hyder Ali, Dechert LLP

EXHIBIT C-104

Ex. C-104

Paula L. Zecchini (SBN 238731)
Aaron M. McKown (SBN 208781)
Jeffrey M. Monhait (*pro hac vice* to be submitted)
COZEN O'CONNOR
999 Third Avenue, Suite 1900
Seattle, WA 98104
Telephone: 206.340.1000
Toll Free Phone: 1.800.423.1950
Facsimile: 206.621.8783
E-Mail: pzecchini@cozen.com
amckown@cozen.com

Attorneys for Plaintiff
RUBY GLEN, LLC

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RUBY GLEN, LLC Plaintiff, vs. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS AND DOES 1-10 Defendant.	Case No.: **PLAINTIFF'S COMPLAINT FOR:** **1) BREACH OF CONTRACT** **2) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING** **3) NEGLIGENCE** **4) UNFAIR COMPETITION (VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200)** **5) DECLARATORY RELIEF** **DEMAND FOR JURY TRIAL**

Plaintiff RUBY GLEN, LLC (hereinafter, "Plaintiff") alleges as follows:

INTRODUCTION

1. Plaintiff was formed for the purpose of applying to the Internet Corporation for Assigned Names and Numbers ("ICANN") for the right to operate the .WEB generic top-level domain ("gTLD"). In reliance on ICANN's agreement to administer the bid process in accordance with the rules and guidelines contained in its gTLD Applicant Guidebook ("Applicant Guidebook"), Plaintiff paid ICANN a mandatory $185,000 application fee for the opportunity to secure the rights to the .WEB gTLD.

2. Throughout every stage of the four years it has taken to bring the .WEB gTLD to market, Plaintiff worked diligently to follow the rules and procedures promulgated by ICANN. In the past month, ICANN has done just the opposite. Instead of functioning as a disinterested regulator of a fair and transparent gTLD bid process, ICANN used its authority and oversight to unfairly benefit an applicant who is in admitted violation of a number of provisions of the Applicant Guidebook. Even more problematic, ICANN's conduct, tainted by an inherent conflict of interest, ensured that it would be the sole beneficiary of the multi-million dollar proceeds from the .WEB auction—a result that ICANN's own guidelines identify as a "last resort" outcome.

3. As set forth more fully herein, ICANN has deprived Plaintiff and other applicants for the .WEB gTLD of the right to compete for the .WEB gTLD in accordance with established ICANN policy and guidelines. Court intervention is necessary to ensure ICANN's compliance with its own accountability and transparency mechanisms in the ongoing .WEB bid process.

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PARTIES

4. Plaintiff RUBY GLEN, LLC is a limited liability company, duly organized and existing under the laws of the State of Delaware and operated by an affiliate located in Bellevue, Washington.

5. Defendant INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS ("ICANN") is a nonprofit corporation, organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California.

6. Defendants Does 1-10 are persons who instigated, encouraged, facilitated, acted in concert or conspiracy with, aided and abetted, and/or are otherwise responsible in some manner or degree for the breaches and wrongful conduct averred herein. Plaintiff is presently ignorant of the true names and capacities, whether individual, corporate, associate, or otherwise, of DOES 1 through 10, and will amend this Complaint to allege their true names and capacities when the same have been ascertained.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1332(a).

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c), in that Defendant ICANN resides and transacts business in this judicial district. Moreover, a substantial part of the events, omissions, and acts that are the subject matter of this action occurred within the Central District of California.

FACTS COMMON TO ALL CAUSES OF ACTION

A. ICANN'S FORMATION AND PURPOSE

9. ICANN is a non-profit corporation originally established to assist in the transition of the Internet domain name system from one of a single domain name operator to one with multiple companies competing to provide domain name

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registration services to Internet users "in a manner that w[ould] permit market mechanisms to support competition and consumer choice in the technical management of the [domain name system]."

10. ICANN's ongoing role is to provide technical coordination of the Internet's domain name system by introducing and promoting competition in the registration of domain names, while ensuring the security and stability of the domain name system. In that role, and as relevant here, ICANN was delegated the task of administering generic top level domains ("gTLDs") such as .COM, .ORG, or, in this case, .WEB.

11. Article 4 of ICANN's Articles of Incorporation requires ICANN to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets." A true and correct copy of ICANN's Articles of Incorporation is attached hereto as Exhibit A and incorporated herein by reference.

12. ICANN is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation as a whole. ICANN's Bylaws require ICANN, its Board of Directors and its staff to act in an open, transparent and fair manner with integrity. A true and correct copy of ICANN's Bylaws are attached hereto as Exhibit B and incorporated herein by reference. Specifically, the ICANN Bylaws require ICANN, its Board of Directors, and staff to:

a. "Mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness."

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

c. "Remain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."

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

e. "[O]perate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."

B. THE NEW gTLD PROGRAM AND APPLICANT GUIDEBOOK

13. ICANN is the sole organization worldwide with the power and ability to administer the bid processes for, and assign rights to, gTLDS. As of 2011, there were only 22 gTLDs in existence; the most common of which are .COM, .NET, and .ORG.

14. In or about 2011, ICANN approved the expansion of a number of the gTLDs available to eligible applicants as part of its 2012 Generic Top Level Domains Internet Expansion Program (the "New gTLD Program").

15. In January 2012, as part of the New gTLD Program, ICANN invited eligible parties to submit applications to obtain the rights to operate various new gTLDs, including, the .WEB and .WEBS gTLDs (collectively referred to herein as ".WEB" or the ".WEB gTLD"). In return, ICANN agreed to (a) conduct the bid process in a transparent manner and (b) abide by its own bylaws and the rules and guidelines set forth in ICANN's gTLD Applicant Guidebook ("Applicant Guidebook"). A true and correct copy of the Applicant Guidebook is attached hereto as Exhibit C and incorporated herein by reference.

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16. The Applicant Guidebook obligates ICANN to, among other things, conduct a thorough investigation into each of the applicants' backgrounds. This investigation is necessary to ensure the integrity of the application process, including a potential auction of last resort, and the existence of a level playing field among those competing to secure the rights to a particular new gTLD. It also ensures that each applicant is capable of administering any new gTLD, whether secured at the auction of last resort or privately beforehand, thereby benefiting the public at large.

17. ICANN has broad authority to investigate all applicants who apply to participate in the New gTLD Program. This investigative authority, willingly provided by each applicant as part of the terms and conditions in the guidelines contained in the Applicant Guidebook, is set forth in relevant part in Section 6 as follows:

> 8. … In addition, Applicant acknowledges that [sic] to allow ICANN to conduct thorough background screening investigations:
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> …
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> c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization; …
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> 11. Applicant authorizes ICANN to:
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> a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;
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> b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession…

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18. To aid ICANN in fulfilling its investigatory obligations, "applicant[s] (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on [their] behalf)" are required to provide extensive background information in their respective applications. In addition to serving the purposes noted above, this information also allows ICANN to determine whether an entity applicant or individuals associated with an entity applicant have engaged in the automatically disqualifying conduct set forth in Section 1.2.1 of the Applicant Guidebook, including convictions of certain crimes or disciplinary actions by governments or regulatory bodies. Finally, this background information is important to provide transparency to other applicants competing for the same gTLD.

19. Indeed, ICANN deemed transparency into an applicant's background so important when drafting the Applicant Guidebook that applicants submitting a new gTLD application are required to undertake a continuing obligation to notify ICANN of "any change in circumstances that would render any information provided in the application false or misleading," including "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant."

20. As a further condition of participating in the .WEB Auction, ICANN required Plaintiff and other applicants to agree to a broad covenant not to sue in order to apply for the .WEB contention set (the "Purported Release"). The Purported Release applies to all new gTLD applicants and states, in relevant part:

> Applicant hereby releases ICANN . . . from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN . . . in connection with ICANN's . . . review of this application. . . . Applicant agrees not to challenge . . . and irrevocably waives any right to sue or proceed in court.

21. The Purported Release is not subject to negotiation. If a potential applicant does not agree to the release, it cannot be considered for participation in the .WEB

auction. The Purported Release is also entirely one-sided in that it allows ICANN to absolve itself of wrongdoing while affording no remedy to applicants. Moreover, the Purported Release does not apply equally as between ICANN and the applicants because it does not prevent ICANN from proceeding with litigation against an applicant.

22. In lieu of the rights ICANN claims are waived by the Purported Release, ICANN purports to provide applicants with an independent review process, as a means to challenge ICANN's actions with respect to a gTLD application. The IRP is effectively an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators. The IRP is officially identified by ICANN as an Accountability Mechanism.

23. In accordance with the IRP, any entity materially affected by a decision or action by the Board that the entity believes is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action. The IRP results are advisory to the ICANN Board.

C. THE AUCTION PROCESS FOR NEW gTLDS

24. A large number of new gTLDs made available by ICANN in 2012 received multiple applications. In accordance with the Applicant Guidebook, where multiple new gTLD applicants apply to obtain the rights to operate the same new gTLD, those applicants are grouped into a "contention set." Applicants are encouraged in the Applicant Guidebook to resolve a new gTLD contention set (i.e., reach a determination as to which applicant will ultimately be assigned the right to operate the new gTLD at issue). If no other resolution occurs among the contention set members, ICANN ultimately facilitates and collects the proceeds of an auction process.

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25. Pursuant to the Applicant Guidebook, a contention set may be resolved privately among the members of a contention set or facilitated by ICANN as an auction of last resort. An ICANN auction of last resort will only be conducted when the members of a contention cannot reach agreement privately. By refusing to agree to resolve a contention set privately, one member of a contention set has the ability to force the other members, all of whom may be willing to resolve the contention set privately, to an ICANN auction of last resort.

26. For purposes of this matter, it is important to understand that the manner in which a contention set is resolved—whether by private agreement or ICANN auction—determines which entities will receive the proceeds from the winning bid. When a contention set is resolved privately, ICANN receives no financial benefit; in an ICANN auction, the entirety of the auction proceeds go to ICANN.

D. PLAINTIFF'S APPLICATION FOR THE .WEB gTLD

27. In May 2012, Plaintiff submitted application 1-1527-54849 for the .WEB contention set. Plaintiff also submitted with its application the sum of $185,000—the mandatory application fee.

28. In consideration of Plaintiff paying the $185,000 application fee, ICANN agreed to conduct the application process for the .WEB gTLD in a manner consistent with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in both the Applicant Guidebook and the Auction Rules, and in conformity with the laws of fair competition. Plaintiff would not have paid the $185,000 mandatory application fee absent the mutual consideration and promises set forth above.

29. Plaintiff's application passed ICANN's "Initial Evaluation" process on July 19, 2013. It is an approved member of the .WEB contention set and qualified to participate in the ICANN auction process for .WEB.

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E. NDC'S APPLICATION FOR THE .WEB gTLD

30. On June 13, 2012, NDC submitted application number 1-1296-36138 for the .WEB contention set.

31. Among other things, the application required NDC to provide "the identification of directors, officers, partners, and major shareholders of that entity." As relevant here, NDC provided the following response to Sections 7 and 11 of the application:

Secondary Contact

7(a). Name

Mr. Nicolai Bezsonoff

7(b). Title

Manager

Applicant Background

11(a). Name(s) and position(s) of all directors

Jose Ignacio Rasco III	Manager
Juan Diego Calle	Manager
Nicolai Bezsonoff	Manager

11(b). Name(s) and position(s) of all officers and partners

Jose Ignacio Rasco III	CFO
Juan Diego Calle	CEO
Nicolai Bezsonoff	COO

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Domain Marketing Holdings, LLC	Not Applicable
NUCO LP, LLC	Not Applicable

32. By submitting its application for the .WEB gTLD and electing to participate in for the .WEB contention set, NDC expressly agreed to the terms and

1 conditions set forth in the Applicant Guidebook as well as Auction Rules, including
2 specifically, and without limitation, Sections 1.2.1, 1.2.7, 6.1 and 6.10 of the Applicant
3 Guidebook.

4 33. The Applicant Guidebook requires an applicant to notify ICANN of any
5 changes to its application; including the applicant background screening information
6 required under Section 1.2.1, the failure to do so can result in the denial of an
7 application. For example, Section 1.2.7 imposes an ongoing duty to update "applicant-
8 specific information such as changes in financial position and changes in ownership or
9 control of the applicant." Similarly, pursuant to Section 6.1, "[a]pplicant agrees to
10 notify ICANN in writing of any change in circumstances that would render any
11 information provided in the application false or misleading."

12 34. In addition to a continuing obligation to provide complete, updated, and
13 accurate information related to its application, Section 6.10 of the Applicant Guidebook,
14 strictly prohibits an applicant from "resell[ing], assign[ing], or transfer[ring] any of
15 applicant's rights or obligations in connection with the application." An applicant that
16 violates this prohibition is subject to disqualification from the contention set.

17 35. ICANN failed to investigate credible evidence supporting a determination
18 that NDC violated each of these guidelines—evidence that it has held for over a month.
19 Despite the urging of multiple .WEB applicants and NDC's written admissions of
20 potentially disqualifying changes to NDC's application, ICANN continues to turn a
21 blind eye to the direct detriment of other .WEB applicants and to ICANN's foundational
22 duties to administer the New gTLD Program with fairness and transparency.

23 **F. NDC'S FAILURE TO NOTIFY ICANN OF CHANGES TO ITS**
24 **APPLICATION**

25 36. On or about June 1, 2016, Plaintiff learned that NDC was the only member
26 of the .WEB contention set unwilling to resolve the contention set in advance and in
27 lieu of the ICANN auction.
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37. At the time, Plaintiff found the decision unusual given NDC's historical willingness and enthusiasm to participate in the private resolution process. Overall, NDC has applied for 13 gTLDs in the New gTLD Program; nine of those gTLDs were resolved privately with NDC's agreement. The auction for the .WEB gTLD is the first auction in which NDC has pushed for an ICANN auction of last resort.

38. On June 7, 2016, Plaintiff contacted NDC in writing to inquire as to whether NDC might reconsider its recent decision to forego resolution of the .WEB contention prior to ICANN's auction of last resort. In response, NDC stated that its position had not changed. NDC also advised, however, that Nicolai Bezsonoff, who is identified on NDC's .WEB application as Secondary Contact, Manager, and COO, is "no longer involved with [NDC's] applications." NDC also made statements indicating a potential change in the ownership of NDC, including an admission that the board of NDC had changed to add "several others" and that he had to check with the "powers that be," implying that he and his associate on the email were no longer in control. The email communication containing these statements is set forth in pertinent part below:

From: Jose Ignacio Rasco Contact Information Redacted
Subject: Re: .web
Date: June 7, 2016 at 11:32:17 AM EDT
To: Jon Nevett <Contact Information Redacted
Cc: Juan Diego Calle Contact Information Redacted

Jon,

[Redacted]

Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our program and Juan sits on the board with me and several others.

[Redacted]

Best,
Jose

39. Noting that NDC's conduct and statements (a) appeared to directly contradict information in NDC's .WEB application and (b) suggested that NDC had

1 either resold, assigned, or transferred its rights in the application in violation of its duties
2 under the Applicant Guidebook, Plaintiff diligently contacted ICANN staff in writing
3 with the discrepancy on or about June 22, 2016 to understand who it was competing
4 against for .WEB and improve transparency over the process for ICANN and the other
5 .WEB applicants.

6 40. After engaging in a series of discussions with ICANN staff, Plaintiff
7 decided to formally raise the issue with the ICANN Ombudsman on or about June 30,
8 2016; as of the filing of this Complaint, Plaintiff's most recent correspondence with the
9 ICANN Ombudsman, dated July 10, 2016, in which it provided further information
10 related to the statements made by NDC, remains unanswered.

11 41. At every opportunity, Plaintiff raised the need for a postponement of the
12 .WEB auction to allow ICANN time to fulfill its obligations to (a) investigate the
13 contradictory representations made by NDC in relation to its pending application; (b)
14 address NDC's continued status as an auction participant; and (c) provide all the other
15 .WEB applicants the necessary transparency into who they were competing against. It
16 also discussed the matter with ICANN staff and the Ombudsman at ICANN's most
17 recent meeting in Helsinki, Finland, which took place from June 27-30, 2016.

18 42. On July 11, 2016, Radix FZC (on behalf of DotWeb Inc.) and Schlund
19 Technologies GmbH, each members of the .WEB contention set, sent correspondence
20 to ICANN stating their own concerns in proceeding with the auction of last resort
21 scheduled for July 27, 2016. The correspondence stated:

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23 > We support a postponement of the auction, to give ICANN and the other
24 > applicants time to investigate whether there has been a change of
> leadership and/or control of another applicant, NU DOT CO LLC. To do
25 > otherwise would be unfair, as we do not have transparency into who leads
> and controls that applicant as the auction approaches.

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G. ICANN'S DECISION TO PROCEED WITH THE .WEB AUCTION

43. On July 13, 2016, ICANN issued a statement denying the collective request of multiple members of the .WEB contention set to postpone the July 27, 2016 auction to allow for a full and transparent investigation into apparent discrepancies in the NDC application, as highlighted by NDC's own statements. Without providing any detail, ICANN simply stated as follows:

> Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.

44. Contrary to its obligations of accountability and transparency, ICANN's decision did not address the manner or scope of the claimed investigation nor did it address whether a specific inquiry was made into (a) Mr. Bezsonoff's current status, if any, with NDC, (b) the identity of "several other[]" new and unvetted members of NDC's board, or (c) any change in ownership—the very issues raised by NDC's own statements.

45. Plaintiff was unable to learn any further information regarding the extent of the investigation undertaken by ICANN, other than it was limited to inquiries only to NDC and no independent corroboration was sought or obtained.

46. Despite the clear credibility issues raised by NDC's own contradictory statements, ICANN conducted no further investigation. Indeed, ICANN informed Plaintiff that it never even contacted Mr. Bezsonoff or interviewed the other individuals identified in Sections 7 and 11 of NDC's application prior to reaching its conclusion.

47. To be clear, the financial benefit to ICANN of resolving the .WEB contention set by way of an ICANN auction is no small matter—ICANN's stated net proceeds from the 15 ICANN auctions conducted since June 2014 total $101,357,812. The most profitable gTLDs from those auctions commanded winning bids of $41,501,000 (.SHOP), $25,001,000 (.APP), $6,706,000 (.TECH), $5,588,888

(.REALTY), $5,100,175 (.SALON) and $3,359,000 (.MLS). ICANN has not yet determined what it will do with the enormous proceeds from these auctions.

H. PLAINTIFF'S REQUEST FOR RECONSIDERATION

48. ICANN's Bylaws provide an established accountability mechanism by which an entity that believes it was materially affected by an action or inaction by ICANN staff that contravened established policies and procedures may submit a request for reconsideration or review of the conduct at issue. The review is conducted by ICANN's Board Governance Committee.

49. On July 17, 2016, Plaintiff and Radix FZC, an affiliate of another member of the .WEB contention set, jointly submitted a Reconsideration Request to ICANN, in response to the actions and inactions of ICANN staff in connection with the decision set forth in the ICANN's July 13, 2016 correspondence.

50. The Reconsideration Request sought reconsideration of (a) ICANN's determination that it "found no basis to initiate the application change request process" in response to the contradictory statements of NDC and (b) ICANN's improper denial of the request made by multiple contention set members to postpone the .WEB auction of last resort, which would have provided ICANN the time necessary to conduct a full and transparent investigation into material discrepancies in NDC's application and its eligibility as a contention set member.

51. The Reconsideration Request highlighted the following issues:

a. ICANN's failure to forego a full and transparent investigation into the material representations made by NDC is a clear violation of the principles and procedures set forth in the ICANN Articles of Incorporation, Bylaws and the Applicant Guidebook.

b. ICANN is the party with the power and resources necessary to delay the ICANN auction of last resort while the accuracy of NDC's current application is evaluated utilizing the broad investigatory

1 controls contained in the Applicant Guidebook, to which all
2 applicants, including NDC, agreed.
3 c. Postponement of the .WEB auction of last resort provides the most
4 efficient manner for resolving the current dispute for all parties by
5 (i) sparing ICANN and the many aggrieved applicants the time and
6 expense of legal action while (ii) avoiding the very real likelihood
7 of a court-mandated unwinding of the ICANN auction of last resort
8 should it proceed.
9 d. ICANN'S July 13, 2016 decision raises serious concerns as to
10 whether the scope of ICANN's investigation was impacted by the
11 inherent conflict of interest arising from a perceived financial
12 benefit to ICANN if the Auction goes forward as scheduled.
13 e. ICANN's New gTLD Program Auctions guidelines state that a
14 contention set would only proceed to auction where all active
15 applications in the contention set have "**no pending ICANN**
16 **Accountability Mechanisms,**" i.e., no pending Ombudsman
17 complaints, Reconsideration Requests or IRPs.
18 52. On July 21, 2016, ICANN denied the Request for Reconsideration. In
19 doing so, ICANN merely relied on statements from NDC that directly contradicted
20 those contained in NDC's earlier correspondence. Once again, despite the clear
21 credibility issues raised by NDC's own contradictory statements, ICANN failed and
22 refused to contact Mr. Bezsonoff or interview the other individuals identified in
23 Sections 7 and 11 of NDC's application prior to reaching its conclusion.
24 53. On July 22, 2016, Plaintiff initiated ICANN's Independent Review
25 Process by filing ICANN's Notice of Independent Review. The IRP remains pending.
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FIRST CAUSE OF ACTION

(Breach of Contract against Defendant ICANN)

54. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 53 above as though fully set forth herein.

55. In June 2012, ICANN invited eligible parties to submit applications to obtain the rights to, among others, the .WEB gTLD as part of the New gTLD Program. In doing so, ICANN promised the potential applicants that it would (a) conduct the bid process in a transparent manner, (b) ensure competition, and (c) abide by its own Bylaws and the rules set forth in the Applicant Guidebook.

56. On or about June 13, 2012, Plaintiff submitted an application to ICANN to obtain the rights to the .WEB gTLD. In consideration of ICANN's promise to abide by its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in the Applicant Guidebook in its administration of the .WEB auction process, Plaintiff paid ICANN a sum of $185,0000—the mandatory application fee.

57. In consideration of Plaintiff paying the sum of $185,000, ICANN promised to conduct the application process for the .WEB gTLD in a manner consistent with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in both the Applicant Guidebook and the Auction Rules, and in conformity with the laws of fair competition.

58. Plaintiff would not have paid the $185,000 mandatory application fee or spent time and other resources absent the mutual consideration and promises set forth above. Plaintiff performed all conditions, covenants, and promises on its part to be performed in accordance with the agreed upon terms of participating in the New gTLD Program, except those obligations, if any, that it has been prevented or excused from performing as a result of the misconduct set forth in this Complaint.

59. ICANN has materially breached its obligations to Plaintiff, as set forth in ICANN's Bylaws and Articles of Incorporation, and the Applicant Guidebook by (a)

failing to thoroughly investigate the issues raised by NDC's own statements and (b) refusing to postpone the .WEB auction of last resort to allow for a full and transparent investigation into the apparent discrepancies in NDC's .WEB application.

60. Specifically, ICANN's acts and omission violated, among other things:

a. Article 1, section 2.8 and Article III, Section 1 of ICANN's Bylaws, which require ICANN to "[m]ak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness" and "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." ICANN obligates each applicant who seeks to participate in the New gTLD auction process to affirm that the statements and representations contained in the application are true and accurate; applicants also undertake a continuing obligation to update their application when changes in circumstance affect an application's accuracy. By failing to engage in a thorough, open, and transparent investigation of the contradictory statements made by NDC in relation to its application, as well as an apparent change of control with potential antitrust implications, ICANN plainly—and inexplicably—failed to reach its decisions by "applying documented policies neutrally and objectively, with integrity and fairness."

b. Article 1, section 2.9 of ICANN's Bylaws, which requires ICANN to "[act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected." In undertaking only a cursory examination of the contradictory statements made by NDC and the apparent change in NDC's rights to its application, ICANN

failed to balance ICANN's interest in a swift resolution of the concerns raised by the members of the .WEB contention set with its obligation to obtain sufficient assurances and information from the individuals and entities at the center of the statements made by NDC; at the very least, ICANN should have conducted interviews with Mr. Bezsonoff and all other individuals identified in Section 11 of NDC's application prior to reaching its conclusion.

c. Article 1, section 2.10 of ICANN's Bylaws, which requires ICANN to "[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness." By failing to make use of the processes established in Sections 6.8 and 6.11 to the Applicant Guidebook in investigating an admitted failure by NDC to abide by its continuing obligation to update its application, ICANN staff disregarded the very accountability mechanisms put in place to serve and protect the .WEB contention set, the Internet community, and the public at large. This error was compounded by the cursory dismissal of the concerns raised by multiple members of the .WEB contention set relating to the accuracy of the representations made in NDC's application. By failing to apprise the members of the contention set as to the manner and scope of the investigation conducted by ICANN staff, ICANN failed to ensure that it would hold itself accountable to any gTLD applicant, let alone the Internet community and the public.

d. Article II, section 3 of ICANN's Bylaws, which states that "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the

promotion of effective competition." There can be no questioning the fact that the Staff Action resulted in disparate treatment in favor of NDC. On one hand, there are clear statements from NDC that representations made in its application are inaccurate and there is ample evidence that NDC has either resold, assigned, or transferred all or some of its rights to its .WEB application. On the other hand, when pressed by multiple members of the contention set to fully investigate the matter, ICANN provided only a conclusory statement that raises more questions than it resolves. To the extent it had reason to engage in such disparate treatment of the members of the .WEB contention set, ICANN failed to provide such a reason in reaching the determinations at issue in this Request.

61. ICANN also promised that a contention set would only proceed to auction where all active applications in the contention set have "**no pending ICANN Accountability Mechanisms**." ICANN breached this promise by refusing to postpone the .WEB auction of last resort while Plaintiff's Reconsideration Request remains pending and its Ombudsman complaint remains unresolved. ICANN further breached this promise by moving forward with the .WEB auction of last resort while Plaintiff's IRP, initiated on July 22, 2016, remains pending.

62. On information and belief, Plaintiff alleges that the breaches set forth above resulted from a pre-textual "investigation" into the admissions made by NDC and ICANN's issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff alleges that ICANN intentionally failed to abide by its contractual obligations to conduct a full and open investigation into NDC's admission because it was in ICANN's interest that the .WEB contention set be resolved by way of an ICANN auction. As such, Plaintiff alleges that ICANN willfully and intentionally committed the wrongful acts described above.

63. As a direct and proximate result of ICANN's breaches, Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue from third parties, profits, consequential costs and expenses, market share, reputation, and goodwill, in an amount to be determined at trial but not less than ten million dollars ($10,000,000) plus interest.

SECOND CAUSE OF ACTION

(Breach of the Covenant of Good Faith and Fair Dealing against Defendant ICANN)

64. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 53 above as though fully set forth herein.

65. An implied covenant of good faith and fair dealing exists between Plaintiff and ICANN as a result of the contractual relationship entered into as part of the .WEB gTLD application process.

66. ICANN breached the covenant of good faith and fair dealing when it acted in a way that deprived Plaintiff of the benefits of the agreement as set forth in the Applicant Guidebook, namely that the administration of the bid process for the .WEB gTLD would be founded on the principles of fairness and transparency.

67. ICANN breached the covenant of good faith and fair dealing when it:

a. Failed to conduct due diligence and an adequate investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions;

b. Failed to conduct interviews with Mr. Bezsonoff and all other individuals identified in Sections 7 and 11 of NDC's application as part of an investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions;

c. Failed to provide a necessary level of transparency into the identity and leadership of a competing applicant; and

d. Refused to postpone the ICANN auction of last resort to allow for a full and transparent investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions.

68. On information and belief, Plaintiff alleges that the breaches set forth above resulted from a pre-textual "investigation" into the admissions made by NDC and ICANN's issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff alleges that ICANN intentionally failed to abide by its contractual obligations to conduct a full and open investigation into NDC's admission because it was in ICANN's interest that the .WEB contention set be resolved by way of an ICANN auction. As such, Plaintiff alleges that ICANN willfully and intentionally committed the wrongful acts described above.

69. As a direct and proximate result of ICANN's breaches as set forth above, Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue from third parties, profits, consequential costs and expenses, market share, reputation, and good will.

THIRD CAUSE OF ACTION

(Negligence against Defendant ICANN)

70. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 53 above as though fully set forth herein.

71. ICANN owed Plaintiff a duty to act with proper care and diligence in administering the .WEB auction process in accordance with its own Bylaws, Articles of Incorporation, and the rules and procedures as stated in the Applicant Guidebook.

72. ICANN breached the duty owed Plaintiff by, among other things:

a. Failing to conduct due diligence and an adequate investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions;

b. Failing to conduct interviews with Mr. Bezsonoff and all other individuals identified in Sections 7 and 11 of NDC's application as part of an investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions;

c. Refusing to postpone the ICANN auction of last resort to allow for a full and transparent investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions; and

d. Failing to provide a rationale for the decision set forth in the July 13, 2016 correspondence.

73. As a direct and proximate result of ICANN's breaches as set forth above, Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue from third parties, profits, consequential costs and expenses, market share, reputation, and good will.

FOURTH CAUSE OF ACTION

(Unfair Competition in Violation of Cal. Bus. & Prof. Code §17200 against Defendant ICANN)

74. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 53 above as though fully set forth herein.

75. The California Unfair Competition Law ("UCL") protects both consumers and competitors by prohibiting "unfair competition," which is defined, in the disjunctive, by Business and Professions Code section 17200 as including "any unlawful, unfair or fraudulent business act or practice" as well as "unfair, deceptive, untrue or misleading advertising."

76. Plaintiff has standing to pursue this claim under Business and Professions Code section 17204 because Plaintiff has suffered injury in fact and has lost money or property as a result of ICANN's actions as set forth above. The losses include, but are not limited to, expenses incurred by Plaintiff in exhausting every available formal and

informal avenue of recourse with ICANN prior to the filing of the above-captioned action, including legal fees related to the preparation and submission of the Reconsideration Request. Losses also include the $185,000 application fee paid to ICANN to participate as an application in the .WEB contention set.

77. The following acts and omissions of ICANN, among others, were unlawful under the UCL:

a. ICANN's imposition of the unenforceable contract terms contained in the Purported Release, in violation of California Civil Code section 1668, which declares violative of public policy those contracts that "have for their object, directly or indirectly, to exempt anyone from the responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent…."

b. ICANN's imposition of the unenforceable contract terms contained in the Purported Release, in violation of California Civil Code § 1770(a)(19), which defines as unlawful, the "[i]nsert[ion] of an unconscionable provision in [a] contract."

78. The following acts and omissions of ICANN, among others, were unfair under the UCL:

a. Plaintiff hereby incorporates by this reference the allegations of Paragraph 77 and its subparts as stated herein; each act therein alleged is also an unfair act or practice under the UCL;

b. ICANN's decision to conduct a cursory investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions without regard for rights of the other .WEB contention set members;

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c. ICANN's decision to forego a postponement of the ICANN auction of last resort scheduled for July 27, 2016 without conducting an open and transparent investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions; and

d. ICANN's decision to allow NDC to continue to participate as a .WEB contention set member despite NDC's own admission of inaccuracies contained in its application, in violation of the guidelines contained in the Applicant Guidebook.

79. The following acts and omissions of ICANN, among others, were fraudulent under the UCL in that they were likely to deceive, and in fact did deceive, members of the public:

a. Plaintiff hereby incorporates by this reference the allegations of Paragraphs 77 and its subparts as if restated herein; each is also a fraudulent act or practice under the UCL;

b. ICANN's false representation that it would make all decisions in administering the .WEB auction process "by applying documented policies neutrally and objectively, with integrity and fairness";

c. ICANN's false representation that in administering the .WEB auction process, it would "[act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected";

d. ICANN's false representation that in administering the .WEB auction process, it would"[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness";

e. ICANN's false representation that in administering the .WEB auction process, it would "apply its standards, policies, procedures,

or practices inequitably or single out any particular party for disparate treatment";

f. ICANN's false representation that all applicants would be subject to the same agreement, rules, and procedures;

g. ICANN's false representation that it would require applicants to update their applications with "any change in circumstances that would render any information provided in the application false or misleading," including "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant"; and

h. ICANN's false representation that a contention set would only proceed to auction where all active applications in the contention set have "**no pending ICANN Accountability Mechanisms**."

80. On information and belief, the conduct identified in Paragraphs 77-79 and their subparts resulted from the intentional conduct of ICANN.

81. With specific reference to the conduct identified in Paragraphs 78-79 and their subparts conduct alleged above, Plaintiff alleges that ICANN's "investigation" into the admissions made by NDC and ICANN's subsequent issuance of its July 13, 2016 decision were pre-textual in nature, the goal of which was to ensure ICANN secured a windfall from the .WEB contention set being resolved by way of an ICANN auction of last resort. Specifically, Plaintiff alleges that ICANN intentionally failed to abide by its contractual obligations to conduct a full and open investigation into NDC's admission because it was in ICANN's interest that the .WEB contention set be resolved by way of an ICANN auction. As such, Plaintiff alleges that it was in ICANN's interest to willfully and intentionally commit the wrongful acts described above.

82. Pursuant to Business and Professions Code section 17203 and the equitable powers of the Court, Plaintiff seeks an order (a) enjoining ICANN from proceeding

with the ICANN auction of last resort currently scheduled for July 27, 2016 until the claims presented by way of the above-captioned action are resolved and (b) enjoining ICANN from engaging in the unlawful, unfair and fraudulent business acts and practices described above. Plaintiff also seeks an order requiring ICANN to comply with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in the Applicant Guidebook, in the continued administration of the .WEB contention set process and to take such corrective actions and adopt such remedial measures as are necessary to prevent the further occurrence of the acts or practices alleged herein.

83. Plaintiff also seeks an order requiring restitution of any and all monies obtained by ICANN from Plaintiff as a result of the intentionally unlawful, unfair, and fraudulent described above. Plaintiff's request includes, but is not limited to, the restitution of any and all fees paid by or monies received from Plaintiff in relation to the .WEB contention set process.

84. Preventing the unlawful business practices engaged in by ICANN will ensure a significant benefit to the other .WEB contention set members as well as the public at large. Moreover, the financial burden of pursuing private enforcement substantially exceeds the financial benefit to Plaintiff. Thus, in the interest of justice, Plaintiff seeks attorneys' fees in bringing this private attorney general claim pursuant to Civil Code section 1021.5 in an amount subject to proof.

FIFTH CAUSE OF ACTION

(Declaratory Relief—Against Defendant ICANN)

85. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 53 above as though fully set forth herein.

86. An actual and justiciable controversy has arisen, and now exists, between Plaintiff, on one hand, and ICANN, on the other, regarding the legality and effect of the Purported Release contained in the Applicant Guidebook.

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87. As a condition of participating in the .WEB contention set process, ICANN required Plaintiff and other applicants to sign the Applicant Guidebook, which contained a covenant not to sue in order to apply for the .WEB contention set. The Purported Release applies to all New gTLD applicants and states, in relevant part:

> Applicant hereby releases ICANN . . . from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN . . . in connection with ICANN's . . . review of this application. . . . Applicant agrees not to challenge . . . and irrevocably waives any right to sue or proceed in court.

32. The Purported Release is not subject to negotiation: If a potential applicant does not agree to the release, it cannot be considered for participation in the .WEB contention set process. The Purported Release is also entirely unilateral in that it allows ICANN to absolve itself of wrongdoing while affording no remedy to applicants. Moreover, the Purported Release does not apply equally as between ICANN and the applicants because it does not prevent ICANN from proceeding with litigation against an applicant.

33. Plaintiff seeks a declaration of its rights regarding the enforceability of the Purported Release in light of California Civil Code Section 1668, which prohibits the type of broad exculpatory clauses contained in the Purported Release: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property or another, or violation of law, whether willful or negligent, are against the policy of the law."

34. Plaintiff maintains that, on its face, the Release is "against the policy of the law" because it exempts ICANN from any and all claims arising out of the application process, even those arising from fraudulent or willful conduct.

35. As such, an actual controversy has arisen and now exists between Plaintiff and ICANN as to the enforceability of the Purported Release. Plaintiff desires a judicial

determination and declaration that the Purported Release is unenforceable, unconscionable, and/or void as a matter of public policy. Such a declaration is necessary and appropriate at this time so that Plaintiff may ascertain its rights with respect to the enforceability of the Purported Release.

WHEREFORE, Plaintiff RUBY GLEN, LLC prays for relief as follows:

1. For compensatory damages according to proof at the time trial;
2. For general damages according to proof;
3. For restitutionary damages according to proof;
4. An injunction requiring ICANN to refrain from conducting the auction of last resort for the .WEB gTLD pending a final decision on the merits of this matter;
5. An injunction requiring ICANN to refrain from assigning the rights to the .WEB gTLD pending a final decision in the merits of this matter;
6. Attorneys' fees and costs to the extent permitted by law; and
7. For such other relief as the Court deems just and proper against all Defendants.

DEMAND FOR JURY TRIAL

Plaintiff hereby requests a jury trial on the following causes of action asserted in the Complaint:

1. First Cause of Action for Breach of Contract;
2. Second Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing;
3. Third Cause of Action for Negligence; and
4. Fourth Cause of Action for Unfair Competition in Violation of Business and Professions Code section 17200

Dated: July 22, 2016

By: */s/ Paula Zecchini*

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EXHIBIT C-105

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Attorneys for Plaintiff
RUBY GLEN, LLC

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RUBY GLEN, LLC

Plaintiff,

vs.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS AND DOES 1-10

Defendant.

Case No.: 2:16-cv-05505-PA-AS

PLAINTIFF'S AMENDED COMPLAINT FOR:

1) **BREACH OF CONTRACT**
2) **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**
3) **NEGLIGENCE**
4) **UNFAIR COMPETITION (VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200)**
5) **DECLARATORY RELIEF**

Plaintiff RUBY GLEN, LLC (hereinafter, "Plaintiff") alleges as follows:

INTRODUCTION

1. Plaintiff was formed for the purpose of applying to the Internet Corporation for Assigned Names and Numbers ("ICANN") for the right to operate the .WEB generic top-level domain ("gTLD"). In reliance on ICANN's agreement to administer the bid process in accordance with the rules and guidelines contained in its gTLD Applicant Guidebook ("Applicant Guidebook"), Plaintiff paid ICANN a mandatory $185,000 application fee for the opportunity to secure the rights to the .WEB gTLD.

2. Throughout every stage of the four years it has taken to bring the .WEB gTLD to market, Plaintiff worked diligently to follow the rules and procedures promulgated by ICANN. In the past month, ICANN has done just the opposite. Instead of functioning as a disinterested regulator of a fair and transparent gTLD bid process, ICANN used its authority and oversight to unfairly benefit an applicant who is in admitted violation of a number of provisions of the Applicant Guidebook. ICANN's conduct, tainted by an inherent conflict of interest, ensured that it would be the sole beneficiary of the $135 million proceeds from the .WEB auction—a result that ICANN's own guidelines identify as a "last resort" outcome. Even more problematic, ICANN allowed a third party to make an eleventh-hour end run around the application process to the detriment of Plaintiff, the other legitimate applicants for the .WEB gTLD and the Internet community at large.

3. ICANN's failure to administer the gTLD application process in a fair, proper, and transparent manner is not unique to the .WEB gTLD applicants. To the contrary, in the days following the filing of this action, ICANN was publicly rebuked by an independent review panel for its "cavalier" and seemingly routine dismissal of concerns raised by gTLD applicants without "mak[ing] any reasonable investigation" into the facts underlying those concerns as required by ICANN's Bylaws, Articles of

Incorporation and the Applicant Guidebook. The independent review panel also highlighted what it deemed to be improper influence by ICANN staff on purportedly independent ICANN accountability mechanisms established to handle concerns raised by gTLD applicants.

4. As set forth more fully herein, ICANN deprived Plaintiff and the other applicants for the .WEB gTLD of the right to compete for the .WEB gTLD in accordance with established ICANN policy and guidelines. Court intervention is necessary to ensure ICANN's compliance with its own accountability and transparency mechanisms in the ongoing .WEB bid process and to prevent the assignment of the .WEB gTLD to an entity that is in admitted violation of ICANN's own policies.

PARTIES

5. Plaintiff Ruby Glen, LLC is a limited liability company, duly organized and existing under the laws of the State of Delaware and operated by Donuts Inc., an affiliate located in Bellevue, Washington. The sole member of Ruby Glen, LLC is Covered TLD, LLC ("Covered TLD"). Covered TLD is a limited liability company, duly organized and existing under the laws of the State of Delaware. Covered TLD has a sole member, Donuts Inc. ("Donuts"). Donuts is a for-profit corporation, duly organized and existing under the laws of the State of Delaware, with its principal place of business in Bellevue, Washington.

6. Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") is a nonprofit corporation, organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California.

7. Defendants Does 1-10 are persons who instigated, encouraged, facilitated, acted in concert or conspiracy with, aided and abetted, and/or are otherwise responsible in some manner or degree for the breaches and wrongful conduct averred herein. Plaintiff is presently ignorant of the true names and capacities, whether individual, corporate, associate, or otherwise, of DOES 1 through 10, and will amend this

Complaint to allege their true names and capacities when the same have been ascertained.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1332(a) as the parties are completely diverse in citizenship and the amount in controversy exceeds $75,000.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c), in that Defendant ICANN resides and transacts business in this judicial district. Moreover, a substantial part of the events, omissions, and acts that are the subject matter of this action occurred within the Central District of California.

FACTS COMMON TO ALL CAUSES OF ACTION

A. ICANN'S FORMATION AND PURPOSE

10. ICANN is a non-profit corporation originally established to assist in the transition of the Internet domain name system from one of a single domain name operator to one with multiple companies competing to provide domain name registration services to Internet users "in a manner that w[ould] permit market mechanisms to support competition and consumer choice in the technical management of the [domain name system]."

11. ICANN's ongoing role is to provide technical coordination of the Internet's domain name system by introducing and promoting competition in the registration of domain names, while ensuring the security and stability of the domain name system. In that role, and as relevant here, ICANN was delegated the task of administering generic top level domains ("gTLDs") such as .COM, .ORG, or, in this case, .WEB.

12. Article 4 of ICANN's Articles of Incorporation requires ICANN to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international

conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets." A true and correct copy of ICANN's Articles of Incorporation is attached hereto as Exhibit A and incorporated herein by reference.

13. ICANN is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation as a whole. ICANN's Bylaws require ICANN, its Board of Directors and its staff to act in an open, transparent and fair manner with integrity. A true and correct copy of ICANN's Bylaws are attached hereto as Exhibit B and incorporated herein by reference. Specifically, the ICANN Bylaws require ICANN, its Board of Directors, and staff to:

a. "Mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness."

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

c. "Remain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."

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

e. "[O]perate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."

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B. THE NEW gTLD PROGRAM AND APPLICANT GUIDEBOOK

14. ICANN is the sole organization worldwide with the power and ability to administer the bid processes for, and assign rights to, gTLDS. As of 2011, there were only 22 gTLDs in existence; the most common of which are .COM, .NET, and .ORG.

15. In or about 2011, ICANN approved the expansion of a number of the gTLDs available to eligible applicants as part of its 2012 Generic Top Level Domains Internet Expansion Program (the "New gTLD Program").

16. In January 2012, as part of the New gTLD Program, ICANN invited eligible parties to submit applications to obtain the rights to operate various new gTLDs, including, the .WEB and .WEBS gTLDs (collectively referred to herein as ".WEB" or the ".WEB gTLD"). In return, ICANN agreed to (a) conduct the bid process in a transparent manner and (b) abide by its own bylaws and the rules and guidelines set forth in ICANN's gTLD Applicant Guidebook ("Applicant Guidebook"). A true and correct copy of the Applicant Guidebook is attached hereto as Exhibit C and incorporated herein by reference.

17. The Applicant Guidebook obligates ICANN to, among other things, conduct a thorough investigation into each of the applicants' backgrounds. This investigation is necessary to ensure the integrity of the application process, including a potential auction of last resort, and the existence of a level playing field among those competing to secure the rights to a particular new gTLD. It also ensures that each applicant is capable of administering any new gTLD, whether secured at the auction of last resort or privately beforehand, thereby benefiting the public at large.

18. ICANN has broad authority to investigate all applicants who apply to participate in the New gTLD Program. This investigative authority, willingly provided by each applicant as part of the terms and conditions in the guidelines contained in the Applicant Guidebook, is set forth in relevant part in Section 6 as follows:

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8. … In addition, Applicant acknowledges that [sic] to allow ICANN to conduct thorough background screening investigations:

…

c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization; …

…

11. Applicant authorizes ICANN to:

a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;

b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession…

19. To aid ICANN in fulfilling its investigatory obligations, "applicant[s] (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on [their] behalf)" are required to provide extensive background information in their respective applications. In addition to serving the purposes noted above, this information also allows ICANN to determine whether an entity applicant or individuals associated with an entity applicant have engaged in the automatically disqualifying conduct set forth in Section 1.2.1 of the Applicant Guidebook, including convictions of certain crimes or disciplinary actions by governments or regulatory bodies. Finally, this background information is important to provide transparency to other applicants competing for the same gTLD.

20. Indeed, ICANN deemed transparency into an applicant's background so important when drafting the Applicant Guidebook that applicants submitting a new

gTLD application are required to undertake a continuing obligation to notify ICANN of "any change in circumstances that would render any information provided in the application false or misleading," including "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant."

21. As a further condition of participating in the .WEB auction, ICANN required Plaintiff and other applicants to agree to a broad covenant not to sue in order to apply for the .WEB contention set (the "Purported Release"). The Purported Release applies to all new gTLD applicants and states, in relevant part:

> Applicant hereby releases ICANN . . . from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN . . . in connection with ICANN's . . . review of this application. . . . Applicant agrees not to challenge . . . and irrevocably waives any right to sue or proceed in court.

22. The Purported Release is not subject to negotiation. If a potential applicant does not agree to the release, it cannot be considered for participation in the .WEB auction. The Purported Release is also entirely one-sided in that it allows ICANN to absolve itself of wrongdoing while affording no remedy to applicants. Moreover, the Purported Release does not apply equally as between ICANN and the applicants because it does not prevent ICANN from proceeding with litigation against an applicant.

23. In lieu of the rights ICANN claims are waived by the Purported Release, ICANN purports to provide applicants with an independent review process, as a means to challenge ICANN's actions with respect to a gTLD application. The IRP is effectively an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators. The IRP is officially identified by ICANN as an Accountability Mechanism.

24. In accordance with the IRP, any entity materially affected by a decision or action by the Board that the entity believes is inconsistent with the Articles of

Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

C. THE AUCTION PROCESS FOR NEW gTLDS

25. A large number of new gTLDs made available by ICANN in 2012 received multiple applications. In accordance with the Applicant Guidebook, where multiple new gTLD applicants apply to obtain the rights to operate the same new gTLD, those applicants are grouped into a "contention set."

26. Pursuant to the Applicant Guidebook, a contention set may be resolved privately among the members of a contention set or facilitated by ICANN as an auction of last resort. Applicants are encouraged to privately resolve a new gTLD contention set (i.e., reach a determination as to which applicant will ultimately be assigned the right to operate the new gTLD at issue). An ICANN auction of last resort will only be conducted when the members of a contention cannot reach agreement privately. By refusing to agree to resolve a contention set privately, one member of a contention set has the ability to force the other members, all of whom may be willing to resolve the contention set privately, to an ICANN auction of last resort.

27. For purposes of this matter, it is important to understand that the manner in which a contention set is resolved—whether by private agreement or ICANN auction—determines which entities will receive the proceeds from the winning bid. When a contention set is resolved privately, ICANN receives no financial benefit; in an ICANN auction, the entirety of the auction proceeds go to ICANN.

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D. PLAINTIFF'S APPLICATION FOR THE .WEB gTLD

28. In May 2012, Plaintiff submitted application 1-1527-54849 for the .WEB contention set. Plaintiff also submitted with its application the sum of $185,000—the mandatory application fee.

29. In consideration of Plaintiff paying the $185,000 application fee, ICANN agreed to conduct the application process for the .WEB gTLD in a manner consistent with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in both the Applicant Guidebook and the Auction Rules, and in conformity with the laws of fair competition. Plaintiff would not have paid the $185,000 mandatory application fee absent the mutual consideration and promises set forth above.

30. Plaintiff's application passed ICANN's "Initial Evaluation" process on July 19, 2013. It is an approved member of the .WEB contention set and qualified to participate in the ICANN auction process for .WEB.

E. NDC'S APPLICATION FOR THE .WEB gTLD

31. On June 13, 2012, NDC submitted application number 1-1296-36138 for the .WEB contention set.

32. Among other things, the application required NDC to provide "the identification of directors, officers, partners, and major shareholders of that entity." As relevant here, NDC provided the following response to Sections 7 and 11 of the application:

Secondary Contact

7(a). Name

Mr. Nicolai Bezsonoff

7(b). Title

Manager

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Applicant Background

11(a). Name(s) and position(s) of all directors

Jose Ignacio Rasco III	Manager
Juan Diego Calle	Manager
Nicolai Bezsonoff	Manager

11(b). Name(s) and position(s) of all officers and partners

Jose Ignacio Rasco III	CFO
Juan Diego Calle	CEO
Nicolai Bezsonoff	COO

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Domain Marketing Holdings, LLC	Not Applicable
NUCO LP, LLC	Not Applicable

33. By submitting its application for the .WEB gTLD and electing to participate in the .WEB contention set, NDC expressly agreed to the terms and conditions set forth in the Applicant Guidebook as well as Auction Rules, including specifically, and without limitation, Sections 1.2.1, 1.2.7, 6.1 and 6.10 of the Applicant Guidebook.

34. The Applicant Guidebook requires an applicant to notify ICANN of any changes to its application, including the applicant background screening information required under Section 1.2.1; the failure to do so can result in the denial of an application. For example, Section 1.2.7 imposes an ongoing duty to update "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant." Similarly, pursuant to Section 6.1, "[a]pplicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading."

35. In addition to a continuing obligation to provide complete, updated, and accurate information related to its application, Section 6.10 of the Applicant Guidebook,

strictly prohibits an applicant from "resell[ing], assign[ing], or transfer[ring] any of applicant's rights or obligations in connection with the application." An applicant that violates this prohibition is subject to disqualification from the contention set.

36. ICANN failed to investigate credible evidence supporting a determination that NDC violated each of these guidelines—evidence that it held for over a month prior to the .WEB auction date. Despite the urging of multiple .WEB applicants and NDC's written admissions of potentially disqualifying changes to NDC's application, ICANN continues to turn a blind eye to the direct detriment of other .WEB applicants and to ICANN's foundational duties to administer the New gTLD Program with fairness and transparency.

F. NDC'S FAILURE TO NOTIFY ICANN OF CHANGES TO ITS APPLICATION

37. On or about June 1, 2016, Plaintiff learned that NDC was the only member of the .WEB contention set unwilling to resolve the contention set in advance and in lieu of the ICANN auction.

38. At the time, Plaintiff found the decision unusual given NDC's historical willingness and enthusiasm to participate in the private resolution process. Overall, NDC has applied for 13 gTLDs in the New gTLD Program; nine of those gTLDs were resolved privately with NDC's agreement. The auction for the .WEB gTLD is the first auction in which NDC has pushed for an ICANN auction of last resort.

39. On June 7, 2016, Plaintiff contacted NDC in writing to inquire as to whether NDC might reconsider its recent decision to forego resolution of the .WEB contention set prior to ICANN's auction of last resort. In response, NDC stated that its position had not changed. NDC also advised, however, that Nicolai Bezsonoff, who is identified on NDC's .WEB application as Secondary Contact, Manager, and COO, is "no longer involved with [NDC's] applications." NDC also made statements indicating a potential change in the ownership of NDC, including an admission that the board of

NDC had changed to add "several others" and that he had to check with the "powers that be," implying that he and his associate on the email were no longer in control. The email communication containing these statements is set forth in pertinent part below:

From: Jose Ignacio Rasco <r@straat.co>
Subject: Re: .web
Date: June 7, 2016 at 11:32:17 AM EDT
To: Jon Nevett <jon@donuts.email>
Cc: Juan Diego Calle <j@straat.co>

Jon,

[Redacted]

Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our program and Juan sits on the board with me and several others.

[Redacted]

Best,
Jose

40. Noting that NDC's conduct and statements (a) appeared to directly contradict information in NDC's .WEB application and (b) suggested that NDC had either resold, assigned, or transferred its rights in the application in violation of its duties under the Applicant Guidebook, Plaintiff diligently contacted ICANN staff in writing with the discrepancy on or about June 22, 2016 to understand who it was competing against for .WEB and to improve transparency over the process for ICANN and the other .WEB applicants.

41. After engaging in a series of discussions with ICANN staff, Plaintiff decided to formally raise the issue with the ICANN Ombudsman on or about June 30, 2016; as of the initiation of this lawsuit, Plaintiff's most recent correspondence with the ICANN Ombudsman, dated July 10, 2016, in which it provided further information related to the statements made by NDC, remains unanswered.

42. At every opportunity, Plaintiff raised the need for a postponement of the .WEB auction to allow ICANN time to fulfill its obligations to (a) investigate the

contradictory representations made by NDC in relation to its pending application; (b) address NDC's continued status as an auction participant; and (c) provide all the other .WEB applicants the necessary transparency into who they were competing against. It also discussed the matter with ICANN staff and the Ombudsman at ICANN's most recent meeting in Helsinki, Finland, which took place from June 27-30, 2016.

43. On July 11, 2016, Radix FZC (on behalf of DotWeb Inc.) and Schlund Technologies GmbH, each members of the .WEB contention set, sent correspondence to ICANN stating their own concerns in proceeding with the auction of last resort scheduled for July 27, 2016. The correspondence stated:

> We support a postponement of the auction, to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.

G. ICANN'S DECISION TO PROCEED WITH THE .WEB AUCTION

44. On July 13, 2016, ICANN issued a statement denying the collective request of multiple members of the .WEB contention set to postpone the July 27, 2016 auction to allow for a full and transparent investigation into apparent discrepancies in the NDC application, as highlighted by NDC's own statements. Without providing any detail, ICANN simply stated as follows:

> Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.

45. Contrary to its obligations of accountability and transparency, ICANN's decision did not address the manner or scope of the claimed investigation nor did it address whether a specific inquiry was made into (a) Mr. Bezsonoff's current status, if any, with NDC, (b) the identity of "several other[]" new and unvetted members of

NDC's board, or (c) any change in ownership—the very issues raised by NDC's own statements. The correspondence was also silent as to any investigation into whether NDC had either resold, assigned, or transferred all or some of the rights to its .WEB application.

46. Plaintiff was unable to learn any further information regarding the extent of the investigation undertaken by ICANN, other than it was limited to inquiries only to NDC and no independent corroboration was sought or obtained.

47. Despite the clear credibility issues raised by NDC's own contradictory statements, ICANN conducted no further investigation. Indeed, ICANN informed Plaintiff that it never even contacted Mr. Bezsonoff or interviewed the other individuals identified in Sections 7 and 11 of NDC's application prior to reaching its conclusion.

48. To be clear, the financial benefit to ICANN of resolving the .WEB contention set by way of an ICANN auction is no small matter—as of the filing of this lawsuit, ICANN's stated net proceeds from the 15 ICANN auctions conducted since June 2014 total $101,357,812. The most profitable gTLDs from those auctions commanded winning bids of $41,501,000 (.SHOP), $25,001,000 (.APP), $6,706,000 (.TECH), $5,588,888 (.REALTY), $5,100,175 (.SALON) and $3,359,000 (.MLS). ICANN has not yet determined what it will do with the enormous proceeds from these auctions.

H. PLAINTIFF'S REQUEST FOR RECONSIDERATION

49. ICANN's Bylaws provide an established accountability mechanism by which an entity that believes it was materially affected by an action or inaction by ICANN staff that contravened established policies and procedures may submit a request for reconsideration or review of the conduct at issue. The review is conducted by ICANN's Board Governance Committee.

50. On July 17, 2016, Plaintiff and Radix FZC, an affiliate of another member of the .WEB contention set, jointly submitted a Reconsideration Request to ICANN, in

response to the actions and inactions of ICANN staff in connection with the decision set forth in the ICANN's July 13, 2016 correspondence.

51. The Reconsideration Request sought reconsideration of (a) ICANN's determination that it "found no basis to initiate the application change request process" in response to the contradictory statements of NDC and (b) ICANN's improper denial of the request made by multiple contention set members to postpone the .WEB auction of last resort, which would have provided ICANN the time necessary to conduct a full and transparent investigation into material discrepancies in NDC's application and its eligibility as a contention set member.

52. The Reconsideration Request highlighted the following issues:

a. ICANN's failure to forego a full and transparent investigation into the material representations made by NDC is a clear violation of the principles and procedures set forth in the ICANN Articles of Incorporation, Bylaws and the Applicant Guidebook.

b. ICANN is the party with the power and resources necessary to delay the ICANN auction of last resort while the accuracy of NDC's current application is evaluated utilizing the broad investigatory controls contained in the Applicant Guidebook, to which all applicants, including NDC, agreed.

c. Postponement of the .WEB auction of last resort provides the most efficient manner for resolving the current dispute for all parties by (i) sparing ICANN and the many aggrieved applicants the time and expense of legal action while (ii) avoiding the very real likelihood of a court-mandated unwinding of the ICANN auction of last resort should it proceed.

d. ICANN'S July 13, 2016 decision raises serious concerns as to whether the scope of ICANN's investigation was impacted by the

inherent conflict of interest arising from a perceived financial benefit to ICANN if the Auction goes forward as scheduled.

e. ICANN's New gTLD Program Auctions guidelines state that a contention set would only proceed to auction where all active applications in the contention set have "**no pending ICANN Accountability Mechanisms,**" i.e., no pending Ombudsman complaints, Reconsideration Requests or IRPs.

53. The issues raised by Plaintiff were similar to those raised by applicants for other gTLDs in similar contexts; issues that were deemed well-founded by an independent panel assigned to review ICANN's compliance with its mandatory obligations and bylaws in relation to its administration of the application processes for the New gTLD Program.

54. On July 21, 2016, ICANN denied the Request for Reconsideration. In doing so, ICANN relied solely on statements from NDC that directly contradicted those contained in NDC's earlier correspondence—a clear red flag. Once again, despite the credibility issues raised by NDC's own contradictory statements, ICANN failed and refused to contact Mr. Bezsonoff or interview the other individuals identified in Sections 7 and 11 of NDC's application prior to reaching its conclusion. ICANN also failed to investigate whether NDC had either resold, assigned, or transferred all or some of its rights to its .WEB application.

55. On July 22, 2016, Plaintiff initiated ICANN's Independent Review Process by filing ICANN's Notice of Independent Review. The IRP remains pending.

I. THE .WEB AUCTION RESULTS

56. On July 27, 2016, the .WEB auction proceeded as scheduled. The following day, ICANN reported NDC as the winning bidder of the .WEB gTLD. According to ICANN, NDC's winning bid amount was $135 million, more than *triple*

the previous highest price paid for a new gTLD and a sum greater than all of the prior ICANN auction proceeds combined.

57. On July 28, 2016, non-party VeriSign, Inc. ("VeriSign"), the registry operator for the .COM and .NET gTLDs, filed a Form 10-Q with the Securities and Exchange Commission in which it disclosed that "[s]ubsequent to June 30, 2016, the Company incurred a commitment to pay approximately $130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016."

58. On August 1, 2016, VeriSign confirmed via a press release that the approximately $130 million "commitment" referred to in its Form 10-Q was, in fact, an agreement entered into with NDC "wherein [VeriSign] provided funds for [NDC]'s bid for the .web TLD" in an effort to acquire the rights to the .WEB gTLD. VeriSign stated that its acquisition of the .WEB gTLD would be complete after NDC "execute[s] the .web Registry Agreement with [ICANN]" and then "assign[s] the Registry Agreement to VeriSign upon consent from ICANN."

59. VeriSign did not apply for the .WEB gTLD and was not a disclosed member of the .WEB contention set. At no point prior to the .WEB auction did NDC disclose (a) its relationship with VeriSign; (b) the fact that NDC had effectively become a proxy for VeriSign as a result of VeriSign agreeing to fund NDC's .WEB auction bids; or (c) the fact that NDC had either resold, assigned, or transferred all or some of its rights to its .WEB application to VeriSign.

60. As alleged above, VeriSign is the registry operator for the .COM and .NET gTLDs, which together account for the greatest market share among all gTLDs. Indeed, on July 28, 2016, VeriSign reported combined registrations for the .COM and .NET registries of 143.2 million domains, *more than six times greater* than the combined total registrations of approximately 23 million for all other existing gTLDs.

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61. On information and belief, VeriSign did not apply for, or disclose its interest in, the .WEB gTLD in an effort to avoid heightened scrutiny of its application by ICANN, the other .WEB applicants, the domain name industry at large and, most importantly, the U.S. Department of Justice; specifically, VeriSign's apparent acquisition of NDC's application rights was an attempt to avoid allegations of anti-competitive conduct and antitrust violations in applying to operate the .WEB gTLD, which is widely viewed by industry analysts as the strongest competitor to the .COM and .NET gTLDs.

62. Had VeriSign's apparent acquisition of NDC's application rights been fully disclosed to ICANN by NDC, as required by Sections 1.2.7, 6.1 and 6.10 of the Applicant Guidebook, among other provisions, the relationship would have also triggered heightened scrutiny of VeriSign's Registry Agreements with ICANN for .COM and .NET, as well as its Cooperative Agreement with the Department of Commerce.

FIRST CAUSE OF ACTION

(Breach of Contract against Defendant ICANN)

63. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above as though fully set forth herein.

64. In June 2012, ICANN invited eligible parties to submit applications to obtain the rights to, among others, the .WEB gTLD as part of the New gTLD Program. In doing so, ICANN promised the potential applicants that it would (a) conduct the bid process in a transparent manner, (b) ensure competition, and (c) abide by its own Bylaws and the rules set forth in the Applicant Guidebook.

65. On or about June 13, 2012, Plaintiff submitted an application to ICANN to obtain the rights to the .WEB gTLD. In consideration of ICANN's promise to abide by its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in

the Applicant Guidebook in its administration of the .WEB auction process, Plaintiff paid ICANN a sum of $185,0000—the mandatory application fee.

66. In consideration of Plaintiff paying the sum of $185,000, ICANN promised to conduct the application process for the .WEB gTLD in a manner consistent with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in both the Applicant Guidebook and the Auction Rules, and in conformity with the laws of fair competition.

67. Plaintiff would not have paid the $185,000 mandatory application fee or spent time and other resources absent the mutual consideration and promises set forth above. Plaintiff performed all conditions, covenants, and promises on its part to be performed in accordance with the agreed upon terms of participating in the New gTLD Program, except those obligations, if any, that it has been prevented or excused from performing as a result of the misconduct set forth in this Complaint.

68. ICANN has materially breached its obligations to Plaintiff, as set forth in ICANN's Bylaws and Articles of Incorporation, and the Applicant Guidebook by (a) failing to thoroughly investigate the issues raised by NDC's own statements and (b) refusing to postpone the .WEB auction of last resort to allow for a full and transparent investigation into the apparent discrepancies in NDC's .WEB application.

69. Specifically, ICANN's acts and omission violated, among other things:

a. Article 1, section 2.8 and Article III, Section 1 of ICANN's Bylaws, which require ICANN to "[m]ak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness" and "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." ICANN obligates each applicant who seeks to participate in the New gTLD auction process to affirm that the statements and representations contained in the application are true

and accurate; applicants also undertake a continuing obligation to update their application when changes in circumstance affect an application's accuracy. By failing to engage in a thorough, open, and transparent investigation of the contradictory statements made by NDC in relation to its application, as well as an apparent change of control with potential antitrust implications, ICANN plainly—and inexplicably—failed to reach its decisions by "applying documented policies neutrally and objectively, with integrity and fairness."

b. Article 1, section 2.9 of ICANN's Bylaws, which requires ICANN to "[act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected." In undertaking only a cursory examination of the contradictory statements made by NDC and the apparent change in NDC's rights to its application, ICANN failed to balance ICANN's interest in a swift resolution of the concerns raised by the members of the .WEB contention set with its obligation to obtain sufficient assurances and information from the individuals and entities at the center of the statements made by NDC; at the very least, ICANN should have (a) conducted interviews with Mr. Bezsonoff and all other individuals identified in Section 11 of NDC's application prior to reaching its conclusion and (b) investigated whether NDC had either resold, assigned, or transferred all or some of its rights to its .WEB application.

c. Article 1, section 2.10 of ICANN's Bylaws, which requires ICANN to "[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness." By failing to

make use of the processes established in Sections 6.8 and 6.11 to the Applicant Guidebook in investigating an admitted failure by NDC to abide by its continuing obligation to update its application, ICANN staff disregarded the very accountability mechanisms put in place to serve and protect the .WEB contention set, the Internet community, and the public at large. This error was compounded by the cursory dismissal of the concerns raised by multiple members of the .WEB contention set relating to the accuracy of the representations made in NDC's application. By failing to apprise the members of the contention set as to the manner and scope of the investigation conducted by ICANN staff, ICANN failed to ensure that it would hold itself accountable to any gTLD applicant, let alone the Internet community and the public.

d. Article II, section 3 of ICANN's Bylaws, which states that "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." There can be no questioning the fact that the Staff Action resulted in disparate treatment in favor of NDC. On one hand, there are clear statements from NDC that representations made in its application are inaccurate and there is ample evidence that NDC has either resold, assigned, or transferred all or some of its rights to its .WEB application. On the other hand, when pressed by multiple members of the contention set to fully investigate the matter, ICANN provided only a conclusory statement that raises more questions than it resolves. To the extent it had reason to engage in such disparate treatment of the members

of the .WEB contention set, ICANN failed to provide such a reason in reaching the determinations at issue in this Request.

70. ICANN also promised that a contention set would only proceed to auction where all active applications in the contention set have "**no pending ICANN Accountability Mechanisms**." ICANN breached this promise by refusing to postpone the .WEB auction of last resort while Plaintiff's Reconsideration Request remains pending and its Ombudsman complaint remains unresolved. ICANN further breached this promise by moving forward with the .WEB auction of last resort while Plaintiff's IRP, initiated on July 22, 2016, remains pending.

71. On information and belief, Plaintiff alleges that the breaches set forth above resulted from a pre-textual "investigation" into the admissions made by NDC and ICANN's issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff alleges that ICANN intentionally failed to abide by its contractual obligations to conduct a full and open investigation into NDC's admission because it was in ICANN's interest that the .WEB contention set be resolved by way of an ICANN auction. As such, Plaintiff alleges that ICANN willfully and intentionally committed the wrongful acts described above.

72. As a direct and proximate result of ICANN's breaches, Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue from third parties, profits, consequential costs and expenses, market share, reputation, and goodwill, in an amount to be determined at trial but not less than twenty-two million, five hundred thousand dollars ($22,500,000) plus interest.

SECOND CAUSE OF ACTION

(Breach of the Covenant of Good Faith and Fair Dealing against Defendant ICANN)

73. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above as though fully set forth herein.

74. An implied covenant of good faith and fair dealing exists between Plaintiff and ICANN as a result of the contractual relationship entered into as part of the .WEB gTLD application process.

75. ICANN breached the covenant of good faith and fair dealing when it acted in a way that deprived Plaintiff of the benefits of the agreement as set forth in the Applicant Guidebook, namely that the administration of the bid process for the .WEB gTLD would be founded on the principles of fairness and transparency.

76. ICANN breached the covenant of good faith and fair dealing when it:

a. Failed to conduct due diligence and an adequate investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions, including but not limited to failing to investigate whether NDC had either resold, assigned, or transferred all or some of its rights to its .WEB application;

b. Failed to conduct interviews with Mr. Bezsonoff and all other individuals identified in Sections 7 and 11 of NDC's application as part of an investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions;

c. Failed to provide a necessary level of transparency into the identity and leadership of a competing applicant;

d. Refused to postpone the ICANN auction of last resort to allow for a full and transparent investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions; and

e. Failed to conduct a reasonable inquiry into NDC's impermissible resale, transfer, or assignment of its rights in the .WEB application to VeriSign.

77. On information and belief, Plaintiff alleges that the breaches set forth above resulted from a pre-textual "investigation" into the admissions made by NDC and

ICANN's issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff alleges that ICANN intentionally failed to abide by its obligations to conduct a full and open investigation into NDC's admission because it was in ICANN's interest that the .WEB contention set be resolved by way of an ICANN auction. As such, Plaintiff alleges that ICANN willfully and intentionally committed the wrongful acts described above.

78. As a direct and proximate result of ICANN's breaches as set forth above, Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue from third parties, profits, consequential costs and expenses, market share, reputation, and good will.

THIRD CAUSE OF ACTION

(Negligence against Defendant ICANN)

79. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above as though fully set forth herein.

80. ICANN owed Plaintiff a duty to act with proper care and diligence in administering the .WEB auction process in accordance with its own Bylaws, Articles of Incorporation, and the rules and procedures as stated in the Applicant Guidebook.

81. ICANN breached the duty owed Plaintiff by, among other things:

a. Failing to conduct due diligence and an adequate investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions, including whether NDC resold, assigned or transferred any of its rights or obligations in connection with the application to VeriSign;

b. Failing to conduct interviews with Mr. Bezsonoff and all other individuals identified in Sections 7 and 11 of NDC's application as part of an investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions;

c. Refusing to postpone the ICANN auction of last resort to allow for a full and transparent investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions; and

d. Failing to provide a rationale for the decision set forth in the July 13, 2016 correspondence.

82. As a direct and proximate result of ICANN's breaches as set forth above, Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue from third parties, profits, consequential costs and expenses, market share, reputation, and good will.

FOURTH CAUSE OF ACTION

(Unfair Competition in Violation of Cal. Bus. & Prof. Code §17200 against Defendant ICANN)

83. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above as though fully set forth herein.

84. The California Unfair Competition Law ("UCL") protects both consumers and competitors by prohibiting "unfair competition," which is defined, in the disjunctive, by Business and Professions Code section 17200 as including "any unlawful, unfair or fraudulent business act or practice" as well as "unfair, deceptive, untrue or misleading advertising."

85. Plaintiff has standing to pursue this claim under Business and Professions Code section 17204 because Plaintiff has suffered injury in fact and has lost money or property as a result of ICANN's actions as set forth above. The losses include, but are not limited to, expenses incurred by Plaintiff in exhausting every available formal and informal avenue of recourse with ICANN prior to the filing of the above-captioned action, including legal fees related to the preparation and submission of the Reconsideration Request. Losses also include the $185,000 application fee paid to ICANN to participate as an application in the .WEB contention set.

86. The following acts and omissions of ICANN, among others, were unlawful under the UCL:

a. ICANN's imposition of the unenforceable contract terms contained in the Purported Release, in violation of California Civil Code section 1668, which declares violative of public policy those contracts that "have for their object, directly or indirectly, to exempt anyone from the responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent…."

b. ICANN's imposition of the unenforceable contract terms contained in the Purported Release, in violation of California Civil Code § 1770(a)(19), which defines as unlawful, the "[i]nsert[ion] of an unconscionable provision in [a] contract."

87. The following acts and omissions of ICANN, among others, were unfair under the UCL:

a. Plaintiff hereby incorporates by this reference the allegations of Paragraph 86 and its subparts as stated herein; each act therein alleged is also an unfair act or practice under the UCL;

b. ICANN's decision to conduct a cursory investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions without regard for rights of the other .WEB contention set members;

c. ICANN's decision to forego a postponement of the ICANN auction of last resort scheduled for July 27, 2016 without conducting an open and transparent investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions; and

d. ICANN's decision to allow NDC to continue to participate as a

.WEB contention set member despite NDC's own admission of inaccuracies contained in its application, in violation of the guidelines contained in the Applicant Guidebook.

88. The following acts and omissions of ICANN, among others, were fraudulent under the UCL in that they were likely to deceive, and in fact did deceive, members of the public:

a. Plaintiff hereby incorporates by this reference the allegations of Paragraph 86 and its subparts as if restated herein; each is also a fraudulent act or practice under the UCL;

b. ICANN's false representation that it would make all decisions in administering the .WEB auction process "by applying documented policies neutrally and objectively, with integrity and fairness";

c. ICANN's false representation that in administering the .WEB auction process, it would "[act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected";

d. ICANN's false representation that in administering the .WEB auction process, it would"[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness";

e. ICANN's false representation that in administering the .WEB auction process, it would "apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment";

f. ICANN's false representation that all applicants would be subject to the same agreement, rules, and procedures;

g. ICANN's false representation that it would require applicants to

update their applications with "any change in circumstances that would render any information provided in the application false or misleading," including "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant";

h. ICANN's false representation that a contention set would only proceed to auction where all active applications in the contention set have "**no pending ICANN Accountability Mechanisms**"; and

i. ICANN's false representation that an applicant would be disqualified from participating in the .WEB contention set for "resell[ing], assign[ing], or transfer[ring] any of [the] applicant's rights or obligations in connection with the application."

89. On information and belief, the conduct identified in Paragraphs 86-88 and their subparts resulted from the intentional conduct of ICANN.

90. With specific reference to the conduct identified in Paragraphs 87-88 and their subparts above, Plaintiff alleges that ICANN's "investigation" into the admissions made by NDC and ICANN's subsequent issuance of its July 13, 2016 decision were pre-textual in nature, the goal of which was to ensure ICANN secured a windfall from the .WEB contention set being resolved by way of an ICANN auction of last resort. Specifically, Plaintiff alleges that ICANN intentionally failed to abide by its contractual obligations to conduct a full and open investigation into NDC's admission because it was in ICANN's interest that the .WEB contention set be resolved by way of an ICANN auction. As such, Plaintiff alleges that it was in ICANN's interest to willfully and intentionally commit the wrongful acts described above. Pursuant to Business and Professions Code section 17203 and the equitable powers of the Court, Plaintiff seeks an order (a) enjoining ICANN from proceeding with the .WEB ICANN auction of last resort until the claims presented by way of the above-captioned action are resolved; (b)

enjoining ICANN from entering into a Registry Agreement with any party for the .WEB gTLD pending a final decision on the merits of this matter; and (c) enjoining ICANN from engaging in the unlawful, unfair and fraudulent business acts and practices described above. Plaintiff also seeks an order requiring ICANN to comply with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in the Applicant Guidebook, in the continued administration of the .WEB contention set process and to take such corrective actions and adopt such remedial measures as are necessary to prevent the further occurrence of the acts or practices alleged herein.

91. Plaintiff also seeks an order requiring restitution of any and all monies obtained by ICANN from Plaintiff as a result of the intentionally unlawful, unfair, and fraudulent described above. Plaintiff's request includes, but is not limited to, the restitution of any and all fees paid by or monies received from Plaintiff in relation to the .WEB contention set process.

92. Preventing the unlawful business practices engaged in by ICANN will ensure a significant benefit to the other .WEB contention set members as well as the public at large. Moreover, the financial burden of pursuing private enforcement substantially exceeds the financial benefit to Plaintiff. Thus, in the interest of justice, Plaintiff seeks attorneys' fees in bringing this private attorney general claim pursuant to Civil Code section 1021.5 in an amount subject to proof.

FIFTH CAUSE OF ACTION

(Declaratory Relief—Against Defendant ICANN)

93. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above as though fully set forth herein.

94. An actual and justiciable controversy has arisen, and now exists, between Plaintiff, on one hand, and ICANN, on the other, regarding the legality and effect of the Purported Release contained in the Applicant Guidebook.

95. As a condition of participating in the .WEB contention set process, ICANN required Plaintiff and other applicants to sign the Applicant Guidebook, which contained a covenant not to sue in order to apply for the .WEB contention set. The Purported Release applies to all New gTLD applicants and states, in relevant part:

> Applicant hereby releases ICANN . . . from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN . . . in connection with ICANN's . . . review of this application. . . . Applicant agrees not to challenge . . . and irrevocably waives any right to sue or proceed in court.

96. The Purported Release is not subject to negotiation: If a potential applicant does not agree to the release, it cannot be considered for participation in the .WEB contention set process. The Purported Release is also entirely unilateral in that it allows ICANN to absolve itself of wrongdoing while affording no remedy to applicants. Moreover, the Purported Release does not apply equally as between ICANN and the applicants because it does not prevent ICANN from proceeding with litigation against an applicant.

97. Plaintiff seeks a declaration of its rights regarding the enforceability of the Purported Release in light of California Civil Code Section 1668, which prohibits the type of broad exculpatory clauses contained in the Purported Release: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property or another, or violation of law, whether willful or negligent, are against the policy of the law."

98. Plaintiff maintains that, on its face, the Release is "against the policy of the law" because it exempts ICANN from any and all claims arising out of the application process, even those arising from fraudulent or willful conduct.

99. As such, an actual controversy has arisen and now exists between Plaintiff and ICANN as to the enforceability of the Purported Release. Plaintiff desires a judicial

determination and declaration that the Purported Release is unenforceable, unconscionable, and/or void as a matter of public policy. Such a declaration is necessary and appropriate at this time so that Plaintiff may ascertain its rights with respect to the enforceability of the Purported Release.

WHEREFORE, Plaintiff RUBY GLEN, LLC prays for relief as follows:

1. For compensatory damages according to proof at the time trial;
2. For general damages according to proof;
3. For restitutionary damages according to proof;
4. An injunction requiring ICANN to refrain from conducting the auction of last resort for the .WEB gTLD pending a final decision on the merits of this matter;
5. An injunction requiring ICANN to refrain from entering into a Registry Agreement with any party for the .WEB gTLD pending a final decision on the merits of this matter;
6. An injunction requiring ICANN to refrain from assigning the rights to the .WEB gTLD to any party pending a final decision on the merits of this matter;
7. Attorneys' fees and costs to the extent permitted by law; and
8. For such other relief as the Court deems just and proper against all Defendants.

Dated: August 8, 2016

By: *s/ Paula L. Zecchini*

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Attorneys for Ruby Glen, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies, under penalty of perjury under the laws of the State of California, that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Electronic Mail Notice List

•Eric P Enson
epenson@jonesday.com,dfutrowsky@jonesday.com

•Jeffrey A LeVee
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SIGNED AND DATED this 8th day of August, 2016 at Seattle, Washington.

COZEN O'CONNOR

By: */s/ Paula Zecchini*
Paula Zecchini

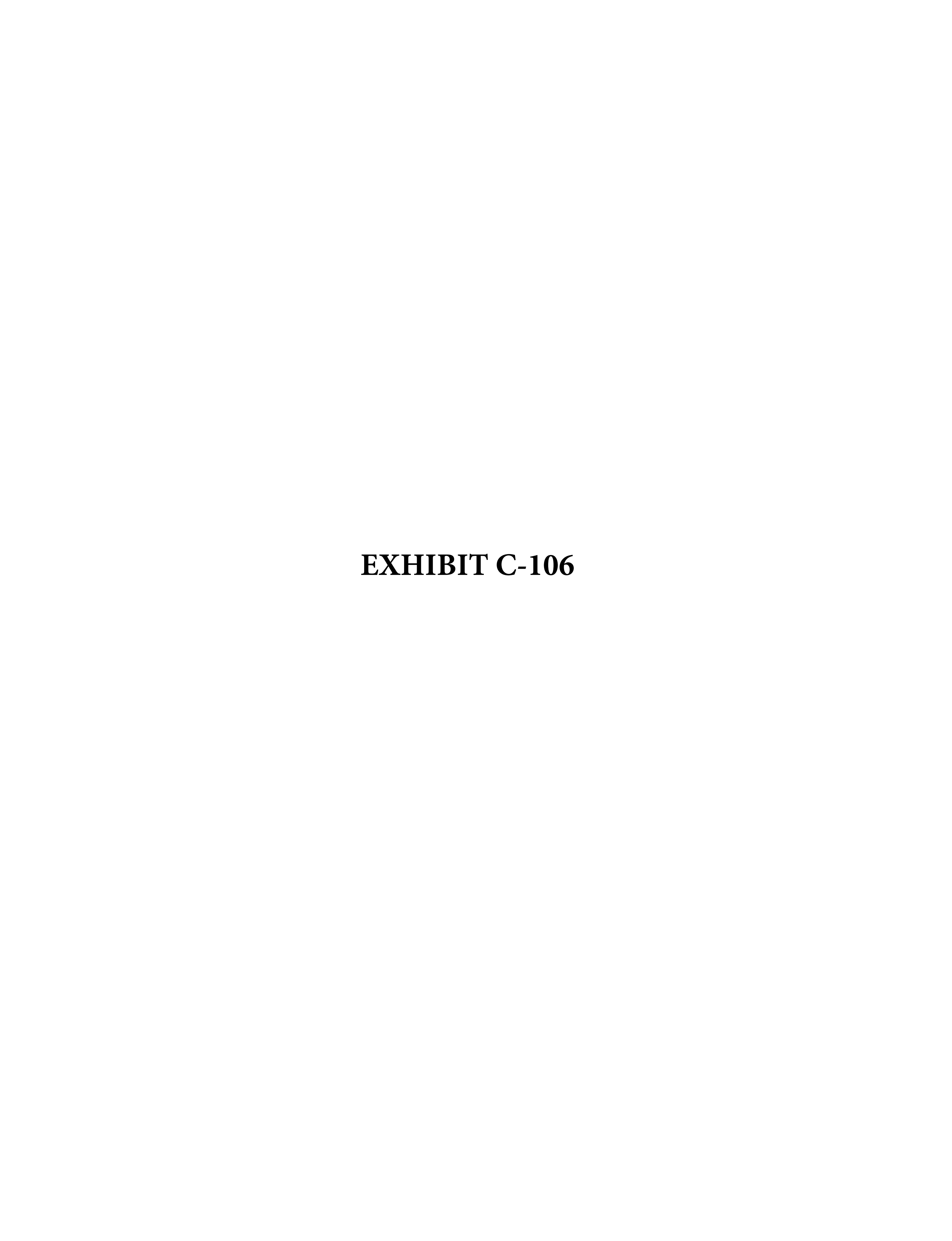

EXHIBIT C-106

Ex. C-106

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	November 28, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Stephen Montes Kerr	None	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS — COURT ORDER

Before the Court is a Motion to Dismiss filed by defendant Internet Corporation for Assigned Names and Numbers ("ICANN") (Docket No. 30). ICANN challenges the sufficiency of the First Amended Complaint ("FAC") filed by plaintiff Ruby Glen, LLC ("Plaintiff"). Also before the Court is a Motion to Take Third Party Discovery or, in the Alternative, for the Court to Issue a Scheduling Order ("Motion to Begin Discovery") filed by Plaintiff (Docket No. 32). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that these matters are appropriate for decision without oral argument. The hearing calendared for November 28, 2016, is vacated, and the matters taken off calendar.

I. Factual and Procedural Background

Plaintiff filed its original Complaint on July 22, 2016. In its Complaint, and an accompanying Ex Parte Application for Temporary Restraining Order, Plaintiff sought to temporarily enjoin ICANN from conducting an auction for the rights to operate the registry for the generic top level domain ("gTLD") for .web. According to the original Complaint, Plaintiff applied to ICANN in 2012 to operate the registry for the .web gTLD. Because other entities also applied to operate the .web gTLD, ICANN's procedures required all of the applicants, in what are referred to as "contention sets," to first attempt to resolve their competing claims, but if they could not do so, ICANN would conduct an auction and award the rights to operate the registry to the winning bidder.

According to Plaintiff, one of the competing entities, Nu Dotco, LLC ("NDC") was unwilling to informally resolve the competing claims and instead insisted on proceeding to an auction. Plaintiff alleged in its original Complaint that NDC experienced a change in its management and ownership after it submitted its application to ICANN but that NDC did not provide ICANN with updated information as required by ICANN's application requirements. On June 22, 2016, Plaintiff requested that ICANN conduct an investigation regarding the discrepancies in NDC's application and postpone the auction. At least one other applicant

seeking to operate the .web registry also requested that ICANN postpone the auction and investigate NDC's current management and ownership structure. ICANN denied the requests on July 13, 2016, and stated that "in regards to potential changes of control of Nu DOT CO LLC, we have investigated the matter and to date we have found no basis to initiate the application change request process or postpone the auction." Plaintiff and another of the applicants then submitted a request for reconsideration to ICANN on July 17, 2016. ICANN denied the request for reconsideration on July 21, 2016.

Plaintiff's original Complaint asserted claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) unfair competition pursuant to California Business and Professions Code section 17200; and (5) declaratory relief. The Court denied Plaintiff's Ex Parte Application for Temporary Restraining Order on July 26, 2016, and the auction went forward. Plaintiff filed its FAC on August 8, 2016.

According to the FAC, NDC submitted the winning bid in the amount of $135 million at the auction. After NDC won the auction, a third-party, VeriSign, Inc. ("VeriSign"), which is the registry operator for the .com and .net gTLDs, announced that it had provided the funds for NDC's bid for the .web gTLD and that it would become the registry operator for the .web gTLD once NDC executes the .web registry agreement with ICANN and, with ICANN's consent, assigns its rights to operate the .web registry to VeriSign.

The FAC asserts the same five claims contained in the original Complaint. Plaintiff's breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims are all based on provisions in ICANN's bylaws, Articles of Incorporation, and the ICANN Applicant Guidebook stating, for instance, that ICANN will make "decisions by applying documented policies neutrally and objectively, with integrity and fairness," that ICANN will remain "accountable to the Internet community through mechanisms that enhance ICANN's effectiveness," and that no contention set will proceed to auction unless there is "no pending ICANN accountability mechanism." Plaintiff's unfair competition and declaratory relief claims allege that a covenant not to sue contained in the ICANN Application Guidebook is invalid and unlawful under California law. That release states:

> Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of

> this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION, APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.

(FAC ¶ 21, Ex. C § 6.6 (capitalization in original).)

In its Motion to Dismiss, ICANN contends that the FAC fails to state any viable claims because Plaintiff has not plausibly alleged any breaches of ICANN's auction rules, Bylaws, and Articles of Incorporation. ICANN additionally asserts that the covenant not to sue bars all of Plaintiff's claims and that the FAC should be dismissed because Plaintiff has failed to join NDC as an indispensable party. Plaintiff's Motion to Begin Discovery seeks permission to propound third-party discovery directed to NDC and VeriSign prior to the parties participating in the Federal Rule of Civil Procedure 26(f) conference.

II. Legal Standard

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the

Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." Fed. R. Civ. P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)). The Ninth Circuit is particularly hostile to motions to dismiss under Rule 12(b)(6). See, e.g., Gilligan v. Jamco Dev. Corp. , 108 F.3d 246, 248–49 (9th Cir. 1997) ("The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.") (internal quotation omitted).

However, in Twombly, the Supreme Court rejected the notion that "a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." Twombly, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." Id. at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 555, 127 S. Ct. at 1965 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (alteration in original)); Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) ("'All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.'") (quoting Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555, 127 S. Ct. at 1964–65 (internal quotations omitted). In construing the Twombly standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

III. Analysis

ICANN seeks dismissal of the FAC based on, among other things, the covenant not to sue contained in the Application Guidebook. Plaintiff, however, claims that the covenant not to sue

is unenforceable because it is void under California law and both procedurally and substantively unconscionable. Specifically, according to Plaintiff, the covenant not to sue violates California Civil Code section 1668, which provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code § 1668. Section 1668 "[o]rdinarily . . . invalidates contracts that purport to exempt an individual or entity from liability for future intentional wrongs and gross negligence. Furthermore, the statute prohibits contractual releases of future liability for ordinary negligence when 'the 'public interest' is involved or . . . a statute expressly forbids it.'" Frittelli, Inc. V. 350 North Canon Drive, LP, 202 Cal. App. 4th 35, 43, 135 Cal. Rptr. 3d 761, 769 (2011) (quoting Farnham v. Superior Court, 60 Cal. App. 4th 69, 74, 70 Cal. Rptr. 2d 85, 88 (1997)). "Whether an exculpatory clause 'covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. When the parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts.'" Burnett v. Chimney Sweep, 123 Cal. App. 4th 1057, 1066, 20 Cal. Rptr. 3d 562, 570 (2004) (quoting Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3d 622, 633, 119 Cal. Rptr. 449, 456 (1975)).

The FAC does not seek to impose liability on ICANN for fraud, willful injury, or gross negligence. Nor does Plaintiff allege that ICANN has willfully or negligently violated a law or harmed the public interest through its administration of the gTLD auction process for .web. Nor is the covenant not to sue as broad as Plaintiff argues. Instead, the covenant not to sue applies to:

> [A]ll claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application.

(FAC ¶ 21, Ex. C § 6.6.) Because the covenant not to sue only applies to claims related to ICANN's processing and consideration of a gTLD application, it is not at all clear that such a situation would ever create the possibility for ICANN to engage in the type of intentional conduct to which California Civil Code section 1668 applies. See Burnett, 123 Cal. App. 4th at 1066, 20 Cal. Rptr. 3d at 570. Additionally, the covenant not to sue does not leave Plaintiff

without remedies. Plaintiff may still utilize the accountability mechanisms contained in ICANN's Bylaws. (See FAC ¶ 21, Ex. C § 6.6.) According to the FAC, these accountability mechanisms include "an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators." (FAC ¶ 23.) Therefore, in the circumstances alleged in the FAC, and based on the relationship between ICANN and Plaintiff, section 1668 does not invalidate the covenant not to sue.[1/]

Plaintiff also contends that the covenant not to sue is both procedurally and substantively unconscionable. Under California law, the "party challenging the validity of a contract or a contractual provision bears the burden of proving [both procedural and substantive] unconscionability." Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 232 Cal. App. 4th 1332, 1347, 182 Cal. Rptr. 3d 235, 247-48 (2015). "The elements of procedural and substantive unconscionability need not be present to the same degree because they are evaluated on a sliding scale. Consequently, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude the term is unenforceable, and vice versa." Id., 182 Cal. Rptr. 3d at 248.

"The oppression that creates procedural unconscionability arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." Id. at 1347-48, 182 Cal. Rptr. 3d at 248. For purposes of procedural unconscionability, "California law allows oppression to be established in two ways. First, and most frequently, oppression may be established by showing the contract is one of adhesion. . . . In the absence of an adhesion contract, the oppression aspect of procedural unconscionability can be established by the totality of the circumstances surrounding the negotiation and formation of the contract." Id. at 1348, 182 Cal. Rptr. 3d at 249. Importantly, "showing a contract is one of adhesion does not always establish procedural unconscionability." Id. at n.9. In the absence of an adhesion contract, the "circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." Id., 182 Cal. Rptr. 3d at 248-49.

[1/] The Court does not find persuasive the preliminary analysis concerning the enforceability of the covenant not to sue conducted by the court in DotConnectAfrica Trust v. ICANN, Case No. 2:16-cv-862 RGK (JCx) (C.D. Cal. Apr. 12, 2016).

Here, even if the covenant not to sue contained in the Application Guidebook is a contract of adhesion, the nature of the relationship between ICANN and Plaintiff, the sophistication of Plaintiff, the stakes involved in the gTLD application process, and the fact that the Application Guidebook "is the implementation of [ICANN] Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period," militates against a conclusion that the covenant not to sue is procedurally unconscionable. (FAC ¶ 21, Ex. C, p. 1-2 ("Introduction to the gTLD Application Process").) ICANN is a non-profit entity that, according to the FAC, "is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation . . . ." (FAC ¶¶ 10 & 13.) Plaintiff, for its part, is a sophisticated entity that paid a $185,000 application fee to participate in the application process for the .web gTLD. (FAC ¶ 1.) Under the totality of these circumstances, the Court concludes that the covenant not to sue is, at most, only minimally procedurally unconscionable.

"Substantive unconscionability is not susceptible of precise definition. It appears the various descriptions—unduly oppressive, overly harsh, so one-sided as to shock the conscience, and unreasonably favorable to the more powerful party—all reflect the same standard." Grand Prospect Partners, 232 Cal. App. 4th at 1349, 182 Cal. Rptr. 3d at 249 (citations omitted). "'[U]nconscionability turns not only on a 'one sided' result, but also on an absence of 'justification' for it.'" Walnut Producers of Cal. v. Diamond Foods, Inc., 187 Cal. App. 4th 634, 647, 114 Cal. Rptr. 3d 449, 459 (2010) (quoting A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 487, 186 Cal. Rptr. 114, 122 (1982)).

Plaintiff contends that the covenant not to sue is substantively unconscionable because of the one-sided limitation on an applicant's ability to sue ICANN without limiting ICANN's ability to sue an applicant. Plaintiff additionally asserts that the issue of the substantive unconscionability of the covenant not to sue is not susceptible to resolution at this stage of the proceedings because the FAC does not allege any facts providing a justification for ICANN's inclusion of the covenant not to sue in the Application Guidebook. The Court disagrees. The nature of the relationship between applicants such as Plaintiff and ICANN, and the justification for the inclusion of the covenant not to sue, is apparent from the facts alleged in the FAC and the FAC's incorporation by reference of the Application Guidebook. Without the covenant not to sue, any frustrated applicant could, through the filing of a lawsuit, derail the entire system developed by ICANN to process applications for gTLDs. ICANN and frustrated applicants do not bear this potential harm equally. This alone establishes the reasonableness of the covenant not to sue. As a result, the Court concludes that the covenant not to sue is not substantively unconscionable.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	November 28, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

Conclusion

For all of the foregoing reasons, the Court concludes that the covenant not to sue is, at most, only minimally procedurally unconscionable. The Court also concludes that the covenant not to sue is not substantively unconscionable or void pursuant to California Civil Code section 1668. Because the covenant not to sue bars Plaintiff's entire action, the Court dismisses the FAC with prejudice. The Court declines to address the additional arguments contained in ICANN's Motion to Dismiss. Plaintiff's Motion to Begin Discovery is denied as moot. The Court will issue a Judgment consistent with this Order.

IT IS SO ORDERED.

EXHIBIT C-107

Ex. C-107

FILED

OCT 15 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUBY GLEN, LLC, Plaintiff-Appellant, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS and DOES, 1-10, Defendants-Appellees.	No. 16-56890 D.C. No. 2:16-cv-05505-PA-AS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted October 9, 2018
Pasadena, California

Before: SCHROEDER, M. SMITH, and NGUYEN, Circuit Judges.

Ruby Glen, LLC ("Ruby Glen") appeals the district court's dismissal of its First Amended Complaint ("FAC") against Internet Corporation for Assigned Names and Numbers ("ICANN"). We have jurisdiction under 28 U.S.C. § 1291. "We review de novo dismissals for failure to state a claim under Rule 12(b)(6)."

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc., 339 F.3d 1087, 1090 (9th Cir. 2003). We affirm.

The district court properly dismissed the FAC on the ground that Ruby Glen's claims are barred by the covenant not to sue contained in the Applicant Guidebook. As the district court found, the covenant not to sue is not void under California Civil Code section 1668. Ruby Glen is not without recourse—it can challenge ICANN's actions through the Independent Review Process, which Ruby Glen concedes "is effectively an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators." Thus, the covenant not to sue does not exempt ICANN from liability, but instead is akin to an alternative dispute resolution agreement falling outside the scope of section 1668. *See* Cal. Civ. Code. § 1668 ("All contracts which have for their object . . . *to exempt* anyone from responsibility for his own fraud, or willful injury . . . , or violation of law . . . are against the policy of the law." (emphasis added)); *see also Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987) (holding that an "exculpatory clause" does not violate California Civil Code section 1668 where the clause bars suit, but "[o]ther sanctions remain in place"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to

arbitrate . . . , a party does not forgo [its] substantive rights . . . ; it only submits to their resolution in an arbitral, rather than a judicial, forum.”).

The district court also properly rejected Ruby Glen’s argument that the covenant not to sue is unconscionable. Even assuming that the adhesive nature of the Guidebook renders the covenant not to sue procedurally unconscionable, it is not substantively unconscionable. *See Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910 (2015) (explaining that procedural and substantive unconscionability “must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability” (emphasis in original) (internal quotation marks omitted)); *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347–48 (2015) (holding that procedural unconscionability “may be established by showing the contract is one of adhesion”). Because Ruby Glen may pursue its claims through the Independent Review Process, the covenant not to sue is not “so one-sided as to shock the conscience.” *See Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647–48 (2010) (internal quotation marks omitted).

Finally, the district court did not abuse its discretion in denying Ruby Glen leave to amend because any amendment would have been futile. *See Carrico v. City & Cty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).[1]

AFFIRMED.

[1] Ruby Glen raises several additional arguments that it failed to raise below. We decline to consider those arguments because they were raised for the first time on appeal. *See Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004).

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

__________ v. __________ 9th Cir. No. __________

The Clerk is requested to tax the following costs against: __________

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, [ ], swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature [ ]

("s/" plus attorney's name if submitted electronically)

Date [ ]

Name of Counsel: [ ]

Attorney for: [ ]

(To Be Completed by the Clerk)

Date [ ]

Costs are taxed in the amount of $ [ ]

Clerk of Court

By: [ ], Deputy Clerk

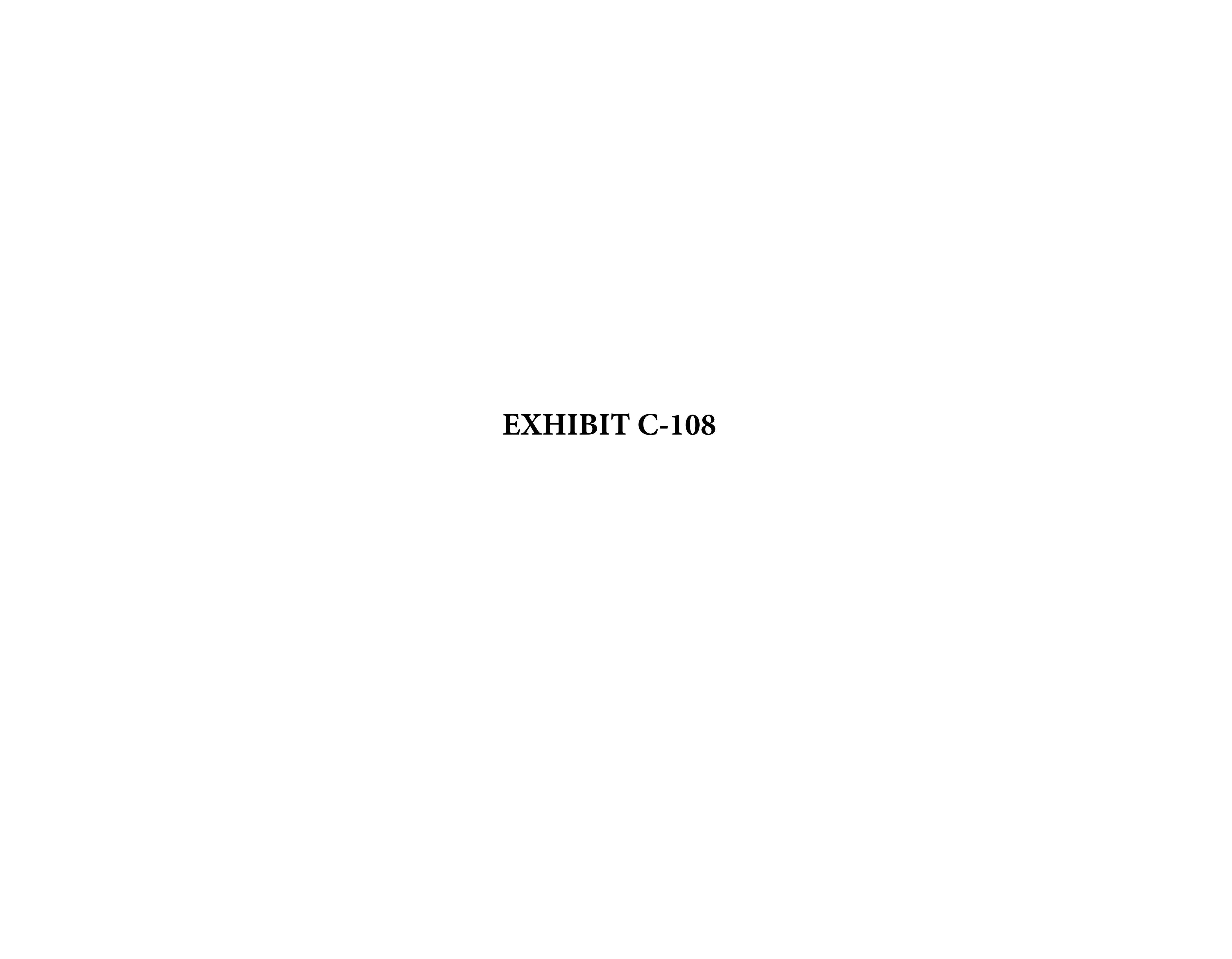

EXHIBIT C-108

Ex. C-108

COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSSES
STATUS UPDATE – 8 AUGUST 2016

ACTIVE COOPERATIVE ENGAGEMENT PROCESS (CEP) PROCEEDINGS[1]

Request Date	Requester	Subject Matter
17-Feb-2014	GCCIX, W.L.L.	.GCC
10-Dec-2014	SportAccord	.SPORTS
20-Jan-2015	Asia Green IT System Ltd.	.PERSIANGULF
20-Jan-2016	Donuts Inc.	.SPA
11-Jul-2016	American Institute of Certified Public Accountants (AICPA)	.CPA
17-Jul-2016	CPA Australia Ltd.	.CPA
2-Aug-2016	Donuts Inc. and Ruby Glen, LLC	.WEB

[1] The Cooperative Engagement Process (CEP) is a process voluntarily invoked by a complainant prior to the filing of an Independent Review Process (IRP) for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. (*See* Bylaws, Art. IV, §§ 3.14-3.17.) Cooperative engagement is expected to be between ICANN and the requesting party, without reference to outside counsel. The requesting party may invoke the CEP by providing written notice to ICANN, noting the invocation of the process, identifying the Board action(s) at issue, identifying the provisions of the ICANN Bylaws or Articles of Incorporation that are alleged to be violated, and designating a single point of contact for the resolution of the issue. Further information regarding the CEP is available at: https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf.

RECENTLY CLOSED COOPERATIVE ENGAGEMENT PROCESS (CEP) PROCEEDINGS

Request Date	Requester	Subject Matter	IRP Filing Deadline[2]
10-Dec-2015	World Rugby (formerly known as International Rugby Board)	.RUGBY	N/A (Withdrawn)

[2] The CEP process provides that "[i]f ICANN and the requester have not agreed to a resolution of the issues upon the conclusion of the cooperative engagement process, or if issues remain for a request for independent review, the requestor's time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days." (https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf)

ACTIVE INDEPENDENT REVIEW PROCESS (IRP) PROCEEDINGS[3]

Date ICANN Received Notice of IRP	Date IRP Commenced by ICDR	Requester	Subject Matter	Status
5-Dec-2014	8-Dec-2014	Gulf Cooperation Council https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en	.PERSIANGULF	Panel Selection: Full panel was confirmed on 2 December 2015. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Final hearing took place on 7 July 2016; awaiting Final Declaration.
19-Mar-2015	24-Mar-2015	Dot Sport Limited https://www.icann.org/resources/pages/dot-sport-v-icann-2015-03-27-en	.SPORT	Panel Selection: Full Panel was confirmed on 3 September 2015. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Final hearing took place on 3 May 2016; awaiting Final Declaration.

[3] The Independent Review Process (IRP) is a process by which 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. (*See* Bylaws, Art. IV, § 3.) In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action. Further information regarding the IRP is available at: https://www.icann.org/resources/pages/mechanisms-2014-03-20-en.

COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSSES
STATUS UPDATE – 8 AUGUST 2016

Date ICANN Received Notice of IRP	Date IRP Commenced by ICDR	Requester	Subject Matter	Status
24-Mar-2015	7-Apr-2015	Corn Lake, LLC https://www.icann.org/resources/pages/corn-lake-v-icann-2015-04-07-en	.CHARITY	Panel Selection: Full Panel was confirmed on 17 September 2015. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Final hearing took place on 8 February 2016; awaiting Final Declaration.
15-Dec-2015	16-Dec-2015	Asia Green IT Systems Bilgisayar San. ve Tic. Ltd. Sti. https://www.icann.org/resources/pages/irp-agit-v-icann-2015-12-23-en	.ISLAM .HALAL	Panel Selection: Full Panel was confirmed on 23 March 2016. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Final hearing scheduled for 7 October 2016.
10-Feb-2016	10-Feb-2016	Commercial Connect, LLC https://www.icann.org/resources/pages/irp-commercial-connect-v-icann-2016-02-16-en	.SHOP	Panel Selection: Full Panel was confirmed on 28 July 2016. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Administrative hearing took place on 29 February 2016. No other hearings are currently scheduled.

COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSSES
STATUS UPDATE – 8 AUGUST 2016

Date ICANN Received Notice of IRP	Date IRP Commenced by ICDR	Requester	Subject Matter	Status
1-Mar-2016	2-Mar-2016	Amazon EU S.à.r.l. https://www.icann.org/resources/pages/irp-amazon-v-icann-2016-03-04-en	.AMAZON	Panel Selection: Two panelists have been appointed; awaiting appointment of third panelist. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Administrative hearing took place on 14 March 2016. No other hearings are currently scheduled.

RECENTLY CLOSED INDEPENDENT REVIEW PROCESS (IRP) PROCEEDINGS

Date ICANN Received Notice of IRP	Date IRP Commenced by ICDR	Requester	Subject Matter	Date IRP Closed	Date of Board Consideration of IRP Panel's Final Declaration[4]
21-Sep-2014	22-Sep-2014	Dot Registry, LLC https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en	.INC .LLC .LLP	29-Jul-2016	Scheduled for August 2016 Board meeting

[4] Pursuant to Article IV, Section 3.21 of the ICANN Bylaws, "[w]here feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value." (https://www.icann.org/resources/pages/governance/bylaws-en#IV)

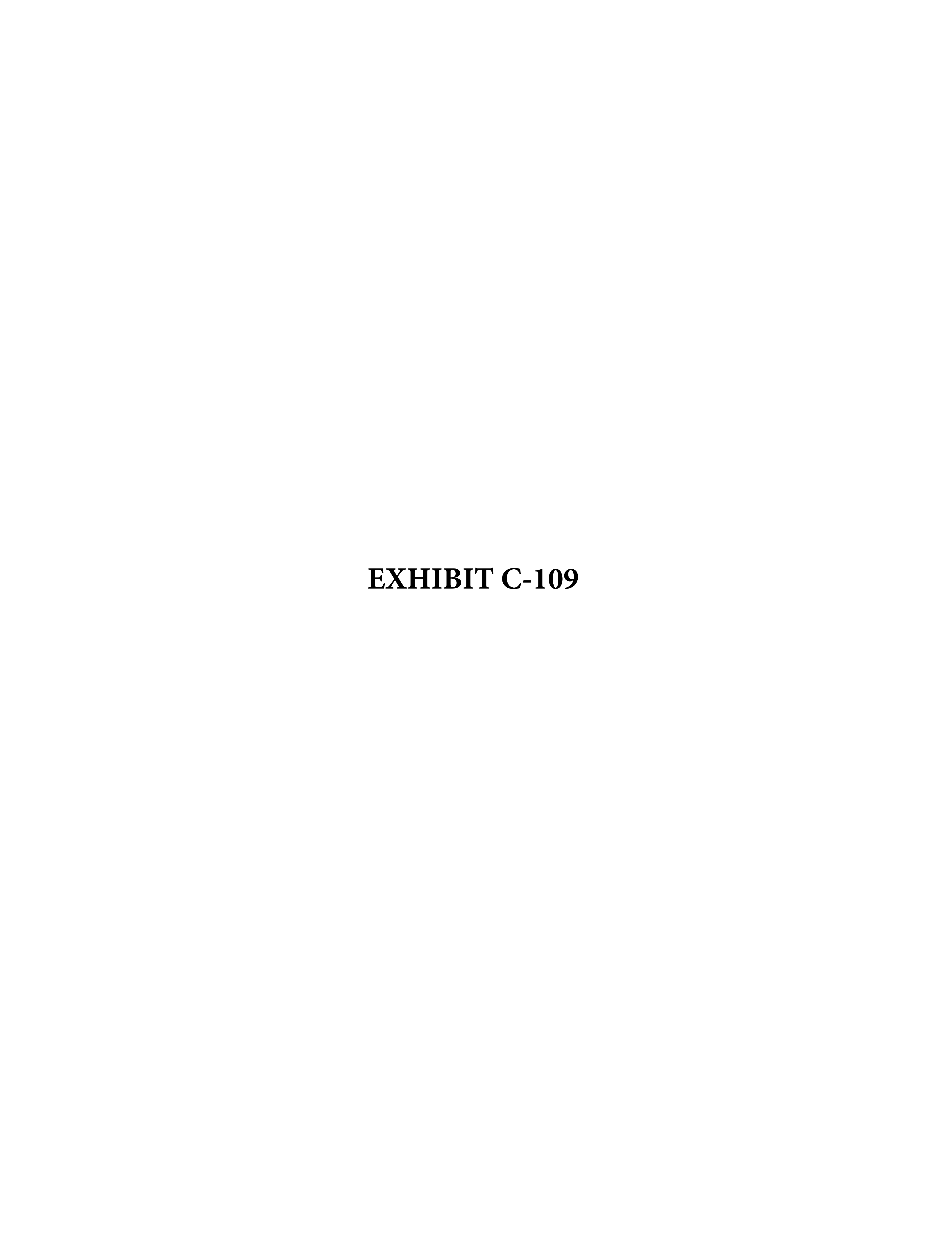

EXHIBIT C-109

Redacted - Third Party Designated Confidential Information

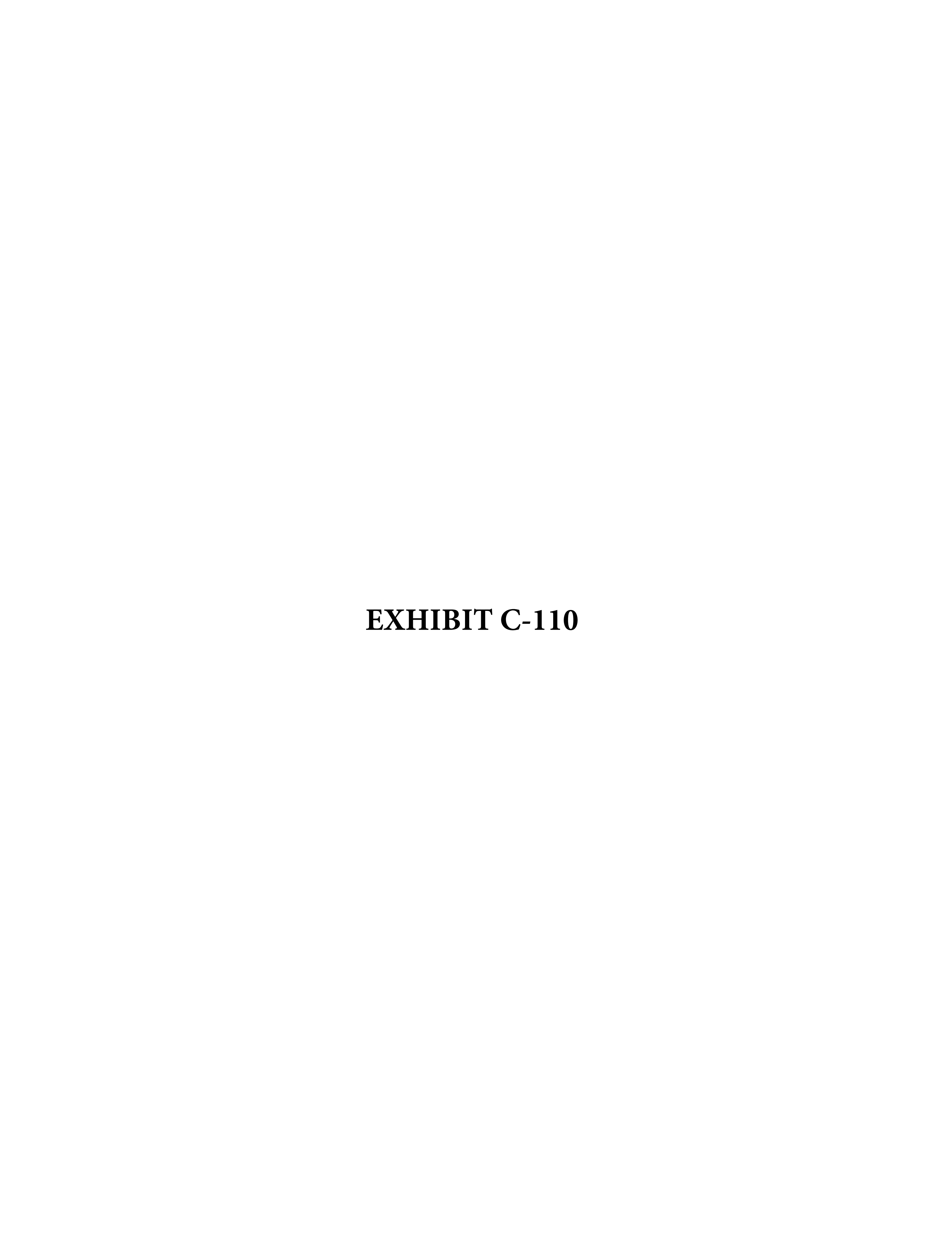

EXHIBIT C-110

Redacted - Third Party Designated Confidential Information

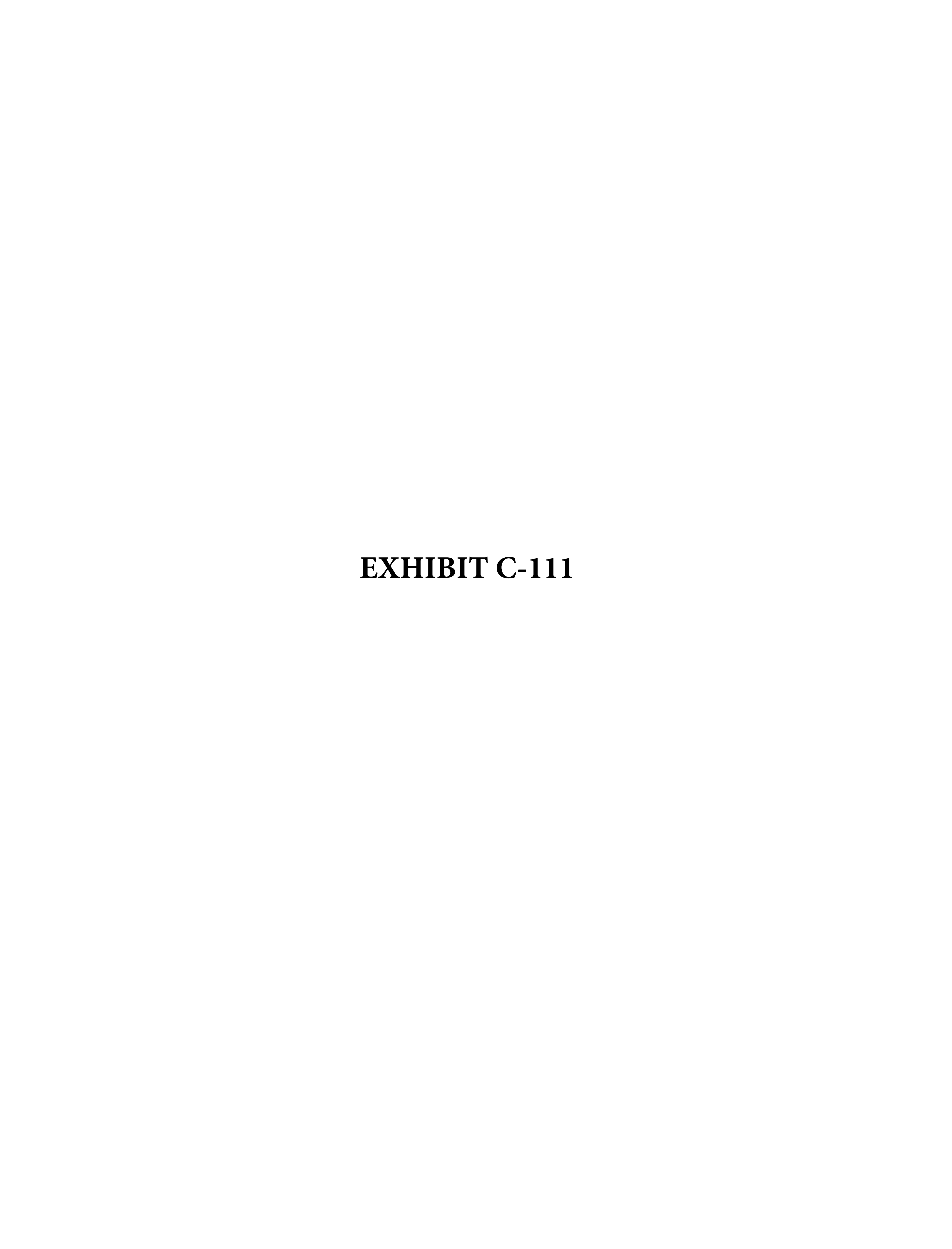

EXHIBIT C-111

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December 21, 2018

VIA E-MAIL

ICANN Board
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Request for Documents under ICANN's Documentary Information Disclosure Policy

Dear ICANN:

We write on behalf of our client, Afilias Domains No. 3 Limited ("**Afilias**"), regarding the Interim Supplementary Procedures for ICANN's Independent Review Process (the "**Interim Procedures**"). As stated in our past correspondence, Afilias has serious concerns—which we believe will also be shared by the Internet Community—about the self-serving manner in which VeriSign, Inc. ("**VeriSign**") participated in the drafting of the Interim Procedures and, specifically the last-minute changes that made with respect to Section 7 of those procedures.[1] We write to request documents from ICANN related to the discussions, negotiations, and drafting of the Interim Procedures under ICANN's Documentary Information Disclosure Policy ("**DIDP**") that would shed light on the matter and kindly request that ICANN address this request on an expedited basis. The requested documents are pertinent to ongoing accountability proceedings relating to the .WEB gTLD initiated by Afilias, and in which VeriSign and NU DOT CO LLC are seeking to participate, *inter alia*, on the basis of the provisions of the Interim Procedures inserted by VeriSign shortly after Afilias informed ICANN of its intention to commence an IRP.

ICANN is obligated by its Bylaws to maintain "open and transparent processes."[2] The Bylaws require that ICANN (1) "[e]mploy open, transparent and bottom-up,

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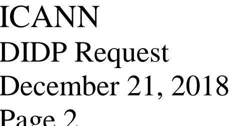
[1] Exhibit 1, Letter from A. Ali to ICANN Board (21 Dec. 2018).

[2] ICANN Bylaws (18 June 2018), Art. 1, Sec. 1.2(a), *available at* https://www.icann.org/resources/pages/governance/bylaws-en/.



multistakeholder policy development processes"[3] and (2) to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."[4] The DIDP was created pursuant to these transparency obligations. The process is "intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."[5]

Therefore, pursuant to the DIDP, Afilias requests that ICANN provide the following documents:

1. All communications between ICANN and VeriSign, including between and among legal counsels to ICANN and VeriSign,[6] regarding or that reference Afilias' complaints about the .WEB contention set;

2. All communications between ICANN and VeriSign, including between and among legal counsels to ICANN and VeriSign, regarding or that reference the Cooperative Engagement Process ("**CEP**") between ICANN and Afilias regarding the .WEB generic top-level domain ("**gTLD**");

3. All communications between ICANN and VeriSign, including between and among legal counsels to ICANN and VeriSign, regarding or that reference the *Afilias Domains No. 3 Limited v. ICANN* Independent Review Process ("**IRP**");

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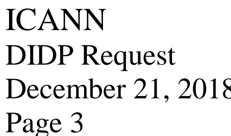
3 *Id.* at Art. 1, Sec. 1.2(a)(iv).

4 *Id.* at Art. 3, Sec. 3.1.

5 ICANN DIDP, *available at* https://icann.org/resources/pages/didp-2012-02-25-en. In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*.

6 During the 30 November 2018 hearing before the Emergency Panelist in the *Afilias Domains No. 3 Limited v. ICANN* Independent Review Process, counsel to ICANN, Mr. LeVee, stated that ICANN and VeriSign are not parties to a joint defense or common interest agreement concerning its dispute with Afilias.



4. All communications between ICANN representatives on the Independent Review Process-Implementation Oversight Team ("**IRP-IOT**"), including Samantha Eisner, and any other employee of ICANN regarding any the drafting, text, effect, or interpretation of the final or any prior draft of what is now Section 7 of the Interim Procedures;

5. All communications between Samantha Eisner and David McAuley concerning the development, drafting, text, effect, or interpretation of the Interim Procedures, and/or, the mandate and/or work of the IRP-IOT, including all communications concerning or that reference the modifications to Section 7 that were circulated to the IRP-IOT on 19 October 2018;

6. All communications circulated among members of the IRP-IOT between 19 October 2018 and 21 October 2018 on any subject related to or that references the Interim Procedures;[7]

7. Documents sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the drafting of the Interim Procedures and, in particular, the development of the text of Section 7;

8. Documents sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the changes made to Section 7 of the Interim Procedures as compared with the version of Section 7 that had been posted for public comment on 28 November 2016; and

9. Documents sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the need to seek a

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[7] Afilias is aware of the materials that ICANN has posted to its website concerning the work produced by the IRP-IOT, including the transcripts of its calls and the emails that have been collected and posted there. For the avoidance of doubt, this DIDP Request seeks materials other than the materials posted to ICANN's website.

further public consultation regarding Section 7 of the Interim Procedures.

There are no compelling reasons as to why the requested documents should not be made available to Afilias and all interested parties. The insertions engineered by VeriSign potentially give VeriSign the ability to participate in many IRPs, even where no interests of VeriSign are directly, or even indirectly, implicated. The legitimacy of the Interim Procedures and of ICANN's accountability mechanisms depend on the extent users of the Interim Procedures were properly informed about their development and ultimately on the information the Board relied on when approving them. We trust therefore that ICANN will agree with us that disclosure of the requested documents is required in the interests of transparency and to maintain the legitimacy of ICANN's procedures.

We reserve the right to request additional documents based on the provision of the above documents.

Sincerely,

Arif Hyder Ali

Exhibit 1

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+1 202 261 3307 Direct
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December 21, 2018

VIA E-MAIL

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Adoption of the Interim Supplementary Procedures

Dear Members of the ICANN Board:

We write on behalf of Afilias Domains No. 3 Limited ("**Afilias**") regarding what would appear to be a serious irregularity in the development of the Interim Supplementary Procedures for ICANN's Independent Review Process ("**Interim Procedures**"), adopted by the Board on 25 October 2018 (the "**Board-Approved Procedures**"). From our review of the drafting history of the Board-Approved Procedures, it appears that VeriSign, Inc. ("**VeriSign**") likely caused specific language to be included in the final draft of the procedures presented to the Board to support an argument that VeriSign and NDC should be allowed to participate in Afilias' IRP with ICANN over the .WEB gTLD. In fact, barely six weeks after the Interim Procedures were approved, VeriSign and NDC specifically invoked this very language in an effort to insert themselves into the ICANN-Afilias dispute. We ask that the Board immediately investigate this matter and take whatever action is necessary to address any irregularities, including suspension of the Interim Procedures.

The Board approved the Board-Approved Procedures on the understanding that (i) this version was "as close as possible to" a version of the Interim Procedures made available for public comment on 28 November 2016 (the "**Public Comment Draft**"); and (ii) that the IRP Implementation Oversight Team ("**IRP-IOT**"), the group tasked with developing the new procedures, had "take[n] no action that would … represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes."[1] The IRP-IOT was presided over by David McAuley, VeriSign's Senior International Policy and Business Development Manager.

A review of the Interim Procedures' drafting history, however, reveals that Section 7 of the Board-Approved Procedures—which addresses third parties' rights of participation in an IRP—is materially different from the version of that section contained in the Public Comment Draft. A redline comparison of the two versions is attached hereto.[2] The drafting history shows that Section 7's language was amended at Mr. McAuley's insistence at the 11th hour, when full discussion within the IRP-IOT (let alone a further public consultation) would not have been possible, and that this was likely intentionally done for the specific purpose of enabling VeriSign to argue that VeriSign

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[1] Adopted Board Resolutions | Regular Meeting of the ICANN Board (25 Oct. 2018), 2(e), *available at* https://www.icann.org/resources/board-material/resolutions-2018-10-25-en. The IRP-IOT also applied a third principle, which is not relevant to Afilias' concerns about the Interim Procedures.

[2] *See* Annex A hereto.

and NDC have standing to intervene in the then-imminent IRP between ICANN and Afilias regarding the .WEB gTLD.[3]

Responses to the Public Comment Draft

As demonstrated by the attached redline, the Public Comment Draft did not contain any provisions for participation in an IRP by a so-called *amicus curiae* or "friend of the court," which is precisely the status in which VeriSign and NDC are now seeking to participate the Afilias-ICANN IRP. The Public Comment Draft featured a new Section 7 ("Consolidation, Intervention, and Joinder"), which provided that multiple pending IRPs may be consolidated if based on "a sufficient common nucleus of common facts" and that any person or entity may intervene in an IRP, but only if they satisfied the standing criteria to be a claimant in that IRP, as set forth in ICANN's Bylaws.[4] In an accompanying report, the IRP-IOT noted that this new Section had been drafted to address recommendations by the ICANN working group that created the IRP-IOT.[5]

Several public comments addressed this new Section 7. Based on these public comments, the IRP-IOT resolved to amend Section 7 to provide limited intervention for parties that had participated in an underlying procedure before an ICANN expert panel pursuant to Section 4.3(b)(iii)(A)(3) of the Bylaws.[6] This linkage between a third party's participation in an IRP and the existence of an underlying expert panel remained part of the internal discussions of the IRP-IOT for many months, and can be seen in drafts of the Interim Procedures as late as May 2018. The concept of *amicus curiae* standing was developed to allow those parties who had participated in such an underlying proceeding, but who lacked claimant standing under the Bylaws, the opportunity to participate in an IRP, thus avoiding any collateral broadening of IRPs.

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[3] *See Afilias Domains No. 3 Limited v. ICANN*, ICDR Case No. 01-18-0004-2702, Request for Independent Review (14 Nov. 2018), *available at* https://www.icann.org/en/system/files/files/irp-afilias-request-redacted-26nov18-en.pdf.

[4] Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (31 Oct. 2016), p. 8, *available at* https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf.

[5] Draft Updated Supplementary Procedures: Report of the IRP IOT (31 Oct. 2016), p. 4, *available at* https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-iot-report-31oct16-en.pdf. ICANN's Cross Community Working Group on Enhancing ICANN Accountability ("**CCWG-Accountability**") created the IRP-IOT in March 2016 to draft detailed rules of procedure for IRP enhancements described in the CCWG-Accountability Supplemental Final Proposal Work Stream 1 Recommendations. Those Recommendations only discussed providing a right of intervention to those entities that also satisfied the tests for claimant standing set forth in the Bylaws. No recommendations were made to provide participation rights in an ICANN Accountability Mechanism to *amicus curiae*, let alone any entity that could be significantly affected by a panel's decision.

[6] Section 4.3(b)(iii)(A)(3) of the ICANN Bylaws defines a category of Disputes that "resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws."

VeriSign Undermines ICANN's Rulemaking Processes for Its Own Benefit

On 18 June 2018, Afilias submitted its Notice Invoking the Cooperative Engagement Process to ICANN. ICANN publicly posted the Notice on 20 June 2018.[7] On 30 August 2018, counsel to VeriSign (copying counsel to NU DOTCO LLC) wrote to the undersigned, *inter alia*, stating that "[we] are advised that Afilias has engaged a Cooperative Engagement Process" and threatening damages claims against Afilias in the "tens of millions of dollars."

In September 2018, McAuley drafted a new set of Interim Procedures, which he circulated to the IRP-IOT on 5 October 2018 (the "**5 October 2018 Draft**"). In relevant part, this new draft of Section 7 now contained a new subsection for "Participation as an *amicus curiae*":

> **Any person, group, or entity that has a material interest relevant to the DISPUTE** but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL.
>
> All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae,* and must be accompanied by the appropriate filing fee.
>
> If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.[8]

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[7] CEP and IRP Status Update – 20 June 2018 (20 June 2018), p. 1, *available at* https://www.icann.org/en/system/files/files/irp-cep-status-20jun18-en.pdf.

[8] UPDATED Draft Interim ICDR Supplementary Procedures (25 Sep. 2018), p. 10, *available at* http://mm.icann.org/pipermail/iot/attachments/20181005/f5a478db/25Sept2018UPDATEDraftInterimSupplementaryProceduresforICANN-0001.doc.

The 5 October 2018 Draft made two critical changes to the possibility of third-party participation in an IRP reflected in the Public Comment Draft and indeed in any draft prior to Afilias' invocation of CEP. *First, amicus curiae* standing was greatly expanded to include any entity with a "material interest" in the IRP. Second, entities that had participated in an underlying procedure before an expert panel—heretofore, the *sine qua non* for standing as third-party participant—were deemed to have a "material interest" and were thus granted a mandatory right to participate in the IRP.

At a subsequent meeting of the IRP-IOT on 9 October 2018, McAuley informed the group that he wanted to further revise Section 7, not as the IRP-IOT leader, but "as a participant here":

> I do have concern about this and what I believe is that on joinder intervention, whatever we are going [to] call it[,] it's essential that a person or entity have a right to join an IRP if they feel that a significant—if they claim that a significant interest they have relates to the subject of an IRP. And that adjudicating the IRP in their absence would impair or impede their ability to protect that.[9]

On 10 October 2018, Afilias provided a confidential draft of its IRP Request to ICANN's legal department in the context of its ongoing Cooperative Engagement Process with ICANN over the rights to the .WEB gTLD.

On 11 October McAuley proposed a further revision to Section 7 that significantly expanded the right of a third party to involve itself in an IRP:

> In addition, any person, group or entity shall have a right to intervene as a CLAIMANT where (1) that person, group, or entity claims a significant interest relating to the subject(s) of the INDEPENDENT REVIEW PROCESS and adjudicating the INDEPENDENT REVIEW PROCESS in that person, group, or entity's absence might impair or impede that person, group, or entity's ability to protect such interest, and/or (2) where any question of law or fact that is common to all who are similarly situated as that person, group or entity is likely to arise in the INDEPENDENT REVIEW PROCESS.[10]

Later on 11 October 2018, the IRP-IOT met again and discussed Section 7 specifically, including McAuley's new language. A member of ICANN's legal department, noted that McAuley's

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9 IRP-IOT Meeting Transcript (9 Oct. 2018), p. 15, *available at* https://community.icann.org/download/attachments/90770283/Transcript_FINAL_IORP-IOT_9Oct2018.pdf?version=1&modificationDate=1539188244000&api=v2.

10 Email from D. McAuley to Members of the IRP-IOT (11 Oct. 2018), pp. 1-3, *available at* https://community.icann.org/download/attachments/95094963/DMc.IRPrules.Joinder%20etc%5B1%5D.pdf?version=1&modificationDate=1539288995000&api=v2.

proposed language greatly expanded the scope of claimant beyond the narrow definition provided in ICANN's Bylaws and offered to work with McAuley to draft alternative language.

McAuley emailed revised *amicus* rules to members of the IRP-IOT late in the day on Friday 19 October 2018.[11] Specifically, he proposed two additional categories of mandatory *amicus curiae*: (1) members of a contention set, and (2) entities that are significantly referred to in IRP filings. The first mandatory category was designed to cover NDC—a member of the .WEB contention set; the second mandatory category was drafted to cover VeriSign—referred to multiple times in Afilias' draft IRP Request, now in the possession of ICANN's legal department.

McAuley then ensured that the IRP-IOT would not have a meaningful opportunity to consider or debate this new language:

> As mentioned by Sam, we have an opportunity to have the board accept and approve 'interim rules of procedure' at ICANN 63 but we must move quickly to do so. . . .
>
> I would like to note one particular area—that of Joinder, etc. (Rule 7). As you may recall that I, wearing my *participant* (not leader) hat, had suggested certain text and with Malcom's help we seemed to have achieved compromise.
>
> As Sam attempted to draft the compromise in this respect she encountered difficulty in capturing appropriate language that she felt would be consistent with bylaws. Sam reached out to me in my participant capacity and we discussed over the ensuing days and so the language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity. I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list—a way to try to take advantage of board action at next week's meeting.
>
> Could you please review these rules and if you have any concern please post to the list by 23:59 UTC on October 21.[12]

The events of 19 October were extraordinary. Despite the IRP-IOT's commitment to propose rules to the Board that remained as close as possible to the Public Comment Draft, the leader of the IRP-IOT ("wearing [his] participant (not leader) hat") was now proposing late in the day on a Friday that:

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[11] Email from B. Turcotte to Members of the IRP-IOT (19 Oct. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-October/000451.html.

[12] *Id.*

- The IRP-IOT consider and adopt a substantial expansion of intervention rights that were not reflected in the Public Comment Draft and which were not reflected in the recommendations of the ICANN working group that the IRP-IOT was tasked to draft into rules of procedure;

- That the IRP-IOP consider and adopt a substantial expansion of intervention rights proposed by its leader, acting in his capacity not as the head of the committee but as a VeriSign participant;

- That the IRP-IOT consider and adopt this substantial expansion of intervention rights without any group discussion and without any disclosure that the amendments were likely drafted to benefit the drafter's employer—VeriSign—in a specific IRP; and

- That despite having worked on the Interim Procedures for over two and a half years, members of the IRP-IOT now needed to review and comment on "language [that was] . . . not exactly as discussed on the calls" and that was **first provided to the IRP-IOT late in the day on Friday by midnight on Sunday**.

Unsurprisingly, given the time of disclosure and the weekend deadline, no comments were received. McAuley thus presented a draft of the Interim Procedures to the Board, containing his 11th hour edits to Section 7 still in redline, the next day.

In its Resolutions adopting the Interim Procedures, the Board noted:

> The IOT began consideration of a set of Interim Supplementary Procedures in May 2018. The version considered by the Board today was the subject of intensive focus by the IOT in two meetings on 9 and 11 October 2018, convened with the intention of delivering a set to the Board for our consideration at ICANN63. There were modifications to four sections identified through those meetings, and a set reflecting those changes was proposed to the IOT on 19 October 2018. With no further comment, on 22 October 2018 the IOT process on the Interim Supplementary Procedures concluded and it was sent to the Board for consideration.[13]

The Resolutions do not reveal whether the Board was aware of the substantial departure these "modifications" represented from the Public Comment Version of Section 7, nor do the Resolutions explain why modifications to Section 4 did require a second public consultation, while the substantial changes to Section 7 did not. The Resolutions do not explain whether the Board was aware that the VeriSign "modifications" to Section 7 were not made in response to the public comments, but rather at the 11th hour, by the IRP-IOT leader, acting in his "participant" capacity as an employee of VeriSign.

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[13] Adopted Board Resolutions | Regular Meeting of the ICANN Board (25 Oct. 2018), 2(e), *available at* https://www.icann.org/resources/board-material/resolutions-2018-10-25-en.

It is also not clear whether the Board was aware that the two "modifications" proposed by VeriSign were likely drafted in anticipation of VeriSign's and NDC's imminent applications to intervene in the .WEB IRP. Indeed, what other explanation could there be for providing *amici* standing for members of a "contention set" where an IRP relates to an application in the New gTLD Program? In the two and half years the IRP-IOT had been considering and debating joinder issues, the concept of providing specific standing for contention set members had never been mentioned prior to 19 October 2018. The VeriSign language appears to have been precisely drafted to provide textual support for VeriSign's and NDC's eventual plans to seek intervention in Afilias' IRP.

Rather than propose specific language that would enable his employer to intervene in an imminent IRP, McAuley should have recused himself from all discussions concerning the joinder provisions given his serious conflict of interest between his duty to ICANN and his obligations to his employer VeriSign. Moreover, given the substantial departure from the Public Comment Draft, the proposed Section 7 should have been the subject of a further public consultation before being adopted by the Board.

Afilias' review of the process by which the Interim Procedures were developed is ongoing and Afilias reserves the right to supplement this submission. But based on what it has discovered to date, Afilias respectfully submits that the Board must, consistent with its commitment to a "bottom-up, multistakeholder policy development process," suspend the validity of the Interim Procedures subject to a complete and thorough investigation of the process by which they were developed. At a minimum, the Board should declare the entirety of Section 7 ineffective pending a second public comment period.

Sincerely,

Arif Hyder Ali

Annex A

7. Consolidation, Intervention~~,~~ and ~~Joinder~~[24] Participation as an Amicus

~~At the request of a party, a~~A PROCEDURES OFFICER ~~may~~shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an amicus. Except as otherwise expressly stated herein, requests for consolidation, intervention, and ~~joinder. Requests for consolidation, intervention, and joinder~~/or participation as an amicus are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for ~~interim relief~~consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER~~. CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.~~[25], as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

~~[24] There is no existing Supplemental Rule. The CCWG Final Proposal and May 2016 ICANN Bylaws recommend that these issue be considered by IOT. See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B); CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, 23 February 2016, Annex 07 – Recommendation #7, at § 20.~~

~~[25] See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).~~

~~In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.~~

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMAINT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an Amicus Curiae

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an amicus curiae before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an amicus before the IRP PANEL:

i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));

ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and

iii. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.

All requests to participate as an amicus must contain the same information as the Written Statement (set out at Section 6), specify the interest of the amicus curiae, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed amicus curiae has a material interest relevant to the DISPUTE, he or she shall allow participation by the amicus curiae. Any person participating as an amicus curiae may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an amicus curiae.

[4] During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of amicus curiae and in then considering the scope of participation from amicus curiae, the IRP PANEL shall lean in favor of allowing broad participation of an amicus curiae as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

Summary report: **Litera® Change-Pro for Word 10.2.0.10 Document comparison done on 12/18/2018 8:57:17 PM**
Changes:
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~~Delete~~
~~Move From~~
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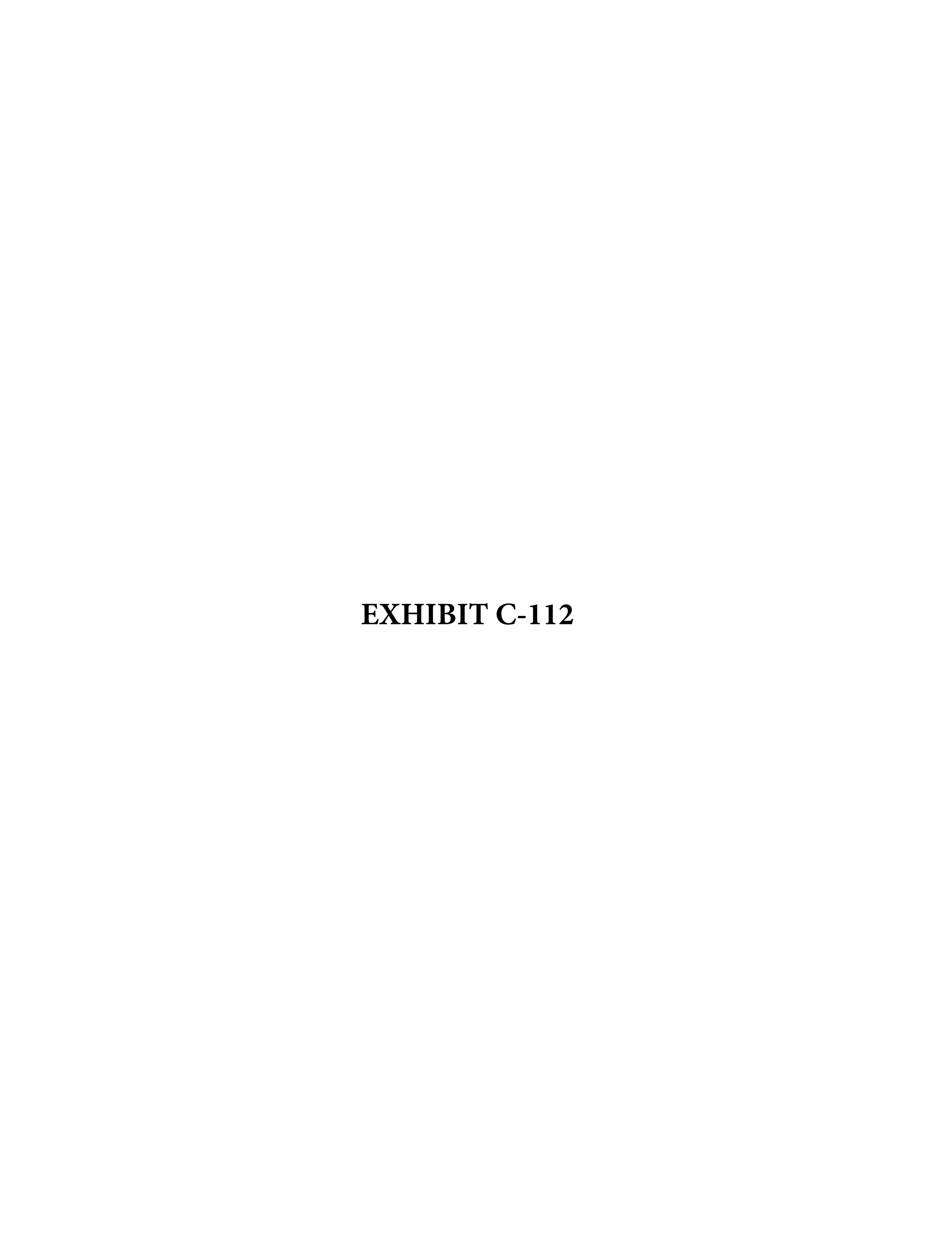

EXHIBIT C-112

Ex. C-112

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1 April 2019

VIA E-MAIL

ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094
didp@icann.org

Re: Request for Documents pursuant to ICANN's Documentary Information Disclosure Policy

Dear ICANN:

We write on behalf of our client, Afilias Domains No. 3 Limited ("**Afilias**"), regarding the recent update to the Independent Review Process-Implementation Oversight Team's ("**IRP-IOT**") website.[1] Prior to this most recent update, the last update to the IRP-IOT's website had been made on 20 December 2018. No emails, meeting transcripts or other communications were posted for either January or February 2019.

We write to request (1) documents from ICANN related to the IRP-IOT's activities during January and February 2019 and (2) additional "off-list correspondence" generated by and among IRP-IOT members, pursuant to ICANN's Documentary Information Disclosure Policy ("**DIDP**"). The requested documents are pertinent to ongoing accountability proceedings relating to the .WEB gTLD initiated by Afilias.

ICANN is obligated by its Bylaws to maintain "open and transparent processes."[2] The Bylaws require that ICANN (1) "[e]mploy open, transparent and bottom-up, multistakeholder policy development processes"[3] and (2) to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed

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[1] *See* "March 2019 Archives by date" ICANN (last visited 27 March 2019), *available at* https://mm.icann.org/pipermail/iot/2019-March/date.html; Email from D. McAuley to Members of the IRP-IOT (6 March 2019), *available at* https://mm.icann.org/pipermail/iot/2019-March/000489.html.

[2] ICANN Bylaws (18 June 2018), Art. 1, Sec. 1.2(a).

[3] *Id.,* Art. 1, Sec. 1.2(a)(iv).

to ensure fairness."[4] The DIDP was created pursuant to these transparency obligations in order "to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."[5]

Pursuant to the DIDP, Afilias requests that ICANN disclose the following documents:

1. All communications, including email correspondence, between members of the IRP-IOT between 20 December 2018 and 1 April 2019;

2. All communications, including email correspondence, concerning David McAuley's absence from the IRP-IOT, as referenced in Malcolm Hutty's 6 March 2019 email to David McAuley;[6]

3. All IRP-IOT meeting transcripts for any meetings of the IRP-IOT that were held between 20 December 2018 and 1 April 2019; and

4. All "off-list correspondence" collected in response to Afilias' 21 December 2018 DIDP Request. In its Response to that DIDP Request, ICANN represented the following:

> ICANN org has also conducted a search for communications responsive to this request that were exchanged outside of the iot@icann.orglistserv. To date, ICANN org has reviewed

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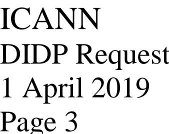
4 *Id.*, Art. 3, Sec. 3.1.

5 *See* ICANN DIDP, https://icann.org/resources/pages/didp-2012-02-25-en. In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*.

6 Malcolm Hutty told David McAuley that it was "Good to have you back" on 6 March 2019. *See* Email from M. Hutty to D. McAuley (6 March 2019), *available at* https://mm.icann.org/pipermail/iot/2019-March/000490.html. The IRP-IOT's posted correspondence, though, provides no further insight regarding McAuley's departure from and return to the IRP-IOT – which would explain the delay in his posting the draft letter to ICANN regarding the nature of ICANN Staff participation in the IRP-IOT. *See* IRP-IOT Meeting #45 Transcript (13 Dec. 2018), p. 12, *available at* https://community.icann.org/download/attachments/99485223/IRP-IOT_13Dec2018_FINAL-en%5B1%5D.pdf?version=2&modificationDate=1545064924000&api=v2 (containing statement by McAuley that he would post the draft letter to ICANN before January 2019); Email from D. McAuley to Members of the IRP-IOT (6 March 2019) (posting the draft letter to ICANN).



> the majority of the emails collected in response to this request and has begun publishing responsive emails on the IRP-IOT community wiki page under "Off-List Correspondences" . . . ICANN org will continue its review of these emails to determine if additional documents should be publicly disclosed and if so, will post these documents on the IRP-IOT community wiki page on a rolling basis.[7]

ICANN has failed to make any update the "Off-List Correspondences" section of the IRP-IOT community wiki page and should do so now.

There are no compelling reasons as to why the requested documents should not be made available to Afilias and posted publicly on the IRP-IOT wiki page. Indeed, the IRP-IOT's consistent practice is to publicly post all of its meeting minutes and internal communications in furtherance of ICANN's transparency obligations. In addition, the requested documents are relevant to the "important issues" for the global Internet community that were recognized by the Procedures Officer appointed in the *Afilias Domains No. 3 Limited v. ICANN* Independent Review Process. We trust, therefore, that ICANN will agree with us that disclosure of the requested documents is required in the interests of transparency and to maintain the legitimacy of ICANN's procedures.

We reserve the right to request additional documents based on the provision of the above documents.

Sincerely,

Arif Hyder Ali

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[7] DIDP Response to Request No. 20181221-1 (20 Jan. 2019), pp. 8-9, *available at* https://www.icann.org/en/system/files/files/didp-20181221-1-ali-response-20jan19-en.pdf.

EXHIBIT C-113

Ex. C-113

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April 16, 2018

VIA E-MAIL

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Request for Updates on the .WEB Contention Set

Dear Members of the ICANN Board:

We write on behalf of our clients, Afilias Plc and Afilias Domains No. 3 Limited (together, "**Afilias**"), regarding the .WEB contention set. As we have explained in our prior correspondence, Afilias is deeply concerned by (1) the stated intention of Nu Dot Co LLC ("**NDC**") to assign the .WEB gTLD to Verisign, Inc. ("**Verisign**"); (2) ICANN's lack of transparency regarding its investigation of NDC, Verisign, and their agreement; (3) NDC and Verisign's subterfuge in the context of the .WEB auction; and (4) the present status of the .WEB contention set.[1] We therefore write to request that ICANN update Afilias on the status of the issues that we have raised in prior correspondence.

We understand that the .WEB contention set is currently "On Hold."[2] To the extent that this is not the case, we request that you inform us immediately and advise us of the actual status. In either case, we ask that ICANN provide Afilias with at least 60 days' notice before taking any further steps to change the "On Hold" status that is currently stated on the ICANN website, so that, if necessary, Afilias can take appropriate legal action to protect its rights and preserve the status quo while those rights are decided.

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[1] *See* DIDP Request 20180223-1 (23 Feb. 2018), https://www.icann.org/resources/pages/didp-20180223-1-ali-request-2018-03-26-en; *see also* Letter from S. Hemphill to A. Atallah (8 Aug. 2016), https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-08aug16-en.pdf; Letter from S. Hemphill to A. Atallah (9 Sep. 2016), https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-09sep16-en.pdf; Letter from J. Kane to C. Willett (7 Oct. 2016).

[2] *See* "Application Details," ICANN (last visited 5 Apr. 2018), https://gtldresult.icann.org/applicationstatus/applicationdetails/1053.

01. Request for Update on the Current Status of the .WEB Contention Set

ICANN is not acting with transparency regarding the .WEB contention set. The principle of "[t]ransparency is one of the essential principles in ICANN's creation documents, and its name reverberates through its Articles [of Incorporation] and Bylaws."[3] Pursuant to its Bylaws, ICANN must "operate to the maximum extent feasible in an open and transparent manner."[4] Despite this obligation, Afilias believes that ICANN has failed to update Afilias on changes to the .WEB contention set and the related accountability mechanisms.

ICANN pledged to notify Afilias of any changes to the .WEB contention set and the related accountability mechanisms. On 19 August 2016, Afilias was told that ICANN had "placed the .WEB contention set on-hold."[5] ICANN later explained that this status "was to reflect a pending ICANN Accountability Mechanism initiated by another member in the contention set"[6]—the cooperative engagement process ("**CEP**") initiated by Donuts Inc. ("**Donuts**") and Ruby Glen, LLC ("**Ruby Glen**").[7] ICANN also assured Afilias that its primary contact "***will be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms***."[8] Afilias has received no such notification from ICANN since ICANN made that assurance on 30 September 2016.

However, recent information from ICANN indicates that there may have been a change in the status of the accountability mechanisms relevant to the .WEB contention set. ICANN specifically changed the status of Donuts and Ruby Glen's CEP to "recently closed" on 31 January 2018, and further indicated that their deadline to file an IRP was 14 February

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3 *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 Jul. 2016), ¶ 101, https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf. https://www.icann.org/resources/pages/governance/bylaws-en.

4 ICANN Bylaws (22 July 2017), Art. 3, Sec. 3.1, https://www.icann.org/resources/pages/governance/bylaws-en.

5 Letter from A. Atallah to S. Hemphill (30 Sep. 2016), https://www.icann.org/en/system/files/correspondence/atallah-to-hemphill-30sep16-en.pdf.

6 *Id*.

7 The 30 September 2016 letter cites to the 22 August 2016 Cooperative Engagement and Independent Review Processes Status Update when describing the "pending ICANN Accountability Mechanism." Letter from A. Atallah to S. Hemphill (30 Sep. 2016), https://www.icann.org/en/system/files/correspondence/atallah-to-hemphill-30sep16-en.pdf. The 22 August 2016 update states that Donuts and Ruby Glen initiated a CEP regarding .WEB on 2 August 2016. Cooperative Engagement and Independent Review Processes Status Update – 22 August 2016 (22 Aug. 2016), p. 1, https://www.icann.org/en/system/files/files/irp-cep-status-22aug16-en.pdf.

8 Letter from A. Atallah to S. Hemphill (30 Sep. 2016), https://www.icann.org/en/system/files/correspondence/atallah-to-hemphill-30sep16-en.pdf (emphasis added).

2018.[9] Clearly, the status of the "relevant Accountability Mechanisms"[10] changed, but Afilias still has not received any information from ICANN regarding these changes. Afilias therefore remains uncertain about the status of the accountability mechanisms related to .WEB.

These developments raise the possibility of changes to the status of the .WEB contention set as well as to the status of the accountability mechanisms. ICANN told Afilias that the .WEB contention set was placed "On Hold" because of Donuts and Ruby Glen's CEP. However, ICANN recently published documents stating that Donuts and Ruby Glen's CEP concluded and that there are no active Independent Review Processes.[11] As a result, Afilias has reason to believe that the status of the .WEB contention set has or will soon be changed.

Afilias' belief is further supported by the recent response it received to DIDP Request No. 201802223-1.[12] In the response, ICANN informed Afilias that the "current status" for the .WEB gTLD is "in contracting."[13] While both the "Application Status" and the "Application Details" pages for NDC's .WEB application state that the "Application Status" is "In Contracting,"[14] the "Application Details" page still states that the "Contention Resolution Status" is "On Hold."[15] This inherent conflict remains unexplained. Furthermore, Afilias has received no communication from ICANN regarding any change to the contention set.

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[9] Cooperative Engagement and Independent Review Processes Status Update – 18 January 2018 (18 Jan. 2018), p. 2, https://www.icann.org/en/system/files/files/irp-cep-status-31jan18-en.pdf. The 29 March 2018 Cooperative Engagement and Independent Review Processes Status Update contains the same information, even though the 14 February 2018 deadline expired. *See* Cooperative Engagement and Independent Review Processes Status Update – 29 March 2018 (29 Mar. 2018), p. 2, https://www.icann.org/en/system/files/files/irp-cep-status-29mar18-en.pdf.

[10] Letter from A. Atallah to S. Hemphill (30 Sep. 2016), https://www.icann.org/en/system/files/correspondence/atallah-to-hemphill-30sep16-en.pdf.

[11] Cooperative Engagement and Independent Review Processes Status Update – 29 March 2018 (29 Mae. 2018), pp. 2-3, https://www.icann.org/en/system/files/files/irp-cep-status-29mar18-en.pdf (stating that Donuts and Ruby Glen's CEP concluded and that there are no active Independent Review Processes).

[12] *See* Response to DIDP Request 20180223-1 (24 Mar. 2018), https://www.icann.org/resources/pages/didp-20180223-1-ali-request-2018-03-26-en.

[13] *Id.* at p. 11.

[14] *See* "New gTLD Application Status" (last visited 6 Apr. 2018), https://gtldresult.icann.org/applicationstatus/viewstatus (stating that NDC's application for .WEB is "In Contracting"); *see also* "Application Details," ICANN (last visited 5 Apr. 2018), https://gtldresult.icann.org/applicationstatus/applicationdetails/1053 (same).

[15] *See* "Application Details," ICANN (last visited 5 Apr. 2018), https://gtldresult.icann.org/applicationstatus/applicationdetails/1053. The "Application Status" page does not contain a field for the "Contention Resolution Status." *See* "New gTLD Application Status" (last visited 6 Apr. 2018), https://gtldresult.icann.org/applicationstatus/viewstatus.

Given the above-described situation, Afilias requests that ICANN immediately inform Afilias of (1) the current status of the .WEB contention set, and, specifically, whether it remains "On Hold," and (2) details regarding its current discussions or negotiations with NDC and/or Verisign related to the .WEB gTLD. And again, Afilias requests that ICANN provide Afilias with at least 60 days' notice before taking any further steps to change the "On Hold" status that is currently stated on the ICANN website. Afilias further requests that ICANN take no steps regarding the delegation of the .WEB gTLD to NDC or Verisign unless and until Afilias' rights to the domain are fully and finally determined by an independent decision-maker.

02. Request for Update on the Current Status of ICANN's Investigation

In addition, Afilias further requests information on the current status of ICANN's investigation of the .WEB contention set. In response to Afilias' letters of 8 August 2016 and 9 September 2016, ICANN requested "additional information" regarding the .WEB auction from Afilias, Ruby Glen, NDC, and Verisign on 16 September 2016.[16] Afilias promptly responded to ICANN's request on 7 October 2016.[17] Yet Afilias has received no information from ICANN regarding the investigation.

Indeed, ICANN has since refused to disclose information regarding its investigation. On 23 February 2018, Afilias asked ICANN to provide an "update on ICANN's investigation of the .WEB contention set."[18] As indicated in the letter, Afilias made this request independent of the Documentary Information Disclosure Policy ("**DIDP**") requests contained in the same correspondence.[19] ICANN, however, mistakenly interpreted Afilias' request as part of its DIDP request and refused to provide a status update.[20]

Thus, Afilias renews its request for a status update on ICANN's investigation of the .WEB contention set, and NDC's agreement with Verisign, independent of ICANN's DIDP.

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16 *See* Letter from C. Willett to J. Kane (16 Sep. 2016), p.1.
17 *See* Letter from J. Kane to C. Willett (7 Oct. 2016).
18 DIDP Request 20180223-1 (23 Feb. 2018), p. 1, https://www.icann.org/resources/pages/didp-20180223-1-ali-request-2018-03-26-en
19 *See id*.
20 Response to DIDP Request 20180223-1 (24 Mar. 2018), p. 1, https://www.icann.org/resources/pages/didp-20180223-1-ali-request-2018-03-26-en ("As such, your request for 'an update on ICANN's investigation of the .WEB contention set' is beyond the scope of the DIDP and will not be addressed in this Response.").

03. Afilias' Request for Prior Notification

Afilias requests the aforementioned updates because it intends to initiate a CEP and a subsequent IRP against ICANN, if ICANN proceeds toward delegation of .WEB to NDC. Afilias also reserves the right to pursue claims against ICANN in a court of law. As Afilias has previously informed ICANN, it has numerous objections to ICANN's conduct with respect to NDC's actions during the .WEB auction and its agreement to assign Verisign the .WEB gTLD, including but not limited to the antitrust and competition issues raised by Verisign's acquisition of the .WEB gTLD.[21]

Therefore, in the interests of transparency and to prevent unnecessary procedural disputes regarding a potential future IRP to be commenced by Afilias, Afilias reiterates its request that ICANN provide it with at least 60 days' notice of any change to the .WEB contention set's status.

Afilias reserves all of its rights and remedies in all available fora whether within or outside of the United States of America.

Sincerely,

Arif Hyder Ali
Partner

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[21] *See* Letter from S. Hemphill to A. Atallah (8 Aug. 2016), https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-08aug16-en.pdf; Letter from S. Hemphill to A. Atallah (9 Sep. 2016), https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-09sep16-en.pdf; Letter from J. Kane to C. Willett (7 Oct. 2016).

EXHIBIT C-114

Ex. C-114

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ARIF HYDER ALI

Contact Information Redacted

May 1, 2018

VIA E-MAIL

Jeffrey A. LeVee
Jones Day
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071

Re: .WEB

Dear Jeff:

Thank you for your letter dated 28 April 2018 on behalf of ICANN. However, we do not understand the basis for your assertion that "in this particular matter, ICANN has been quite transparent" about its conduct. To date, ICANN has provided ***no*** information about the investigation (if any) it has undertaken regarding the concerns raised by Afilias – *viz*., that the bid for .WEB that NDC supposedly made on its own behalf was in fact secretly funded by and made for the benefit of Verisign.

As you know, Afilias first raised its concerns that the conduct of NDC and Verisign had violated the rules set forth in the 2012 gTLD Applicant Guidebook in August 2016. In September 2016, ICANN sent Afilias a lengthy set of questions regarding Afilias' concerns, which Afilias fully answered in October 2016. More than 18 months later, Afilias has received no further information from ICANN regarding this matter.

You refer in your letter to "papers publicly filed in the federal court action that Ruby Glen initiated," but do not identify the particular submissions to which you are referring. We are of course aware of the questions that Ruby Glen raised in June and July 2016, concerning whether NDC had undergone a change in its ownership or control that caused its withdrawal from the private auction. You are perhaps referring to the exhibits reflecting the brief correspondence from July 2016, in which ICANN asked NDC if it had undergone any change in ownership or control, and NDC responded that it had not. But that correspondence pre-dates Verisign's public acknowledgement in August 2016 that it had been the real party in interest behind NDC's bid. We do not see anything in the public

record (whether in the *Ruby Glen* submissions or elsewhere) to indicate that ICANN has taken any steps to address the concerns that Afilias raised about the secret involvement of Verisign in NDC's bid, apart from issuing the written questions sent to Afilias and other members of the .WEB contention set in September 2016.

You also assert in your letter that "ICANN will continue to follow its processes." But ICANN has provided no information about what those "processes" are or when they will be completed. Indeed, the public information available to Afilias regarding the status of .WEB is contradictory. ICANN reports that the .WEB contention set is still "on hold" but that NDC's application status is "in contracting."[1] We do not understand how the contention set can be "on hold" if ICANN is currently "contracting" with NDC.

In the meantime, you assert that ICANN is rejecting Afilias' request for 60 days' notice of a change to the "on-hold" status of the .WEB contention set. Afilias' request is entirely reasonable. As we explained, Afilias has asked for this notice because – in the event that ICANN decides to delegate .WEB to NDC and/or Verisign – Afilias wishes to have adequate time to challenge that delegation ***before*** the delegation is made and a Registry Agreement is executed, which would otherwise result in irreparable injury to Afilias. It will not be to anyone's benefit if Afilias were to challenge the delegation successfully after ICANN has already entered into a Registry Agreement for .WEB with NDC and/or Verisign.

You also assert that providing Afilias with 60 days' notice to a change to the "on-hold" status would constitute a "special notice that is not available to others . . . ." But we are unable to find any provision in ICANN's "documented policies" stating the notice period to be given to applicants who plan to challenge a proposed delegation of contested TLD licensing rights. Afilias has no objection to ICANN's providing the same 60-day notice to any other member of the .WEB contention set or other parties who are similarly situated to Afilias. If ICANN believes that some other notice period is applicable, we would ask ICANN to state what the notice period is and to identify where in its policies such notice period is set forth.

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[1] *See* https://gtldresult.icann.org/applicationstatus/applicationdetails/1053.

Finally, you assert that ICANN "vehemently disputes" our "characterizations." At this point, we have no idea which of our "characterizations" ICANN is disputing, other than our assertion that ICANN has not acted transparently in this matter. (E.g., does ICANN dispute that Verisign secretly funded NDC's bid or that Verisign was secretly the true party in interest behind NDC's bid? If not, does ICANN actually believe that such conduct complied with the Guidebook, or that ICANN's failure (so far) to address such conduct is consistent with its Core Values?) We can assure you that ICANN is not helping itself on the issue of transparency when it refuses to provide us with the basic information we have requested – including what (if anything) ICANN is doing to address Afilias' concerns and how much notice Afilias might receive before ICANN makes a decision on the .WEB contention set and proceeds to enter a Registry Agreement.

We look forward to your prompt response on these matters.

Sincerely,

Arif Hyder Ali
Counsel for Afilias

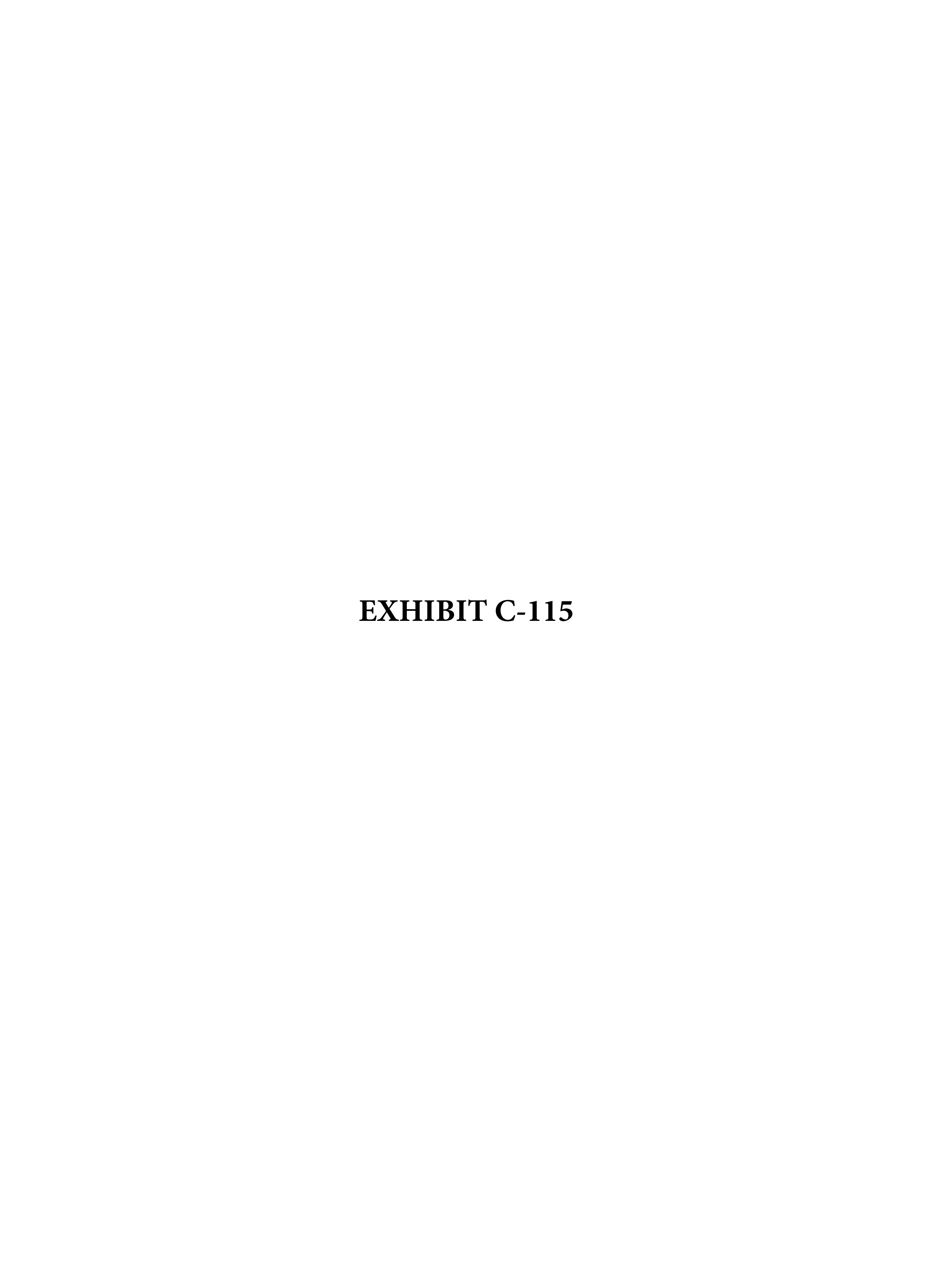
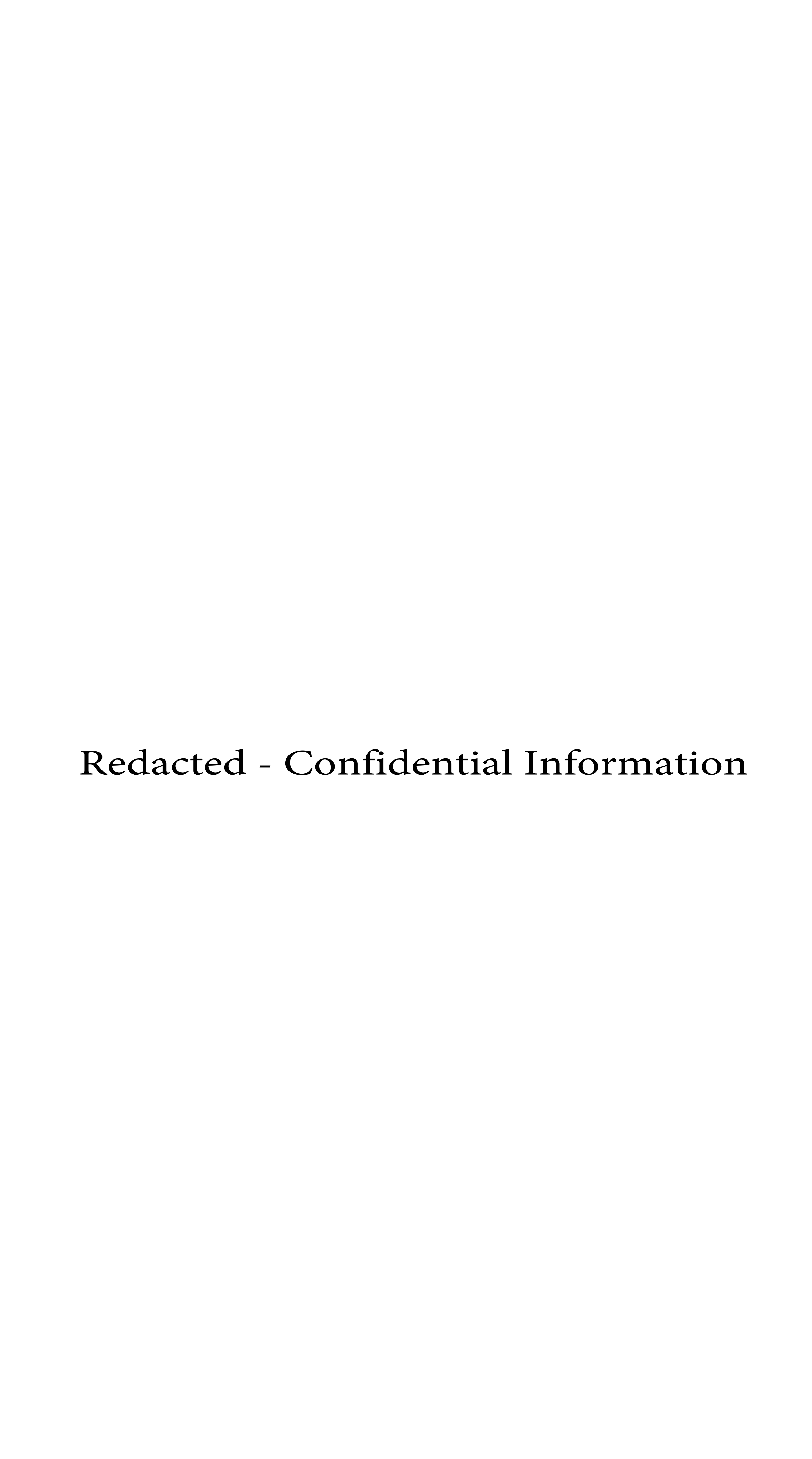


EXHIBIT C-115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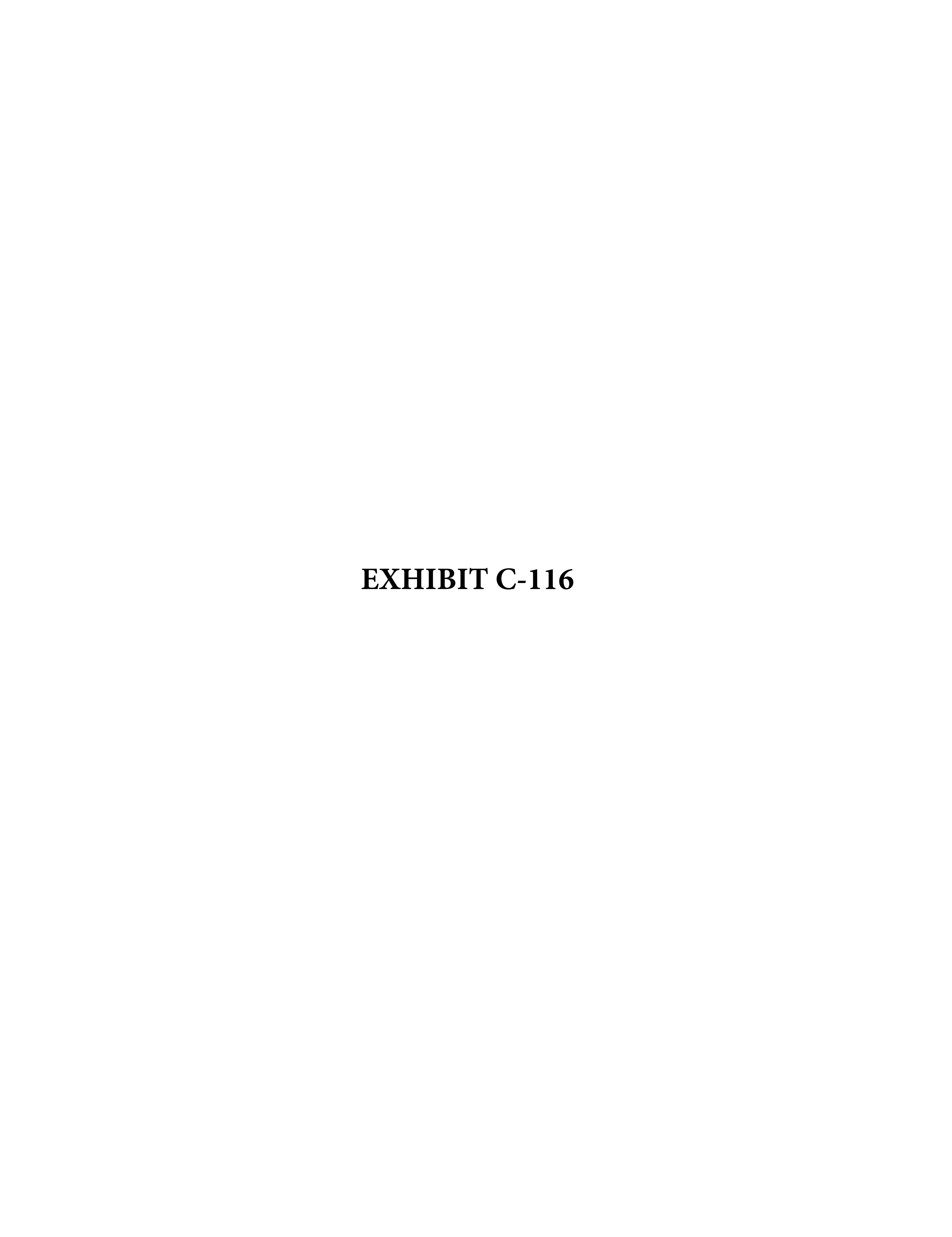

EXHIBIT C-116

Ex. C-116

The Economics of Regulation
Principles and Institutions

Volume I Economic Principles
Volume II Institutional Issues

Alfred E. Kahn

The MIT Press
Cambridge, Massachusetts
London, England

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CHAPTER 1

Introduction: The Rationale of Regulation and the Proper Role of Economics

Economics emerged in the eighteenth and nineteenth centuries as an attempt to *explain* and to *justify* a market system. This is an oversimplification, but it is a broadly accurate characterization of the mainstream of Western economic thought. The purpose has been to describe how an essentially uncontrolled economy, in which the critical economic decisions are made by individuals, each separately pursuing his own interest, can nonetheless orderly and efficiently do society's work. The coordinating and controlling mechanism is the competitive market and the system of prices that emerges out of the bargains between freely contracting buyers and sellers. The competitive market guides and controls the self-seeking activities of each individual, so that, as Adam Smith stated in 1776, while "he intends only his own gain . . . he is . . . led by an invisible hand to promote an end which was no part of his intention"[1]—that is, to maximize the wealth of the nation.

This rationalization and description of the competitive market is still in large measure relevant to Western economies today. The economic reforms initiated in the 1960s by many Communist countries were short steps in the same direction. For all the great modifications to which market economies have been subjected in practice during the last century, and for all the qualifications that must be attached to the case for such an economy, the competitive market model is still in important measure (some economists would even say essentially) descriptive both of reality and of the community's conception of what an ideal economic system would look like.[2]

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[1] *An Inquiry into the Nature and Causes of The Wealth of Nations*, Edwin Cannan, ed., 4th ed. (London: Methuen & Co. Ltd., 1925), I: 421.

[2] Apart from the fact that no two economists could agree on its precise formulation, it is impossible for even a single, nonschizophrenic, informed observer to make any brief statement that would adequately characterize the extent to which the model remains descriptively or analytically valid. There are large segments of the economy to which the model applies only peripherally—the governmental, public utility, and nonprofit sectors, including in the latter the entire household economy. See, for example, Eli Ginzberg, Dale L. Hiestand, and Beatrice G. Reubens, *The Pluralistic Economy* (New York: McGraw-Hill Book Co., 1965). Even where it does apply, the competition that actually prevails is highly imperfect at best. It may be agreed that even when the model does roughly characterize the functioning of the economy from some perspectives—for example, explaining how resources are allocated—it is almost entirely silent about other essential aspects—for example,

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THE REGULATED SECTOR

There are at least two large chunks of the economy that the competitive market model obviously does not describe or even purport to describe. These are the huge and growing public sector, the allocation of resources to which is determined not by the autonomous market but by political decisions, and the public utilities, in which the organization and management is for the most part (in the United States—not in most other countries) private but the central economic decisions are subject to direct governmental regulation.[3]

To be sure, the government influences the functioning of the private, competitive sectors of the economy as well in many ways—for example, by regulating the supply and availability of money, enforcing contracts, protecting property, providing subsidies or tariff protection, prohibiting unfair competition, providing market information, imposing standards for packaging and product content, and insisting on the right of employees to join unions and bargain collectively. In principle, these influences, however pervasive, are intended to operate essentially at the periphery of the markets affected. Their role is generally conceived as one of maintaining the institutions *within* whose framework the free market can continue to function, of enforcing, supplementing, and removing the imperfections of competition—not supplanting it.[4] In these sectors the government does not, or is not supposed to, decide what should be produced and how or by whom; it does not fix prices itself, nor does it control investment or entry on the basis of its own calculations of how much is economically desirable; the government does not specifically control who should be permitted to do what jobs, nor does it specify the permissible dimensions and characteristics of the product.[5]

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how the decisions of the assumedly "sovereign consumer" are really made. See Thorstein Veblen, *The Theory of the Leisure Class; an Economic Study of Institutions* (New York: The Macmillan Company, 1912) and John Kenneth Galbraith, *The New Industrial State* (Boston: Houghton Mifflin, 1967), Chapter 19 and *passim*.

[3] See the reference in note 2 to the large private nonprofit sector, also.

[4] Professor Hayek greatly stresses the distinction between governmental interventions consistent and inconsistent with the preservation of competition as the central economic regulator. It is the latter, not the former, he argues, that pose a threat to political and social freedom. Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), 88–100.

Professor Clair Wilcox organizes his excellent text, *Public Policies Toward Business*, 3rd ed. (Homewood: Richard D. Irwin, 1966), under a similar set of headings. See also Lee Loevinger, "Regulation and Competition as Alternatives," *The Antitrust Bulletin* (January–April 1966), XI: 104–108.

[5] It is important even in a general introduction not to leave the reader with the misleading impression that government policy is more logical, consistent, or clear-cut than it really is. We shall point out the fuzzy and frequently inconsistent shifting line that various governments have drawn between the essentially competitive and the regulated sectors of the economy. The Food and Drug Administration has determined that bread baked according to a formula developed by Cornell University may not be sold as white bread because it contains 6% soya flour. And that a perfectly healthful confection cannot be labeled as "jam" or even, clearly, as "imitation jam" unless it has at least 45% by weight of the purported fruit ingredient. See *62 Cases, More or Less, Each Containing Six Jars of Jam et al. v. U.S.*, 340 U.S. 593 (1951). In this instance the Supreme Court overturned the FDA. Heavyweight champions may be denied the right to defend their titles if they have had the temerity to make unpopular statements to the press. In many states professional wrestlers, veterinarians, and undertakers may not practice their trade without taking loyalty oaths. And we shall have occasion to note the many ways in which government restrictions on entry into supposedly competitive trades do in fact have major economic consequences, consequences often intended by those who administer them. On the other hand, the rationale or justification of such interventions, of which the foregoing

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In contrast, the government does do all these things with the public utilities. Here the primary guarantor of acceptable performance is conceived to be (whatever it is in truth) not competition or self-restraint but direct governmental prescription of major aspects of their structure and economic performance. There are four principal components of this regulation that in combination distinguish the public utility from other sectors of the economy: control of entry, price fixing, prescription of quality and conditions of service, and the imposition of an obligation to serve all applicants under reasonable conditions. This book is an analysis of the economics of that regulation—its characteristics and consequences, the principles that govern it, and the principles that ought to govern it.

THE LEGAL RATIONALE

For some 67 years, roughly in the period 1877–1934, the United States Supreme Court took the position that there were certain more or less readily identifiable industries, peculiarly and sufficiently "clothed" or "affected with a public interest" to justify legislatures subjecting them to regulation despite the Fourteenth Amendment's injunction that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." In a series of landmark decisions in the field of constitutional law, it drew tight boundaries around that group of industries, holding that outside those boundaries the Fourteenth Amendment prohibited any such drastic interferences with the freedom of contract. It admitted into the select circle grain elevators,[6] banks,[7] fire insurance companies,[8] and insurance agents.[9] In so doing it recognized also the long-accepted right of legislatures similarly to regulate the suppliers of gas, electricity, water, and transport services on the ground that these companies operated under governmental franchises giving them the right to make use of public streets or to condemn private property; these, being contracts freely entered into, could legitimately impose various regulatory conditions on the franchisee. And, typically over the vigorous dissents of such justices as Oliver Wendell Holmes, Louis D. Brandeis, and Harlan Fiske Stone, the Supreme Court declared "essentially private in nature"[10] and therefore beyond the reach of state regulation the manufacture of food, clothing, and fuels,[11] and the operations of theater ticket brokers,[12] employment agencies,[13] gasoline service stations,[14] and ice plants.[15]

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represent an almost infinitesimally small sample, is not the direct control over economic performance. The purported and often real purpose is either a political one—harassment of the "disloyal"—or to see to it that consumers are not misled in making their free choices, that is, to assure that competition itself functions more effectively.

[6] *Munn v. Illinois*, 94 U.S. 113 (1877).

[7] *Noble State Bank v. Haskell*, 219 U.S. 104 (1911).

[8] *German Alliance Insurance Company v. Lewis, Superintendent of Insurance of the State of Kansas*, 233 U.S. 389 (1913).

[9] *O'Gorman & Young, Inc., v. Hartford Fire Insurance Co.*, 282 U.S. 251 (1931).

[10] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 277 (1932).

[11] *Chas. Wolff Packing Co. v. Court of Industrial Relations of The State of Kansas*, 262 U.S. 522 (1923).

[12] *Tyson & Brother—United Theatre Ticket Offices v. Banton, District Attorney*, 273 U.S. 418 (1927).

[13] *Ribnik v. McBride, Commissioner of Labor of the State of New Jersey*, 277 U.S. 350 (1928).

[14] *Williams, Commissioner of Finance, et al. v. Standard Oil Co. of Louisiana*, 278 U.S. 235 (1929).

[15] See note 10. In a way it is ironic and somewhat misleading to trace the restrictiveness of this doctrine back to *Munn v. Illinois*, since in that decision the Supreme Court deferred to the judgment of the legislature in finding in the strategic position of the grain elevators (their importance to the public and purported power) a sufficient justification for regulation. It

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ively limit the force of the competitive market. Even in principle it is clear that many of the other instances of governmental intervention just mentioned represent policies of direct economic regulation, no more and no less, whatever their public rationalizations.

The period of the 1920s and 1930s, the very time when the constitutional issue was most strenuously contested and ultimately resolved, were especially propitious for this extension and blurring of the edges of the public utility concept, that is, of the boundaries between the industries appropriately regulated and those left to the regime of competition. Economists and law-makers were pointing with increasing emphasis to the pervasiveness of monopoly elements throughout the economy,[30] and this suggested at least to some that direct regulation of performance might be required to protect the consumer over a far wider range of industry than the public utilities proper.[31] In other contexts, these and other observers were pointing out that some of the same factors that made competition infeasible and potentially destructive among public utility companies—notably economies of scale and heavy overhead costs—were widespread in unregulated industry as well.[32] This led some of them to call for the introduction of comprehensive regulation as a means of eliminating the wastes, instabilities, and social costs imposed by

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See *U.S. v. Parke, Davis and Co.*, 362 U.S. 29 (1960); *U.S. v. General Motors Corp. et al.*, 384 U.S. 127 (1966); *U.S. v. Arnold, Schwinn & Co. et al.*, 388 U.S. 365 (1967); and *U.S. v. International Business Machines Corp.*, Civil Action No. 69, filed January 17, 1969, U.S. Dist. Ct., S.D.N.Y., *CCH Trade Regulation Reporter*, ¶ 45,069 (Case 2039).

[30] See, for example, Edward H. Chamberlin, *The Theory of Monopolistic Competition* (Cambridge: Harvard University Press, 1933), and Joan Robinson, *The Economics of Imperfect Competition* (London: Macmillan and Co., Ltd., 1933), both giving formal recognition in their theoretical models to the fact that all real markets lie somewhere between the polar extremes of perfect competition and pure monopoly.

[31] See Arthur Robert Burns, *The Decline of Competition* (New York: McGraw-Hill Book Co., 1936), especially Chapters 11 and 12. See also the dissenting opinions of Justice Stone in *Tyson v. Banton*, 273 U.S. 418, 447–454 (1927) and *Ribnik v. McBride*, 277 U.S. 350, 361–375 (1928), contending that the presence of substantial monopoly power and the necessity of protecting the unemployed from extreme exploitation justified these attempts by the states to regulate the fees of ticket brokers and employment exchanges. Of course, not all economists concluded that widespread imperfections of competition made it necessary to abandon antitrust policy generally and turn to regulation. See, for example, J. M. Clark, "Toward a Concept of Workable Competition," in American Economic Association, *Readings in the Social Control of Industry* (Philadelphia: The Blakiston Co., 1942), pp. 452–475.

[32] J. M. Clark was a leading and perhaps most profound exponent of this view:

"It soon became evident that railroads were not the only industry using large fixed capital and subject to the 'peculiarities' of constant and variable costs. It also became evident that discrimination was not the only untoward result. . . . It became evident that economic law did not insure prices that would yield 'normal' returns on invested capital. . . . The business cycle had become a recognized part of the order of things, with its recurrent periods of excess producing capacity, during which active competition tended to lower prices until even efficient concerns could make little or no return on their investment. . . .

"Here we have an array of problems, primarily relating to the economist's search for the laws governing normal and market price and to the question whether competition is natural and can endure. . . .

"Other important developments have occurred in connection with public utilities. . . . Here, for the first time, organized technical attention is paid to the recurrent ebb and flow of output and the daily and seasonal 'peaks' of demand. . . . [But] Restaurants, theaters, golf clubs, garment-making industries, railroads and street cars, building, and other trades—all have their peaks, daily or seasonal. And all industries suffer in common from the unpredictable irregularities of the business cycle." *Studies in the Economics of Overhead Costs* (Chicago: University of Chicago Press, 1923), 11–15. Copyright 1923 by the University of Chicago. All rights reserved.

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competition,[33] an argument that reinforced the movement, increasingly popular among businessmen, for "rationalization" of industry by industry-wide cooperation and cartelization.[34] Not surprisingly, it was in the middle of the Great Depression that these views ultimately prevailed—in the *Nebbia* decision, which involved minimum price fixing for milk, and more generally in the National Recovery Program, which, in quest of general economic recovery, introduced industry-wide "codes of fair competition."[35] That these codes were used to involve much more self-regulation of industry and cartelization than effective governmental controls does not alter the fact that the National Recovery Administration represented during its short lifetime a further blurring of the distinction between the competitive and public utility sectors; and many of its policies continue to be applied today.

And yet there *is* such a thing as a public utility. The line between these and other types of industries is a shadowy area; and it shifts over time. But there remains a core of industries, privately owned and operated in this country, in which, at least in principle, the primary guarantor of acceptable performance is *conceived* to be (whatever it is in truth) not competition or self-restraint but direct government controls—over entry (and in many instances exit), *and* price, *and* conditions of service—exercised by administrative commissions constituted for this specific purpose.[36] In this respect, the public utilities remain a fairly distinct group, comprising the same industries that 60 to 80 years ago would have been given essentially the same designation and regulatory treatment—the generation, transmission, and distribution of electric power; the manufacture and distribution of gas; telephone, telegraph, and cable communications; common-carrier transportation, urban and interurban, passenger and freight; local water and sewerage supply (to the extent at least that these continue to be provided by privately-owned companies); and, in a sense at the periphery, banking. The list could well embrace, also, warehouses, docks, wharves, stockyards, taxis, ticket brokers, employment exchanges, ice plants, steam heating companies, cotton gins, grist mills, irrigation companies, stock exchanges, and express

[33] See, for example, the analysis and proposals by Walton H. Hamilton and Helen R. Wright, *The Case of Bituminous Coal* (New York: The Macmillan Co., 1925), and Walton H. Hamilton, *A Way of Order for Bituminous Coal* (New York: The Macmillan Co., 1928); and A. R. Burns, *loc. cit.*

[34] See, for example, Robert A. Brady, *Business as a System of Power* (New York: Columbia University Press, 1943), Chapters 7 and 8; George W. Stocking and Myron W. Watkins, *Cartels or Competition?* (New York: Twentieth Century Fund, 1948), Chapter 2; and *Monopoly and Free Enterprise* (New York: Twentieth Century Fund, 1951), Chapter 8.

[35] See A. R. Burns, *op. cit.*, Chapter 10; and Clair Wilcox, *op. cit.*, 677–687.

[36] Every state, including the District of Columbia, Puerto Rico, and the Virgin Islands, has such a commission, although the powers vested in them vary. For example, the Minnesota and Nebraska state commissions do not regulate either the retail or the wholesale rates, and those of Texas and South Dakota control only the wholesale rates charged by private electric companies. But the Nebraska exception is easily explained: there are no private electric utilities in that state. In all four states the municipalities have jurisdiction over the retail rates. All the other state commissions regulate at least the retail rates. No less than nine states have not given their commissions authority to require certificates of convenience and necessity before companies may begin service in a new area or to control abandonments; but in many, if not all of them, the municipalities do have these powers. The situation in natural gas distribution is similar. All states except Texas regulate telephone rates. For a survey, see U.S. Senate, Committee on Government Operations, Subcommittee on Intergovernmental Relations, 90th Cong. 1st Sess., *State Utility Commissions: Summary and Tabulation of Information Submitted by the Commissions*, Washington, 1967. See also Federal Power Commission, *Federal and State Commission Jurisdiction and Regulation: Electric, Gas, and Telephone Utilities*, Washington, 1967.

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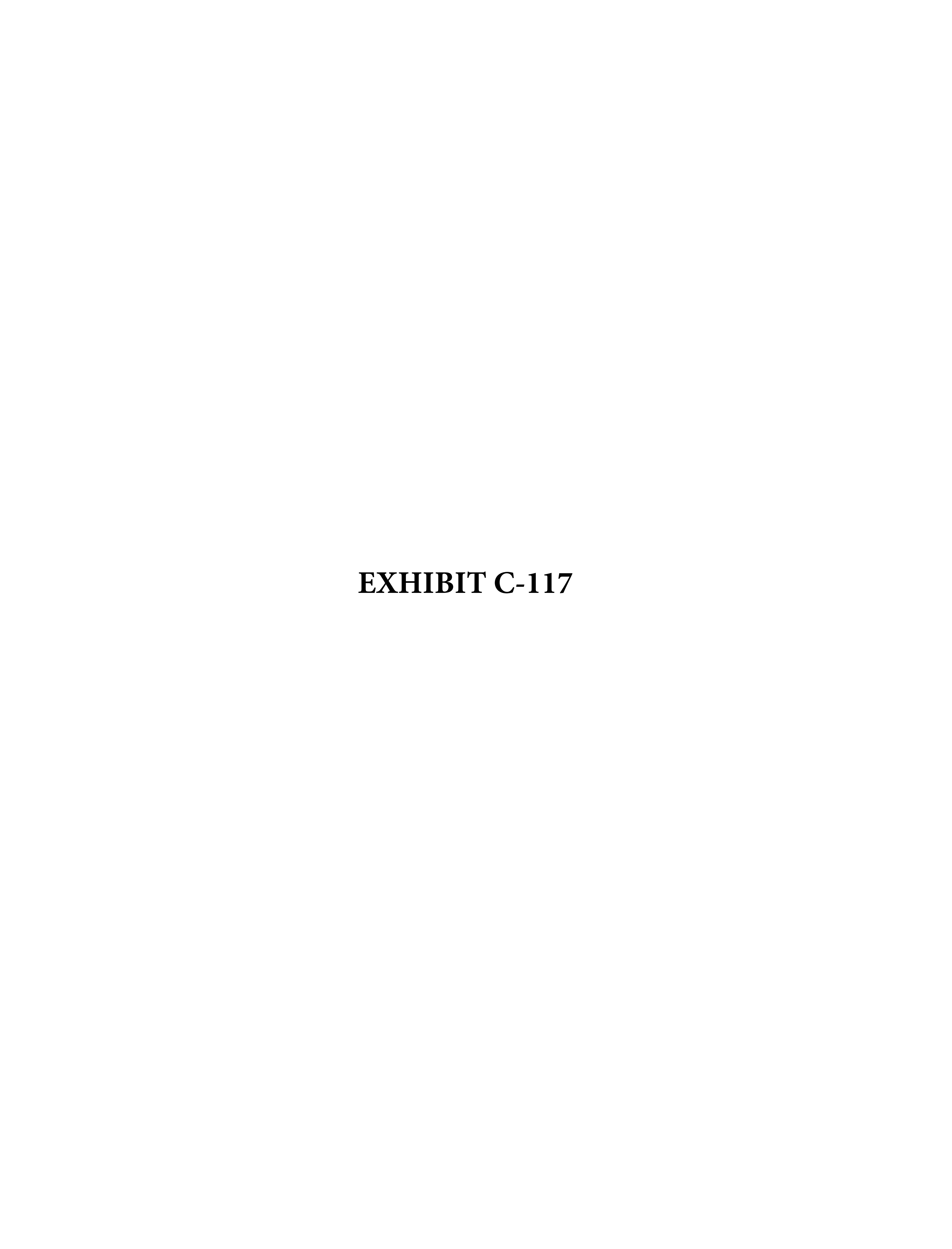

EXHIBIT C-117

Ex. C-117

An official website of the United States government
Here's how you know

Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum

Washington, DC ~ Thursday, November 16, 2017

Thank you so much Jon for that kind introduction and to Svetlana Gans and David Gelfand for their help in organizing this year's Fall Forum. I appreciate the opportunity to address such an experienced audience of antitrust practitioners, academics, enforcers, and experts. The welcome letter for this Fall Forum raises an important question that I've been hearing a lot lately. Given last year's election, it asks: "how does antitrust fare in the required reduction in federal regulations?" I certainly support limited government and a reduction in regulation. But what does that mean for the enforcement of the antitrust laws? Today, with your permission, I'll discuss two related answers to that question.

First, antitrust is law enforcement, it's not regulation. At its best, it supports reducing regulation, by encouraging competitive markets that, as a result, require less government intervention. That is to say, proper and timely antitrust enforcement helps competition police markets instead of bureaucrats in Washington, D.C. doing it. Vigorous antitrust enforcement plays an important role in building a less regulated economy in which innovation and business can thrive, and ultimately the American consumer can benefit.

The second answer relates to remedies—at times antitrust enforcers have experimented with allowing illegal mergers to proceed subject to certain behavioral commitments. That approach is fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market. And, as 11 Senators wrote to the Attorney General earlier this year, the "lack of enforceability and reliability of such conditions [can] render them insufficient" to protect consumers. As we reduce regulation across the government, I expect to cut back on the number of long-term consent decrees we have in place and to return to the preferred focus on structural relief to remedy mergers that violate the law and harm the American consumer.

I have a lot more to say about both of those points. But before I get into the substance of my remarks let me mention what an honor it is to appear before you as the Assistant Attorney General for the Antitrust Division. I've worked in various jobs in all three branches of the federal government, and I truly believe that working at the Antitrust Division of the Department of Justice is one of the greatest privileges anyone can have. As Attorney General Ashcroft used to remind me, it's the only Department in all the federal government with a moral ideal in its very name.

I have especially enjoyed reconnecting with the career staff that I got to know during my prior service at the Division, and meeting the tremendously talented professionals who have joined since. Anyone who has worked with or at the Antitrust Division knows that it's a unique organization where most of the hard thinking and case development is done at the staff level, and everyone takes seriously our law enforcement mission of protecting free markets and the American consumer.

I should also mention at the outset how pleased I am to have such a capable team of partners working with me. In addition to the career staff, I have an outstanding Front Office. You likely know my good friend and Principal Deputy AAG Andrew Finch, who I have to say did a great job as Acting AAG for a longer stretch than most of us anticipated. Barry Nigro, who is no stranger to this Section; Professor Roger Alford, a world class scholar and academic from Notre Dame Law School and a leader in international law; Don Kempf, a former colleague on the Antitrust Modernization Commission and a legend in litigation (he chaired Kirkland's litigation for decades); and last but not least, Professor Luke Froeb, one of the finest antitrust economists around who, like me and Andrew, is also making a return appearance

at the Division. The rest of the Front Office, including our capable Counsels and talented Directors of Enforcement are all excited for the work to come.

Let me return to the question of the role of antitrust in the ongoing deregulatory push. In my view, antitrust is inherently deregulatory—in other words, competition law enforcement contributes to a well-functioning free market economy, and our prosecution efforts will support a more limited overall federal government role in the markets.

Prior to serving as a distinguished Associate Justice on the U.S. Supreme Court, one of my legal heroes, Robert Jackson, made this point in 1937 when he gave a speech as the Assistant Attorney General for the Antitrust Division. He said it much better than I could: "The antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices. It was hoped to … let [government] confine its responsibility to seeing that a true competitive economy functions." This, he said, "is the lowest degree of government control that business can expect."

That reflects a fundamental choice in the relationship between government and the economy. Some economies are centrally planned and others are highly regulated, but in the United States our economy is premised on liberty. We believe that through the give and take of the free market, the competitive process maximizes consumer welfare. As Justice Black wrote in Northern Pacific, the Sherman Act is a "comprehensive charter of economic liberty," and antitrust enforcement "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress." This focus on economic liberty and consumer welfare serves our most cherished values.

The economic liberty approach to industrial organization is also good economic policy. F. A. Hayek won the 1974 Nobel Prize in economics for his work on the problems of central planning and the benefits of a decentralized free market system. The price system of the free market, he explained, operates as a mechanism for communicating disaggregated information. "[T]he ultimate decisions must be left to the people who are familiar with the[] circumstances." Regulation, I humbly submit in contrast, involves an arbiter unfamiliar with the circumstances that cannot possibly account for the wealth of information and dynamism that the free market incorporates.

All of this, I think, is well understood and generally accepted. Indeed there has been broad, bipartisan, agreement for several decades on what Robert Bork famously described as the "single goal of consumer welfare in the interpretation of the antitrust laws." I believe that should and will continue. Antitrust seeks to protect the competitive process to maximize consumer welfare, and we rely on economic analysis to effectively serve those goals. In so doing, we minimize the need for regulatory intervention on issues of price, quality, and investment. For this reason, the Division, through its various enforcement and advocacy tools, will continue to be active in promoting strong competition policy and reducing regulations that unnecessarily burden the American economy.

That background provides a framework for thinking about remedies. When competition policy works well, it maintains economic liberty and leaves decision-making to the markets. As Bork explained: "Antitrust was originally conceived as a limited intervention in free and private processes for the purpose of keeping those processes free." Our goal in remedying unlawful transactions should be to let the competitive process play out.

Unfortunately, behavioral remedies often fail to do that. Instead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation; it replaces disaggregated decision making with central planning. That concern was one of the core insights of the 2004 Remedies Guidelines, which were issued while I was last at the Antitrust Division. As the report notes, "conduct remedies generally are not favored in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies can avoid."

At the beginning of the last administration, the Division entered into several behavioral consent decrees to resolve vertical mergers it determined to be illegal, such as those in Comcast/NBCU, Google/ITA, and LiveNation/TicketMaster. Several observers took issue with this regulatory approach to antitrust enforcement. For example, law professor and economist John Kwoka and Diana Moss of AAI wrote thoughtfully and critically about the problems of using regulatory solutions to address antitrust violations. They pointed out that "allowing the merger and then requiring the merged firm to ignore the incentives inherent in its integrated structure is both paradoxical and likely difficult to achieve." Likewise, in his 2014 book on merger control, Professor Kwoka recognized the "[i]rony that … traditional regulation has fallen out

of favor … [and yet] its essential elements have been incorporated in the revised policy and practice toward merger remedies…..”

I agree with that skepticism. Like any regulatory scheme, behavioral remedies require centralized decisions instead of a free market process. They also set static rules devoid of the dynamic realities of the market. With limited information, how can antitrust lawyers hope to write rules that distort competitive incentives just enough to undo the damage done by a merger, for years to come? I don’t think I’m smart enough to do that.

Behavioral remedies often require companies to make daily decisions contrary to their profit-maximizing incentives, and they demand ongoing monitoring and enforcement to do that effectively. It is the wolf of regulation dressed in the sheep’s clothing of a behavioral decree. And like most regulation, it can be overly intrusive and unduly burdensome for both businesses and government.

Take so-called arbitration remedies as an example. Rather than permitting price to act as a carrier of information in the market as Hayek described, this type of remedy puts the arbitration backdrop in charge. The arbitrator will certainly have limited information—he or she has no more capability than any central planner—yet the expected arbitration outcome will overshadow every negotiation and distort the competitive process.

In recent years, antitrust enforcers have struggled more and more with the challenges of crafting and enforcing effective behavioral relief. I know that many thought the Comcast/Time Warner Cable deal would be approved subject to behavioral conditions because the two did not compete for downstream customers, but I understand that the FCC and DOJ rejected that approach and the merger was abandoned by the parties. Likewise, when Lam Research sought to acquire KLA-Tencor last year, the transaction raised vertical foreclosure concerns because it combined a manufacturer of semiconductor fabrication tools and a company that made an important input for using those tools. I was not yet at the Division, but as the companies publicly explained upon abandoning, “the U.S. Department of Justice advised [them] that it would not continue with a consent decree that the parties had been negotiating.” The ABA Antitrust Section’s bi-partisan Presidential Transition report this year appropriately described behavioral remedies as “controversial.”

Without getting into specifics, I can say that behavioral remedies have proven challenging to enforce today. In recent years, the Division has investigated a number of behavioral decree violations, but has found it onerous to collect information or satisfy the exacting standards of proving contempt and seeking relief for violations. We have a limited window into the day-to-day operations of business, and it is difficult to monitor and enforce granular commitments like non-discrimination and information firewalls. Behavioral remedies presume that the Justice Department should serve as a roving ombudsman of the affairs of business; even if we wanted to do that, we often don’t have the skills or the tools to do so effectively.

Another problem with behavioral remedies is determining their expiration. A short-term remedy is a band-aid, not a fix, and as FTC Commissioner McSweeny said last year, “the relief at best only delays the merged firm’s exercise of market power.” On the other hand, if we make behavioral commitments indefinite, then we really are becoming full-time regulators instead of law enforcers.

That is not to say we would never accept behavioral remedies. In certain instances where an unlawful vertical transaction generates significant efficiencies that cannot be achieved without the merger or through a structural remedy, then there’s a place for considering a behavioral remedy if it will completely cure the anticompetitive harms. It’s a high standard to meet.

To be crystal clear, that cuts both ways—if a merger is illegal, we should only accept a clean and complete solution, but if the merger is legal we should not impose behavioral conditions just because we can do so to expand our power and because the merging parties are willing to agree to get their merger through. Meanwhile, we will take seriously our obligations as law enforcers to ensure full compliance with judgments already in place.

So, how should merging parties view the standards for behavioral relief? I believe the Division should fairly review offers to settle but also be skeptical of those consisting of behavioral remedies or divestitures that only partially remedy the likely harm. We should settle federal antitrust violations only where we have a high degree of confidence that the remedy does not usurp regulatory functions for law enforcement, and fully protects American consumers and the competitive process.

Decrees should avoid taking pricing decisions away from the markets, and should be simple and administrable by the DOJ. We have a duty to American consumers to preserve economic liberty and protect the competitive process, and we will not accept remedies that risk failing to do so. I believe this is a bipartisan view. As my friend, former AAG for Antitrust Bill Baer said in Senate testimony last year, "consumers should not have to bear the risks that a complex settlement may not succeed."

We're thinking hard about ways that consent decrees can be improved. In my short tenure at the Division we have begun to streamline and improve our use of consent decrees. I was surprised to learn how many longstanding antitrust decrees we still have on the books. Believe it or not, we have nearly 1,300 judgments in effect, with some that are well over 100 years old. One dates to 1891. My favorite is the one pertaining to music rolls, still protecting consumers against the ills of anticompetitive behavior in the mechanical organ market. But I understand our Chief Legal Officer Dorothy Fountain prefers the Horseshoer's National Protective Association judgment from 1913. Both are still in effect today. Do you see what I mean about static solutions to the realities of dynamic markets?

We're also taking steps to improve the enforceability of our consent decrees. Although generally a contempt action must be proven by a clear and convincing evidence standard, we are incorporating language that provides for agreement by parties that alleged violations will be evaluated under a preponderance standard. We recently included such a provision in the Entercom-CBS decree, which was a structural remedy. We will also be seeking agreement on attorney's fees and costs provisions to compensate American taxpayers for the burdens of ongoing monitoring and enforcement of consent decrees.

Let me finish where I started—with how excited and honored I am to represent the Antitrust Division. Every day I walk into Main Justice past a wall filled with the photos of my predecessors—it's humbling to see the photos dating back well before Justice Jackson, with names such as Thurman Arnold, Bill Baxter, and my friend Sandy Litvack —and I'm deeply inspired by all that they did to build and grow this vital institution. The Antitrust Division plays a critical role at the intersection of the American economy and its government, and it is incredibly important to our country that it preserve free market competition through principled application of the antitrust laws. I only hope to continue that work and to leave the Division a little better than I found it. Thank you.

Speaker:
Makan Delrahim, Assistant Attorney General

Attachment(s):
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Topic(s):
Antitrust

Component(s):
Antitrust Division

Updated November 16, 2017

EXHIBIT C-118

Ex. C-118

No. 19-1397

IN THE
United States Court of Appeals for the Fourth Circuit

STEVES AND SONS, INC.,
Plaintiffs-Appellee,

v.

JELD-WEN, INC.,
Defendants-Appellant.

On Appeal from the
United States District Court for the Eastern District of Virginia
Honorable Robert E. Payne
No. 3:16-cv-545-rep

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLEE STEVES AND SONS, INC.

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INTEREST OF THE UNITED STATES

The United States enforces the federal antitrust laws and has a strong interest in ensuring that remedies for antitrust violations restore competition to the market. This brief addresses two issues that impact current and future merger reviews by the Antitrust Division of the U.S. Department of Justice: (1) the application of the equitable doctrine of laches to private-party antitrust suits seeking divestiture of assets after a merger, and (2) the evidentiary significance in a private antitrust suit of a decision by the Antitrust Division not to challenge the underlying merger or acquisition.

The United States urges this Court to recognize that laches does not bar all private-party antitrust suits seeking divestiture filed after the consummation of a merger, particularly those suits in which the private-party plaintiff cooperated with the Antitrust Division's review instead of immediately bringing its own suit to block the merger. The United States also urges that no inference should be drawn from the Division's decision to close an investigation into a merger without taking further action. This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

JELD-WEN, Inc. is a vertically integrated manufacturer of both molded interior doors and doorskins, which are the decorative coverings for molded interior doors. Mem. Op., ECF No. 1783 at 3, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 16-545 (E.D. Va. Oct. 5, 2018) ("Divestiture Op."). Steves & Sons ("Steves") is both a competitor to and a customer of JELD-WEN; Steves manufactures and sells molded interior doors but purchases its doorskins from manufacturers, including JELD-WEN. *Id.*

In May 2012, JELD-WEN and Steves entered into a long-term doorskin supply agreement with a seven-year term, which included provisions governing the prices JELD-WEN could charge Steves and the amount by which JELD-WEN could increase those prices year-to-year depending on various inputs. Divestiture Op. at 4, 16-18, 28. Subsequently, in July 2012, JELD-WEN announced it would acquire Craftmaster Manufacturing, Inc. ("CMI"), another doorskin manufacturer. *Id.* at 3-4, 18. JELD-WEN's entrance into the supply contract with Steves was "part of its plan to secure merger approval" for the CMI deal. *Id.* at 16.

The Antitrust Division investigated JELD-WEN's proposed CMI acquisition and closed that investigation in September 2012 without taking further action. Divestiture Op. at 18-19. JELD-WEN acquired CMI on October 24, 2012. *Id.* at 19.

In September 2014, JELD-WEN requested a price increase from Steves that was not permitted under their contract terms, and which Steves rejected; JELD-WEN then sent notice it would terminate the supply agreement effective September 2021, per the contract terms. Divestiture Op. at 28-31.

In December 2015, after negotiations and mediation with JELD-WEN, Steves met with the Antitrust Division, raising antitrust concerns about the CMI deal. Divestiture Op. at 42. That month, the Division opened an investigation into the deal for a second time. "Steves gave a presentation to the DOJ later that month, and then produced documents to the DOJ in January 2016, in response to a civil investigative demand. On April 7, 2016, JELD-WEN also made a presentation to the DOJ." *Id.* In May 2016, the Division again closed the investigation without taking further action. *Id.*

Shortly thereafter, on June 29, 2016, Steves filed a complaint alleging that JELD-WEN's acquisition of CMI has and will continue to "substantially . . . lessen competition or . . . tend to create a monopoly in the markets for interior molded doorskins" in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Compl. at ¶ 176, ECF No. 1, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 16-545 (E.D. Va. June 29, 2016).

The case was tried to a jury, which found JELD-WEN's acquisition of CMI violated Section 7 and awarded Steves over $100 million in damages for JELD-WEN's antitrust violations and breaches of the supply agreement, as well as future lost profits. Divestiture Op. at 4-5.

Thereafter, Steves sought an injunction requiring JELD-WEN to divest the CMI assets in lieu of the jury's award of future lost profits. Pl.'s Mot. for Equitable Relief, ECF No. 1191, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 16-545 (E.D. Va. Mar. 13, 2018). Steves asked the district court to order JELD-WEN to divest to a "willing independent competitor" the doorskins manufacturing facility in Towanda, Pennsylvania it had acquired through its CMI acquisition and requested that the divestiture be accompanied by a number of other concessions from JELD-WEN, including an irrevocable intellectual

property license, transitional services, opportunities to hire Towanda employees, and doorksin supply agreements. Mem. in Supp. of Pl.'s Mot. for Equitable Relief, ECF No. 1193, *Steves and Sons, Inc. v. JELD-WEN*, *Inc.*, No. 16-545 (E.D. Va. Mar. 13, 2018).

On June 6, 2018, the United States submitted a statement of interest in the district court in response to Steves's motion seeking divestiture. Statement of Interest of the United States of America Regarding Equitable Relief ("Statement of Interest"), ECF No. 1640, *Steves and Sons, Inc. v. JELD-WEN*, *Inc.*, No. 16-545 (E.D. Va. June 6, 2018). In it, the United States explained why divestiture "normally is the best way to preserve and restore competition in the relevant market threatened by, or already harmed by, an anticompetitive merger"; outlined the method by which Antitrust Division examines any proposed divestiture to ensure it "addresses the competitive harm caused by the merger and is substantial enough to enable the purchaser to effectively preserve or restore competition"; and urged the court and the parties not to infer anything from the Division's decision not to challenge JELD-WEN's acquisition of CMI. *Id.* at 1, 2 n.1, 5-7.

The district court granted Steves's divestiture request, holding that absent the divestiture, "it is not possible to restore the substantially lessened competition in the market for interior molded doorskins that the jury found was the consequence of the acquisition of [CMI] by JELD-WEN," that Steves had no adequate remedy at law for the antitrust injury it sustained as a result of the merger, that Steves would suffer irreparable injury without the divestiture, that the balance of hardships Steves and JELD-WEN would sustain because of the divestiture tilted in favor of Steves, and that divestiture would serve the public interest. Amended Final Judgement Order at 2-3, ECF No. 1852, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 16-545 (E.D. Va. Mar. 13, 2019). The court also amended the jury's verdict of past antitrust damages for Steves from $12,151,873 to $36,455,619. *Id.* at 2.

In a separate divestiture opinion, the district court examined and rejected a number of JELD-WEN's arguments, including that the affirmative defense of laches should apply to block Steves's divestiture claim because of the years-long delay between the closure of the acquisition on October 24, 2012 and Steves's choice to file suit on June 29, 2016. Divestiture Op. at 117-148.

SUMMARY OF ARGUMENT

The United States files this brief to state its positions on two issues raised in this appeal and urge the Court not to accept JELD-WEN's arguments that would contravene those positions. First, laches should not be uniformly applied to block private-party divestiture suits filed after the consummation of a merger or acquisition. Second, no inference should be drawn from the Antitrust Division's decision to close an investigation into a merger or acquisition without taking additional action. The United States does not otherwise take a position on the district court's decision, the district court's divestiture order, the outcome of the issues raised in this appeal, or the sufficiency of the arguments offered by the parties.

ARGUMENT

I. Laches Should Not Be Applied Uniformly to Private-Party Antitrust Claims Seeking Divestiture Filed After Consummation of a Merger.

Laches is an equitable doctrine that bars relief when a plaintiff has unreasonably and prejudicially delayed in filing suit. "Laches imposes on the defendant the ultimate burden of proving '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)). It "applies to preclude relief for a plaintiff who has unreasonably 'slept' on his rights" and blocks "claims where a defendant is prejudiced by a plaintiff's unreasonable delay in bringing suit after the plaintiff knew of the defendant's violation." *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 121 (4th Cir. 2011). Laches demands a highly fact-specific inquiry; "whether laches bars an action depends upon the particular circumstances of the case." *White*, 909 F.2d at 102.

JELD-WEN wrongly urges this Court to adopt a rigid approach to laches and overturn the district court's conclusion that laches does not

bar Steves's divestiture claim, citing cases that "found that laches barred private-party divestiture claims brought *at any time* after a merger was consummated." Redacted Br. for Defendant-Appellant ("Br.") at 44, ECF No. 35 (June 10, 2019) (citing *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010); *Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118, 1125 (N.D. Cal. 2011); *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1172-73 (C.D. Cal. 2000)). Although the Supreme Court noted laches may apply to block a "belated" private-party antitrust divestiture claim, it has never stated—and this Court should not adopt—a rule that laches bars every suit filed after the consummation of a merger, or that all claims filed post-consummation are belated. *California v. Am. Stores Co.*, 495 U.S. 271, 294-95 (1990) (noting that laches may apply to "protect consummated transactions from belated attacks by private parties"). A rigid or reflexive application of laches to all divestiture suits filed post-consummation conflicts with the equitable nature of the remedy and could hamper both private and public antitrust enforcement.

Rather than uniformly time-barring suits post-consummation, the doctrine should allow the court to take into account that a plaintiff

actively cooperated with a government investigation of the transaction, or that the potential antitrust harms of a transaction may not have been apparent to the plaintiff before consummation.

A. Plaintiffs May Reasonably Delay Filing to Assist the Government's Merger Review Process.

The Antitrust Division relies on the cooperation of third parties when investigating mergers. JELD-WEN's laches argument risks undercutting such cooperation. Private plaintiffs should not be penalized in a laches analysis because they chose to cooperate with antitrust enforcement agencies.

After opening an inquiry into a merger or acquisition, Division employees contact the customers and competitors of the merging parties as well as other third parties, seeking interviews, in-person meetings, and relevant documents. The information the Division gleans from these third parties is essential to developing the Division's understanding of the market in which the merger is occurring and its potential benefits and harms, crucial to any merger investigation. "Information from customers about how they would likely respond to a price increase, and the relative attractiveness of different products or suppliers, may be highly relevant." U.S. Dep't of Justice and Fed. Trade

Commission, *Horizontal Merger Guidelines* at 2.2.2 (Aug. 19, 2010). "Customers also can provide valuable information about the impact of historical events such as entry by a new supplier" or "the likely impact of the merger." *Id.* Similarly, "[s]uppliers, indirect customers, distributors, other industry participants, and industry analysts can also provide information helpful to a merger inquiry," and the views of third parties "selling products complementary to those offered by the merging firms often are well aligned with those of customers, making their informed views valuable." *Id.* at 2.2.3.

This investigative process occurs during the same post-announcement, pre-consummation period in which potential private plaintiffs challenging a merger under Clayton Act § 16, 15 U.S.C. § 26, would have their first opportunities to file suit. Applying laches to block suits not filed during this period would unjustly cabin the right of a prospective plaintiff to file a private-party antitrust divestiture claim to a small period of time, in which the plaintiff must race the clock to find counsel, attempt to measure the potential impact of a merger or acquisition on its business, evaluate the strength of its evidence, and weigh the wisdom of filing a time-consuming suit rather than pursuing

other options, including cooperating with an Antitrust Division merger investigation.

It is reasonable for a third party to choose to cooperate with the Division and wait to see whether the government decides to challenge a particular acquisition before itself filing suit. Moreover, public policy should not discourage third parties from volunteering their time and expertise to the Division by forcing a potential plaintiff to focus on whether it should be using its limited resources to file suit rather than inform the government's own inquiry.

B. Plaintiffs May Reasonably Delay Filing Because Harmful Merger Effects Can Take Time to Materialize.

Confining suits under § 16 of the Clayton Act by rigidly applying the doctrine of laches also ignores the reasonable possibility that a party could be injured by a merger after it has been consummated, or that the threat of antitrust injury may not materialize until some time after the merger has closed. *Cf. Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 682 (2014) (in a laches analysis, it might be reasonable for a copyright plaintiff to wait and watch before filing suit because "there is nothing untoward about waiting to see whether an infringer's

exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even complements it"). Unlike the government, a private antitrust plaintiff must show actual or threatened antitrust injury *to itself*, not consumers at large; in a private suit, "a plaintiff must still demonstrate that injunctive relief is necessary to prevent injury to its interests," *Garabet*, 116 F. Supp. 2d at 1170, as compared to a government case, in which "proof of the violation of law may itself establish sufficient public injury to warrant relief," *Am. Stores*, 495 U.S. at 295.

In a case in which the merging parties argue that long-term supply contracts will protect customers from anticompetitive effects post-merger, a customer may reasonably delay filing suit pre-merger based on the concern it will face a standing challenge.[1] If laches barred

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[1] Indeed, JELD-WEN argues here that its pre-merger supply contract with Steves protected it from antitrust injury. Br. at 35. According to JELD-WEN, Steves did not have antitrust injury (or, hence, standing to bring a Section 7 claim) unless and until it could prove that JELD-WEN breached the supply contracts (1) by virtue of the merger, and (2) in a manner that left Steves worse off than before the merger. *Id.* at 34-42. Although the United States takes no position on whether Steves demonstrated antitrust injury in this case, the United States does note that it would have been difficult for Steves to anticipate, pre-merger, the precise manner in which JELD-WEN would breach its supply contracts post-merger. If, as JELD-WEN argues, antitrust standing

all post-consummation challenges by private parties, then merging parties could attempt to use contractual promises to undermine customers' standing before consummation, and then efficiently breach those contracts after consummation. In such a case, it may be reasonable for the customer to observe the actual or threatened harm only after the date of consummation, and the laches doctrine should be flexible enough to hold the merging parties responsible for such a scheme.

In sum, laches is a fact-specific doctrine. A court may find it was reasonable for a particular plaintiff to have waited until after consummation to file suit for a variety of reasons. Although the United States does not take a position on the applicability of laches in this case, this Court should not create a categorical rule that laches bars challenges to a merger after consummation.

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requires a customer-plaintiff to demonstrate that the precise manner of breach left it worse off than before the merger, the customer may need to observe the breach before it can bring suit.

II. No Inference Should Be Drawn From the Antitrust Division's Closed Investigations of the JELD-WEN/CMI Transaction.

Contrary to JELD-WEN's suggestion, no inference should be drawn from the Division's closure of its investigations into JELD-WEN's proposed and consummated acquisition of CMI. Br. at 67. As the United States has stated twice previously in this case in response to JELD-WEN's assertions, *see* Statement of Interest at 2 n.1, there are many reasons why the Antitrust Division might close an investigation or choose not to take an enforcement action. The Division's decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive.

CONCLUSION

This Court should reject any rule uniformly applying laches to block private-party divestiture suits filed after the consummation of a merger or acquisition and any attempt to draw an inference from the Antitrust Division's decision to close an investigation into a merger or acquisition without taking additional action.

Respectfully submitted.

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August 23, 2019

CERTIFICATE OF COMPLIANCE

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August 23, 2019

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August 23, 2019

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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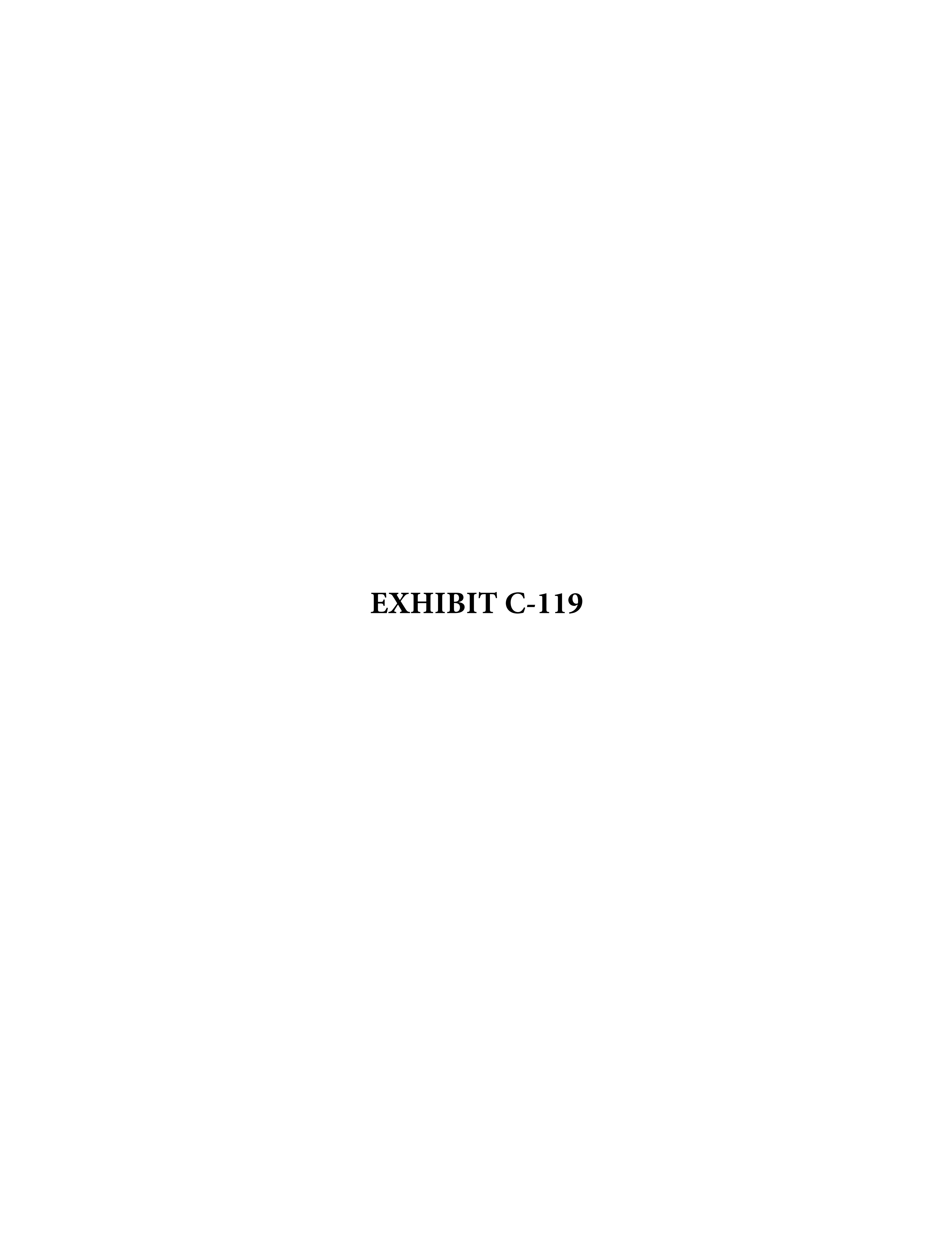

EXHIBIT C-119

Ex. C-119

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

STEVES AND SONS, INC., Plaintiff,	)	
v.	)	Civil Action No. 3:16-CV-00545-REP
JELD-WEN, INC., Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA REGARDING EQUITABLE RELIEF

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INTEREST OF THE UNITED STATES

The United States respectfully submits this statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court. The United States enforces the federal antitrust laws and has a strong interest in ensuring that remedies for antitrust violations restore competition to the market. The United States files this statement to express its strong policy preference for structural relief in the form of divestiture to remedy anticompetitive mergers in its cases, and to explain how the Antitrust Division of the U.S. Department of Justice determines whether a particular divestiture likely would restore competition in a market.

SUMMARY OF ARGUMENT

Divestiture is "the most important of antitrust remedies." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961). A divestiture of assets, particularly an ongoing business, normally is the best way to preserve and restore competition in the relevant market threatened by, or already harmed by, an anticompetitive merger. The Antitrust Division strongly prefers structural relief in the form of a divestiture to remedy an anticompetitive merger. Where appropriate in light of equitable principles, a court may likewise order divestiture when the plaintiff is a private party. *California v. Am. Stores Co.*, 495 U.S. 271, 296 (1990). To be successful, divested assets must be placed in the hands of an independent buyer that has the experience, financial means, incentive, and intention of operating the divested assets as an effective competitor.

Before granting Steves' motion for an order of divestiture, the Court should determine—either by itself or with the assistance of a special master—which assets are needed to form a viable business, identify and vet a divestiture buyer likely to run that business independently as a

vigorous competitor, and reject any encumbrances, or divestiture proposal, that would threaten the restoration of lost competition.

BACKGROUND

JELD-WEN is a vertically integrated manufacturer of molded interior doors and doorskins (the largest input cost of a molded interior door). In 2012, JELD-WEN acquired Craftmaster Manufacturing Inc. (CMI), a manufacturer of molded doorskins. In June 2016, plaintiff Steves & Sons, Inc. (Steves), a rival manufacturer of molded doors, which buys its doorskins primarily from JELD-WEN, filed a complaint alleging that JELD-WEN's acquisition of CMI has and will continue to "substantially . . . lessen competition, or . . . tend to create a monopoly in the markets for interior molded doorskins" in violation of Section 7 of the Clayton Act. Pl.'s Compl. at ¶ 176, ECF No. 1 (June 29, 2016). The case was tried to a jury, which found JELD-WEN's acquisition of CMI violated Section 7.[1] The jury awarded Steves $12,151,873 in damages for past antitrust injury and $46,480,581 in damages for future lost profits. Verdict Form, ECF No. 1022 (Feb. 15, 2018).

As an alternative to the jury's award of future lost profits, Steves now seeks equitable relief under Section 16 of the Clayton Act in the form of a divestiture by JELD-WEN of the doorskins manufacturing facility in Towanda, Pennsylvania that JELD-WEN acquired through CMI. Pl.'s Mot. For Equitable Relief, ECF No. 1191 (Mar. 13, 2018). JELD-WEN opposes this

[1] The Antitrust Division takes no position on the jury's liability determination. Because the parties to this action have chosen to make this information public, the Antitrust Division confirms that it investigated this transaction, and did not take any enforcement action. As the Division has explained, however, no inference should be drawn in this private action based upon the Antitrust Division's decision not to take enforcement action. Letter from Maribeth Petrizzi, Chief, Defense, Industrials, and Aerospace Section, Antitrust Division, U.S. Dep't of Justice to Glenn D. Pomerantz, Munger, Tolles & Olson LLP and Lawrence E. Buterman, Latham & Watkins LLP (Dec. 5, 2017).

divestiture. Def.'s Opp'n. to Pl.'s Mot. For Equitable Relief, ECF No. 1285 (Mar. 27, 2018). Steves proposes that the Court issue a judgment that would order divestiture of the Towanda facility from JELD-WEN to a "willing independent competitor." Pl.'s Separate Br. Addressing the Mechanics and Functionality of a Divestiture Remedy at 6, ECF No. 1607 (May 15, 2018) (quoting *California v. Am. Stores Co.*, 495 U.S. 271, 285 (1990)). Steves also proposes that the Court require JELD-WEN to grant the buyer an irrevocable and paid-up license to JELD-WEN's intellectual property related to operating the Towanda facility, in existence at the time of the divestiture, *id.* at Ex. A § VII.B; require JELD-WEN to provide transitional services to the buyer for two years, *id.* at § III.E; allow the buyer to offer to hire any JELD-WEN employee, *id.* at §§ VI.E-F; require the buyer to enter into an eight-year supply agreement with Steves on terms and prices based on Steves' current supply agreement with JELD-WEN, *id.* at §§ III.F, IV.H; and require the buyer to enter into a limited two-year interim supply agreement with JELD-WEN, *id.* at § VI.J.

ARGUMENT

I. THE BEST EQUITABLE REMEDY FOR AN ANTICOMPETITIVE MERGER IS RESTORATION OF COMPETITION BY DIVESTITURE OF A VIABLE BUSINESS ENTITY TO AN INDEPENDENT BUYER

Section 7 of the Clayton Act prohibits mergers or acquisitions "where in any line of commerce or . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18; *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). When a defendant is found to have violated Section 7, a court may grant a private plaintiff equitable relief under Section 16 of the Clayton Act. 15 U.S.C. § 26 ("Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws.").

1. Restoring competition is the "key to the whole question of an antitrust remedy." *United States v. E.I. Du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1960); *see Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1971). An antitrust remedy must promote competition generally, rather than protect or favor specific competitors. *See Brown Shoe*, 370 U.S. at 320; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). This focus on competition enables the antitrust laws "to protect the competitive process as a means of promoting economic efficiency." *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986). And, of course, any remedy should be effective and enforceable. *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 137 (D.D.C. 2002), *aff'd sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

2. In fashioning a remedy, the court should keep in mind that "the purpose of giving private parties . . . [equitable] remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969). Therefore, the "availability [of equitable relief] should be 'conditioned by the necessities of the public interest which Congress has sought to protect.'" *Id.* (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944)). And remedies available under Section 16, "like other equitable remedies, [are] flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" *Id.* (quoting *Hecht*, 321 U.S at 329-30).

3. Divestiture is structural relief "designed to protect the public interest." *Du Pont*, 366 U.S. at 326. "It is simple, relatively easy to administer, and sure." *Id.* at 331. To the extent possible, a properly crafted divestiture restores the competition eliminated by the merger and thus uniquely serves the purposes of Section 7 of the Clayton Act, which prohibits acquisitions

that may substantially lessen competition. Divestiture "should always be in the forefront of a court's mind when a violation of § 7 has been found." *Id.*

4. To remedy an anticompetitive merger, the Antitrust Division strongly prefers structural relief in its cases because it is the best way to restore competition to the market. Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at Competition and Deregulation Roundtable No. 2, 2-3 (Apr. 26, 2018). Divestiture of an existing business "preserves separate control, and leaves open the opportunity for independent innovation and collaboration through arms' length transactions." *Id.* at 5.

By contrast, equitable remedies that are purely behavioral (often referred to as conduct remedies) "generally are not favored in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies can avoid." Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust and Deregulation, Remarks as Prepared for Am. Bar Ass'n Antitrust Section Fall Forum 12 (Nov. 16, 2017) (citing Antitrust Division Policy Guide to Merger Remedies (Oct. 2004)); *see St. Alphonsus Med. Ctr.-Nampa, Inc. v. Saint Luke's Health Sys., Ltd.*, 778 F.3d 775, 793 (9th Cir. 2015) (explaining that behavioral remedies "risk excessive government entanglement in the market"); *Promedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 573 (6th Cir. 2014) (noting that "there are usually greater long term costs associated with monitoring the efficacy of a conduct remedy than with imposing a structural solution").

5. Consequently, divestiture has long been "the preferred remedy for an illegal merger or acquisition," in actions brought by the government. *California v. Am. Stores Co.*, 495 U.S. 271, 280-81 (1990). And nearly 30 years ago, the Supreme Court determined that private parties

could similarly pursue divestiture as an equitable remedy under Section 16 of the Clayton Act to prevent a merger from causing future economic harm. *Id.* at 283. Because Section 16 authorizes a "private divestiture remedy *when appropriate in light of equitable principles*" it "fits well in [the U.S.] statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger." *Id.* at 283-85 (emphasis added). But, the Supreme Court has cautioned that the power to order a divestiture in a private case "does not mean that such power should be exercised in every situation in which the Government would be entitled to such relief." *Id.* at 295.[2]

6. Divestiture has been an effective remedy in consummated mergers challenged by the Antitrust Division. *See, e.g.*, Modified Final Judgment, *United States v. Parker-Hannifin Corp.*, No. 17-1354 (D. Del. Apr. 30, 2018) (consent divestiture of aviation filtration business without trial to remedy loss of competition alleged in complaint under Section 7, submitted for court approval 10 months after consummated merger); Third Amended Final Judgment, *United States v. Bazaarvoice*, No. 13-133 (N.D. Cal. Dec. 2, 2014), Competitive Impact Statement, *id.*, (divestiture of business following court determination of Section 7 violation, complaint filed 7 months after acquisition). Although "resurrecting a business when the assets were commingled post-merger [is] much more difficult," divestiture remedies often can restore competition, particularly where the assets to be divested are not fully integrated and contracts can be used to

[2] JELD-WEN has argued that divestiture is not appropriate in this case in light of other equitable defenses. The Supreme Court has recognized that "equitable defenses such as laches, or perhaps 'unclean hands' may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest." *California v. Am. Stores Co.*, 495 U.S. 271, 296 (1990). The United States takes no position on the applicability of those defenses here.

facilitate the divestiture buyer's entry. The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics 19 (Jan. 2017).

II. THE ANTITRUST DIVISION'S ANALYTICAL FRAMEWORK CAN HELP ENSURE THAT A DIVESTITURE WILL RESTORE COMPETITION TO THE RELEVANT MARKET

A. Overview of the Antitrust Division's Divestiture Analytical Framework

Determining how to best restore competition in a particular market is necessarily fact-specific and must be tailored to the particulars of the case to redress the specific harm alleged. An effective divestiture addresses the competitive harm caused by the merger and is substantial enough to enable the purchaser to effectively preserve or restore competition. To ensure—to the extent possible—that a divestiture will achieve that goal, the Antitrust Division considers five factors when vetting a proposed divestiture: (1) whether the divestiture assets are sufficient to create a business that will replace lost competition; (2) whether the divestiture buyer has the incentive to compete in the relevant market; (3) whether the divestiture buyer has the business acumen, experience, and financial ability to compete in the relevant market in the future; (4) whether the divestiture itself is likely to cause competitive harm; and (5) whether the asset sale is structured to enable the buyer to emerge as a viable competitor.

1. *Assessing the sufficiency of the divestiture.* To ensure that the buyer will be able to compete successfully in the market, the Antitrust Division strongly prefers the divestiture of a complete business and, when possible, one that has competed successfully in the past as an independent or nearly independent entity. An existing business entity typically has the physical assets, intangible assets, personnel, and infrastructure to compete effectively. The FTC's Merger Remedies 2006-2012 at 21-22.

If that is not possible, the divestiture package, at a minimum, must include the critical tangible and intangible assets the new business will need to compete successfully in the relevant market. Critical assets for a divestiture business are generally the physical assets, such as plants and equipment used to produce the relevant product, and intangible assets such as intellectual property rights, know-how, and customer lists and contracts. These assets must be sufficient to create a business that will be competitive over the long term.

2. *Assessing the potential buyer's incentive to compete.* In order to examine the incentives of the buyer of the assets to be divested, the Antitrust Division vets the buyer before the sale. The Division considers whether the purchase price of divestiture assets reflects the buyer's intent to invest in the divestiture business. The Division also examines the buyer's business plans to confirm that the buyer intends to grow the business through further investment, to pursue new business opportunities and customers, and to compete effectively.

In addition, the Antitrust Division considers whether the potential buyer has other relationships with the seller of the assets that might reduce the incentive of the potential buyer to compete aggressively or grow the business. Short-term transition agreements that enable the buyer to take over existing business with minimal disruption may enable the buyer to restore lost competition more quickly. But the divestiture remedy could not be fully successful if it established a long-term relationship between the buyer and seller that would weaken the buyer as a competitor. Competition could suffer significantly, if, for example, over the long-term, agreements related to critical inputs raise the buyer's marginal costs, could be terminated at any time, provide the seller with confidential business information, or otherwise undermine the incentive or ability of the buyer to succeed as an independent competitor.

3. *Assessing the potential buyer's business acumen, experience, and financial ability to compete in the future.* As part of its vetting of a potential buyer, the Antitrust Division examines that buyer's experience in the relevant market or a related market, as well as the management team or key employees upon which the business likely would rely. The Division also examines the buyer's financial statements, business plans for the divestiture assets, including plans for physical assets, plans for long-term investments such as research and development, and strategic goals. The Division discusses the purported reasons for the acquisition and the proposed business strategy to compete in the relevant market with the potential buyer's key business representatives. The Division looks for gaps in the proposed business strategy, such as distribution or transportation networks, and assesses whether a potential buyer can fill those gaps so as to be an effective competitor. The Division also typically contacts key customers to solicit their views about the capabilities and incentives of the potential buyer to compete in the relevant market.

4. *Assessing the potential for competitive harm.* A divestiture intended to restore competition in a market must not itself become a source of competitive harm. For example, the Antitrust Division would not approve the sale of a divested business to a potential buyer if it were already a significant competitor in a relevant market and the divestiture itself would reduce competition. The identity of the buyer, in particular, is critical to making this assessment.

5. *Structuring the divestiture.* The Antitrust Division examines the structure of the divestiture assets sale to ensure that the divestiture business is held separate during the pendency of the divestiture or preserved in a commercially reasonable manner by the seller, depending upon whether the merger was consummated and to what extent the divestiture assets can be independently operated prior to sale. While the sale of divestiture assets is pending, the Division

considers whether sufficient funding and experienced leadership are available to preserve and sustain the operation of the divestiture assets as a viable business. In cases where the relevant market or the divestiture assets are complex or unusual, the Division might also require that an operating trustee be appointed to oversee the assets during the divestiture sales process. The Division also ensures that the seller is not financing the sale to avoid entanglements between the seller and the buyer. Finally, the Division includes post-sale reporting and inspection requirements, to permit the Division to ensure that the seller and buyer comply with their divestiture commitments.

B. Aspects of the Proposed Divestiture and Other Requested Relief May Be Inconsistent With the Goal of Restoring Competition Lost By the Merger

The Antitrust Division has not determined whether a divestiture could restore lost competition here, nor has it conducted a detailed assessment of the divestiture proposed by Steves. We note, however, that a potential buyer has not been identified or consulted about the proposed terms of the divestiture. Pl.'s Proposed Findings of Fact & Conclusions of Law at 41, ECF No. 1603 (May 15, 2018). Neither party to a private action can be expected to advocate for the interests of a potential buyer when the buyer's interest diverges from their own, as it almost certainly will. Even a financially stable and savvy potential buyer could find it difficult to succeed under the conditions preferred by a major customer (in this case, Steves) or one of its primary competitors (in this case, JELD-WEN). *See* Pl.'s Post-Hearing Mem. Requesting Equitable Relief at 29, ECF No. 1605 (May 15, 2018) (inviting JELD-WEN to propose modifications to the divestiture order Steves' has proposed). We further note that several aspects of the proposed divestiture appear particularly inconsistent with the goal of restoring lost competition.

For example, Steves has indicated it intends to bid for the divested assets. Pl.'s Post-Hearing Mem. Requesting Equitable Relief at 28 n.12, ECF No. 1605 (May 15, 2018). If the divestiture buyer is Steves—rather than an independent third-party—that would leave only three major doorskin manufacturers, all of which would be vertically integrated. The remaining door makers would have no independent suppliers from which to purchase doorskins, and could be competitively disadvantaged by the divestiture to a rival with which they compete in the molded door market.

In addition, Steves has proposed that the buyer be required to offer an eight-year supply agreement to Steves, modeled on Steves' current supply agreement with JELD-WEN. Pl.'s Separate Br. Addressing Mechanics and Functionality of a Divestiture Remedy Ex. A at § V.H, ECF No. 1607, (May 15, 2018). The long-term supply agreement would require that the buyer abide by a pre-2012 price formula and other terms for the sale of its primary product, doorskins. Forcing the divestiture buyer to abide by price terms it did not negotiate and which likely do not reflect the commercial realities of 2018, threatens to undermine the viability of the divestiture business. In any event, rather than allowing prices to be set through the competitive process, it places the Court in the role of price setter, a result that a divestiture remedy is meant to avoid.

Moreover, Steves proposes that the divestiture buyer be limited for two years in the number of doorskins it may sell to JELD-WEN from the Towanda plant. *Id.* at § VI.J. Barring the buyer from maximizing its sales by prohibiting it from supplying a significant customer in the market could likewise threaten the viability of the divestiture buyer and distort competition on price and quality.

CONCLUSION

Should this Court determine that it is appropriate to grant equitable relief based on the record in this case, it should do so only if it can grant structural relief in the form of a divesture of an independent doorskin business to an independent buyer with the ability and incentive to operate as a vigorous competitor in the doorskin market.

June 6, 2018

Respectfully submitted,

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I hereby certify that on this 6th day of June, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record in this matter.

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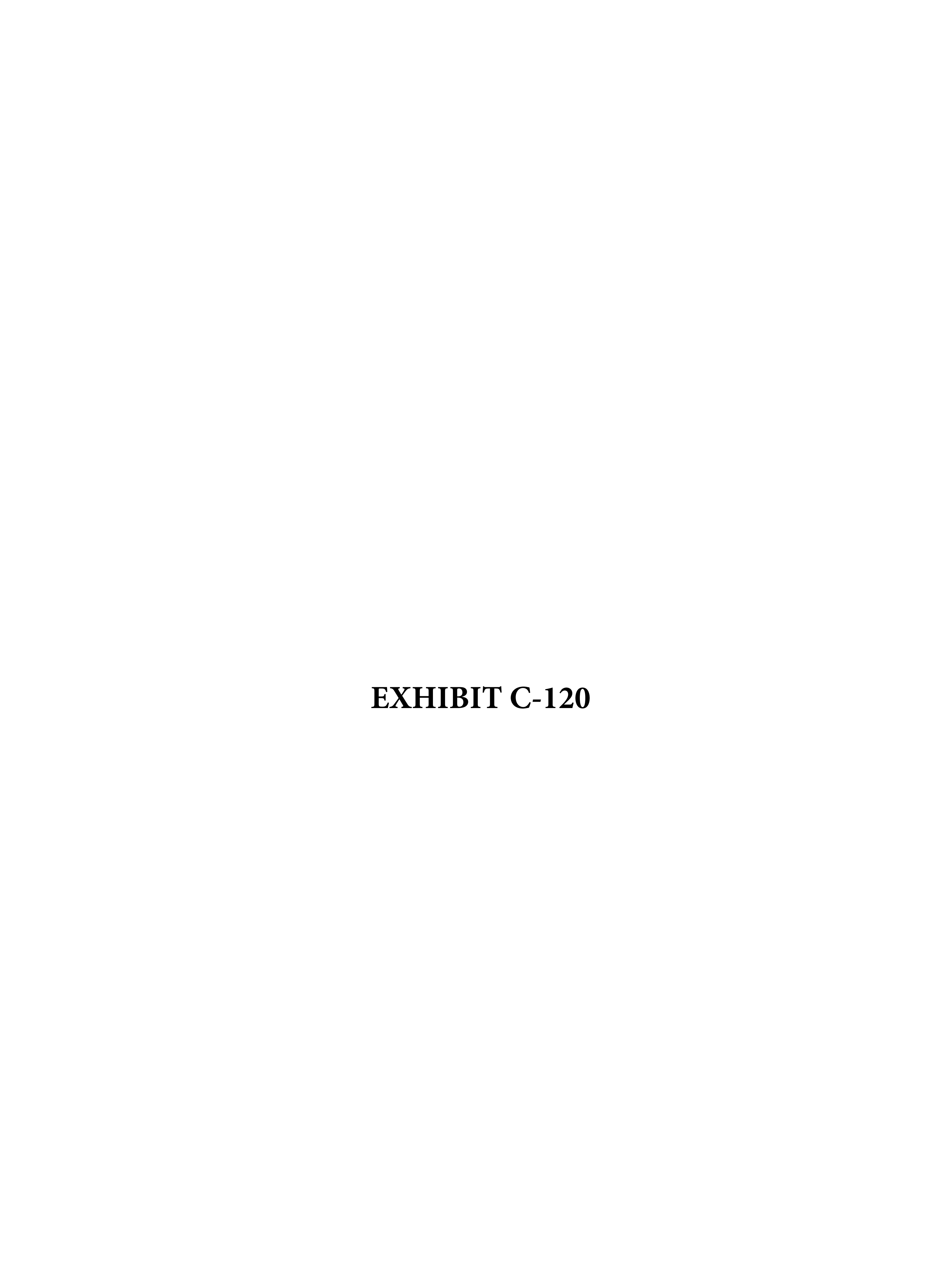

EXHIBIT C-120

Ex. C-120

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December 18, 2018

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Re: *Afilias Domains No. 3 Limited v. ICANN*, Case No. 01-18-0004-2702

Dear Mr. Ali:

On behalf of our client, the Internet Corporation for Assigned Names and Numbers ("ICANN"), we are producing documents responsive to Afilias Domains No. 3 Limited's ("Afilias") Request for the Production of Documents ("Requests"), as required by the Emergency Panelist's Decision On Afilias' Request For Production Of Documents In Support Of Its Request For Interim Measures, in the above-captioned matter. The production consists of the following bates range: ICANN-WEB_000001-ICANN-WEB_000199.

All documents produced by ICANN are subject to the parties' Protective Order, and if the Protective Order has not been fully executed at the time of this production, we understand that the parties have agreed that all documents are to be treated in the interim as Highly Confidential – Attorneys' Eyes Only. ICANN also expressly retains all objections to Afilias' Requests and reserves all of its rights, including the right to supplement its production as necessary.

This production is subject to the understanding that the inadvertent disclosure of any documents or information that may be subject to the attorney-client privilege, work product doctrine, or any other applicable privilege or protection shall not constitute either a waiver of, or prejudice to, any claim that such documents or information are protected from disclosure, and that any such documents or information, including all copies thereof, shall be returned to counsel for ICANN immediately upon request.

Very truly yours,

J. LeVee/KO

Jeffrey A. LeVee

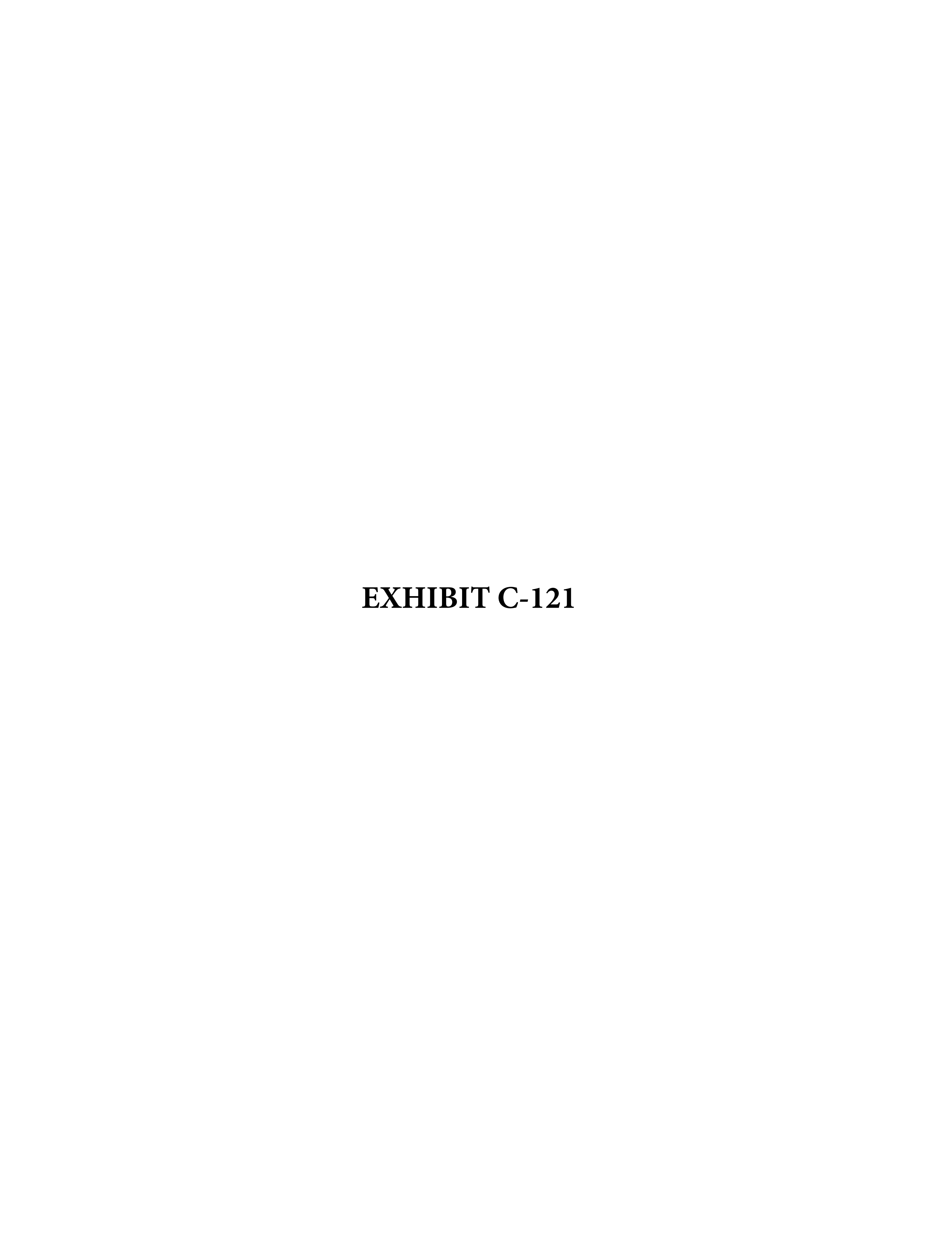


EXHIBIT C-121

Cooperative Engagement Process – Requests for Independent Review
11 April 2013

As specified in Article IV, Section 3 of the ICANN Bylaws, prior to initiating an independent review process, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. It is contemplated that this cooperative engagement process will be initiated prior to the requesting party incurring any costs in the preparation of a request for independent review. Cooperative engagement is expected to be among ICANN and the requesting party, without reference to outside counsel.

The Cooperative Engagement Process is as follows:

1. In the event the requesting party elects to proceed to cooperative engagement prior to filing a request for independent review, the requesting party may invoke the cooperative engagement process by providing written notice to ICANN at [independentreview@icann.org], noting the invocation of the process, identifying the Board action(s) at issue, identifying the provisions of the ICANN Bylaws or Articles of Incorporation that are alleged to be violated, and designating a single point of contact for the resolution of the issue.
2. The requesting party must initiate cooperative engagement within fifteen (15) days of the posting of the minutes of the Board (and the accompanying Board Briefing Materials, if available) that the requesting party's contends demonstrates that the ICANN Board violated its Bylaws or Articles of Incorporation.
3. Within three (3) business days, ICANN shall designate a single executive to serve as the point of contact for the resolution of the issue, and provide notice of the designation to the requestor.
4. Within two (2) business days of ICANN providing notice of its designated representatives, the requestor and ICANN's representatives shall confer by telephone or in person to attempt to resolve the issue and determine if any issues remain for the independent review process, or whether the matter should be brought to the ICANN Board's attention.
5. If the representatives are not able to resolve the issue or agree on a narrowing of issues, or a reference to the ICANN Board, during the first conference, they shall further meet in person at a location mutually agreed to within 7 (seven) calendar days after such initial conference, at which the parties shall attempt to reach a definitive agreement on the resolution of the issue or on the narrowing of issues remaining for the independent review process, or whether the matter should be brought to the ICANN Board's attention.
6. The time schedule and process may be modified as agreed to by both ICANN and the requester, in writing.

If ICANN and the requestor have not agreed to a resolution of issues upon the conclusion of the cooperative engagement process, or if issues remain for a request

for independent review, the requestor's time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.

Pursuant to the Bylaws, if the party requesting the independent review does not participate in good faith in the cooperative engagement process and ICANN is the prevailing party in the independent review proceedings, the IRP panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees. ICANN is expected to participate in the cooperative engagement process in good faith.

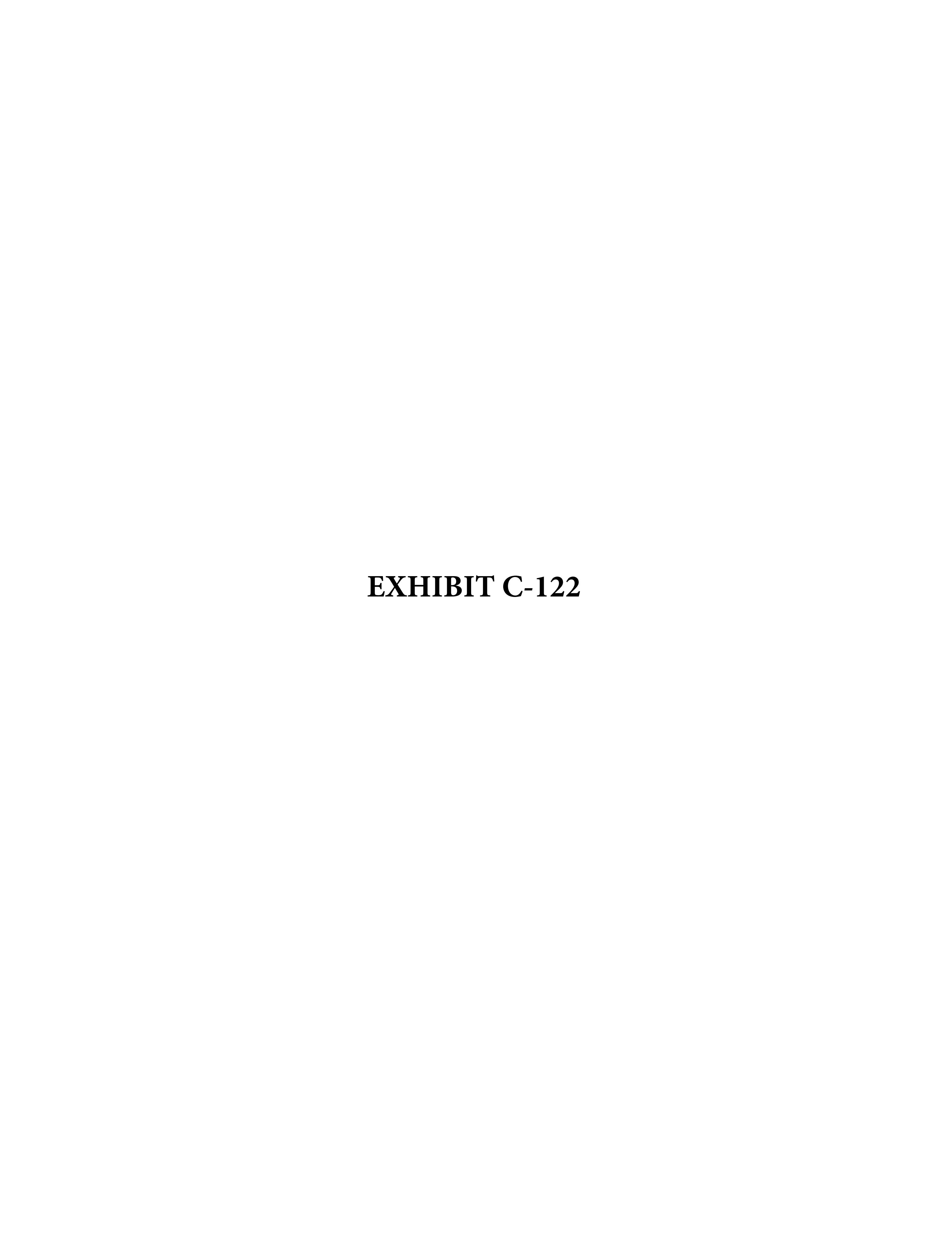


EXHIBIT C-122

Ex. C-122

CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations

23 February 2016

Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process

1. Summary

01 The purpose of the Independent Review Process (IRP) is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.

02 A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith.

03 The CCWG-Accountability therefore proposes several enhancements to the IRP to ensure that the process is:

- Transparent, efficient and accessible (both financially and from a standing perspective).
- Designed to produce consistent and coherent results that will serve as a guide for future actions.

04 The CCWG-Accountability also proposes that the IRP:

- Hear and resolve claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws – including any violation of the Bylaws resulting from action taken in response to advice/input from any Supporting Organization (SO) or Advisory Committee (AC).
- Hear and resolve claims that Post-Transition IANA (PTI), through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
- Hear and resolve claims that expert panel decisions are inconsistent with the ICANN Bylaws.
- Hear and resolve claims that DIDP decisions by ICANN are inconsistent with the ICANN Bylaws.
- Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community's legal expenses.
- Be subject to certain exclusions relating to the results of an SO's policy development process, country code top-level domain delegations/redelegations, numbering resources, and protocols parameters.

2. CCWG-Accountability Recommendations

- Modifying the Fundamental Bylaws to implement the modifications associated with this recommendation on the IRP which include:
  - Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).
  - Hear and resolve claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
  - Hear and resolve claims that expert panel decisions are inconsistent with ICANN's Bylaws.
  - Hear and resolve claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
  - Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.
- A standing judicial/arbitral panel: The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially affected by ICANN's action or inaction in violation of the Articles of Incorporation and/or Bylaws.
  - Composition of Panel and Expertise: Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration is necessary.
  - Diversity: English will be the primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).
  - Size of Panel:
    - Standing Panel: Minimum of seven panelists.
    - Decisional Panel: Three panelists.
  - Independence: Panel members must be independent of ICANN, including ICANN SOs and ACs.
  - Recall: Appointments shall be made for a fixed term of five years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed by way of the IRP subgroup.
- Initiation of the Independent Review Process: An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws, or otherwise within the scope of IRP jurisdiction. The Empowered Community could initiate an IRP with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.

- Standing: Any person/group/entity “materially affected” by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. The Board’s failure to fully implement an Empowered Community decision will be sufficient for the Empowered Community to be materially affected.
- Community Independent Review Process: The CCWG-Accountability recommends giving the Empowered Community the right to present arguments on behalf of the Empowered Community to the IRP Panel. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community’s legal expenses.
- Standard of Review: The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of the ICANN Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions.
- Accessibility and Cost: The CCWG-Accountability recommends that ICANN bear all the administrative costs of maintaining the system (including panelist salaries), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. The panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access – for example access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.
- Implementation: The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, the CCWG-Accountability proposes to subject the IRP to periodic community review.
- Transparency: The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust IRP, and as such, the CCWG-Accountability recommends reviewing and enhancing ICANN’s Documentary Information Disclosure Policy as part of the accountability enhancements in Work Stream 2.

3. Detailed Explanation of Recommendations

05 A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN’s existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith. Commenters called for an IRP that was binding rather than merely advisory, and also strongly urged that the process be:

- Transparent, efficient and accessible (both financially and from a standing perspective).

- Designed to produce consistent and coherent results that will serve as a guide for future actions.

06 **Purpose of the Independent Review Process**

07 The purpose of the IRP is to ensure that ICANN does not exceed the scope of its limited technical Mission, and otherwise complies with its Articles of Incorporation and Bylaws. The IRP should:

- Empower the community and affected individuals/entities to prevent “Mission creep,” and enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable, accessible expert review of ICANN actions or inaction.
- Ensure that ICANN is accountable to the community and individuals/entities for actions or inaction outside its Mission or that otherwise violate its Articles of Incorporation or Bylaws.
- Reduce disputes going forward by creating precedent to guide and inform the ICANN Board, staff, Supporting Organizations (SOs) and Advisory Committees (ACs), and the community in connection with policy development and implementation.
- Hear and resolve claims that PTI, through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.

08 **Role of the Independent Review Process**

09 The role of the IRP will be to:

- Hear and resolve claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).
- Hear and resolve claims that PTI, through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
  - Per the CWG-Stewardship Final Proposal, ICANN will enter into a contract with PTI that grants PTI the rights and obligations to serve as the IANA Functions Operator for the IANA naming functions, sets forth the rights and obligations of ICANN and PTI, and includes service level agreements for the IANA naming functions.
  - The ICANN Bylaws will require ICANN to enforce its rights under the ICANN-PTI Contract/Statement of Work, to ensure that PTI complies with its contractual obligations. ICANN’s failure to enforce material obligations will constitute a Bylaws violation and be grounds for an IRP by the Empowered Community.
  - The ICANN Bylaws will provide that PTI service complaints of direct customers of the IANA naming functions that are not resolved through mediation may be appealed by way of the IRP, in both cases as provided for in the CWG-Stewardship Final Proposal Annex I, Phase 2.
    - Note that CWG-Stewardship Final Proposal Annex I, Phase 2 also permits PTI Direct Customers to pursue “other applicable legal recourses that may

be available." ICANN must modify Registry Agreements with gTLD Operators to expand the scope of arbitration available thereunder to cover PTI service complaints and potential inclusion of optional arbitration under agreements with ccTLD registries if developed through the appropriate processes or the development of another alternative dispute resolution mechanism.

    - The standard of review for PTI cases will be an independent assessment of whether there was a material breach of PTI obligations under the contract with ICANN, whether through action or inaction, where the alleged breach has resulted in material harm to the complainant.

- Hear and resolve claims that expert panel decisions are inconsistent with the ICANN Bylaws.
- Hear and resolve claims that DIDP decisions by ICANN are inconsistent with the ICANN Bylaws.
- Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.

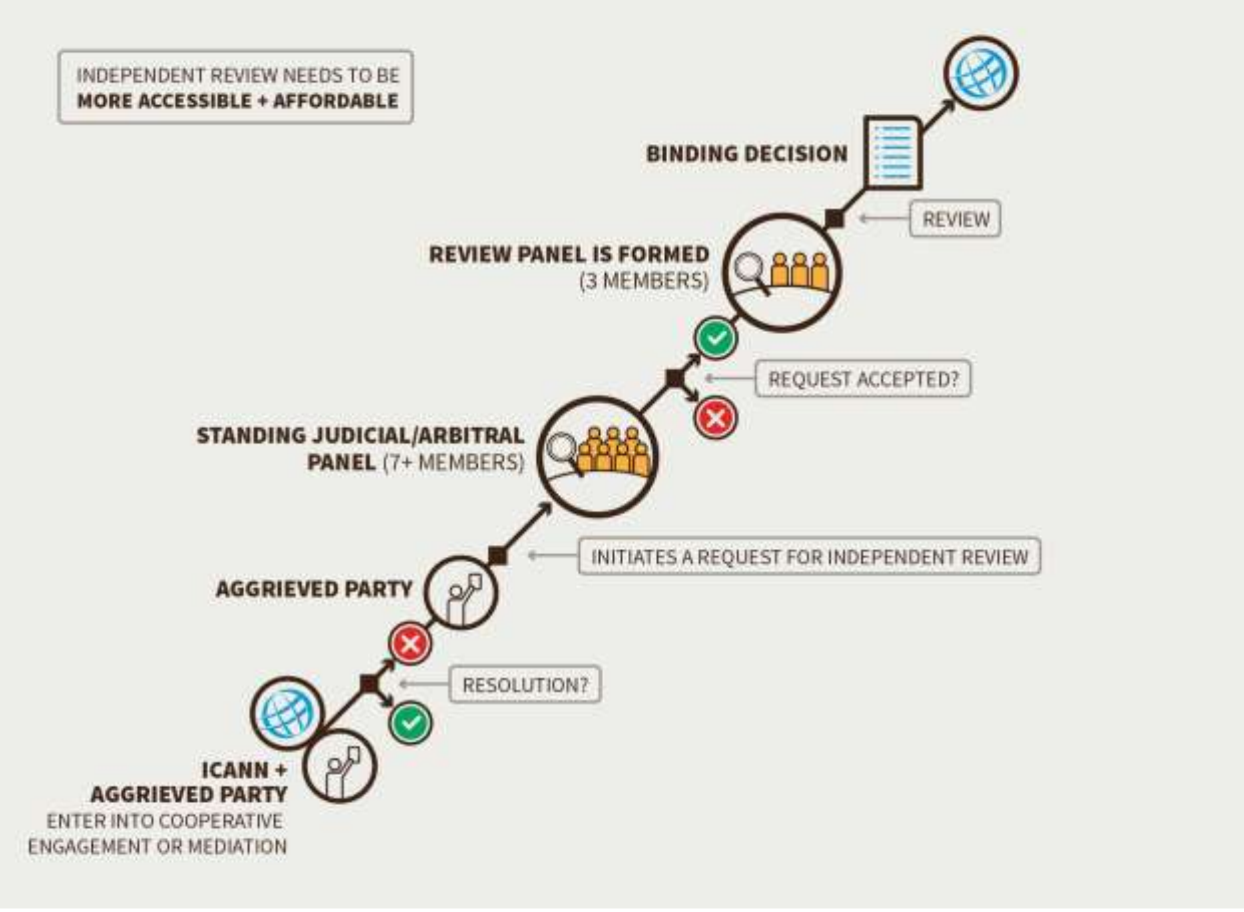
10 Standing Panel

11 The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought forward by individuals, entities, and/or the community who have been materially affected by ICANN's action or inaction in violation of the Articles of Incorporation and/or Bylaws.

12 Initiation of the Independent Review Process

13 An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws, or otherwise within the scope of IRP jurisdiction. The Empowered Community could initiate an IRP with respect to matters reserved to the Empowered Community in ICANN's Articles of Incorporation or Bylaws.

14 When the Empowered Community has decided to pursue an IRP, the decision would be implemented by the chairs of the SOs and ACs who supported the proposal. The chairs of the SOs and ACs who supported the decision to file a community IRP would constitute a "Chairs Council" that would act subject to the direction of those SOs and ACs of the Empowered Community that supported the proposal. The Chairs Council would, by majority vote, act on behalf of the Empowered Community in taking any reasonably necessary ministerial steps to implement the decision to pursue the community IRP, and to delegate and oversee tasks related to the community IRP, including but not limited to, engagement of legal counsel to represent the Empowered Community in the community IRP, approval of court filings, or enforcement of a community IRP award in court if ultimately necessary.



15 ## Possible Outcomes of the Independent Review Process

16 An IRP would result in a declaration that an action/failure to act *complied* or *did not comply* with ICANN's Articles of Incorporation and/or Bylaws. To the extent permitted by law, IRP decisions shall be binding on ICANN.

- Decisions of a three-member Decisional Panel will be appealable to the full IRP Panel sitting en banc, based on a clear error of judgment or the application of an incorrect legal standard. The standard may be revised or supplemented by way of the IRP Subgroup process, which will be developed.
- This balance between the limited right of appeal and the limitation to the type of decision made is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid an outcome that would force the Board to violate its fiduciary duties.
- The limited right to appeal is further balanced by the seven Community Powers, relevant policy development processes, and advice from ACs, each as set forth in the Bylaws.
- IRP panelists shall consider and give precedential effect to prior decisions of other Independent Review Processes that address similar issues.
- Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff actions where a complainant can demonstrate each of the following factors:

- Harm that cannot be cured once a decision has been taken or for which there is no adequate remedy once a decision has been taken.
- Whichever:
  - A likelihood of success on the merits.
  - Sufficiently serious questions going to the merits.
  - A balance of hardships tipping decidedly toward the party seeking the relief.

17 ## Standing

18 Any person, group or entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress.

19 They must do so within a certain number of days (to be determined by the IRP Subgroup) after becoming aware of the alleged violation and how it allegedly affects them. The Empowered Community has standing to bring claims involving its rights under the Articles of Incorporation and ICANN Bylaws.

20 The ICANN Board's failure to fully implement an Empowered Community decision will be sufficient for the Empowered Community to be materially affected. Issues relating to joinder and intervention will be determined by the IRP Subgroup, assisted by experts and the initial Standing Panel, based on consultation with the community.

21 ## Community Independent Review Process

22 The CCWG-Accountability recommends giving the Empowered Community the right to present arguments on behalf of the Empowered Community to the IRP Panel (see Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Power). In such cases, ICANN will bear the costs associated with the Standing Panel as well as the Empowered Community's legal expenses, although the IRP Subgroup may recommend filing or other fees to the extent necessary to prevent abuse of the process.

23 ## Exclusions:

24 ### Challenges the result(s) of a Supporting Organization's Policy Development Process (PDP)

25 Notwithstanding the foregoing and notwithstanding any required threshold for launching a community IRP, no community IRP that challenges the result(s) of an SO's PDP may be launched without the support of the SO that approved the policy recommendations from the PDP or, in the case of the result(s) of a Cross Community Working Group (CCWG) chartered by more than one SO, without the support of the SOs that approved the policy recommendations from that CCWG.

26 ### Country Code Top-Level Domain Delegation/Redelegation

27 In its letter dated 15 April 2015, the CWG-Stewardship indicated that “any appeals mechanism developed by the CCWG-Accountability should not cover country code top-level domain delegation/redelegation issues as these are expected to be developed by the country code top-level domain community through the appropriate processes.”

28 As requested by the CWG-Stewardship, decisions regarding country code top-level domain delegations or redelegations would be excluded from standing, until the country code top-level domain community, in coordination with other parties, has developed relevant appeals mechanisms.

29 Numbering Resources

30 The Address Supporting Organization (ASO) has likewise indicated that disputes related to Internet number resources should be out of scope for the IRP, since an existing dispute settlement mechanism already exists as part of the ICANN Address Supporting Organization Memorandum of Understanding[1]. As requested by the ASO, decisions regarding numbering resources would be excluded from standing.

31 Protocol Parameters

32 The Internet Architecture Board (IAB) has likewise indicated that disputes related to protocol parameters should be out of scope for the IRP, since an existing dispute settlement mechanism already exists as part of the ICANN / IANA - IETF MoU. As requested, decisions regarding resources for protocol parameters would be excluded from standing.

33 Standard of Review

34 The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of ICANN’s Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN’s Mission and/or violates ICANN’s Articles of Incorporation and/or Bylaws and prior IRP decisions. Decisions will be based on each IRP panelist’s assessment of the merits of the claimant’s case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts.

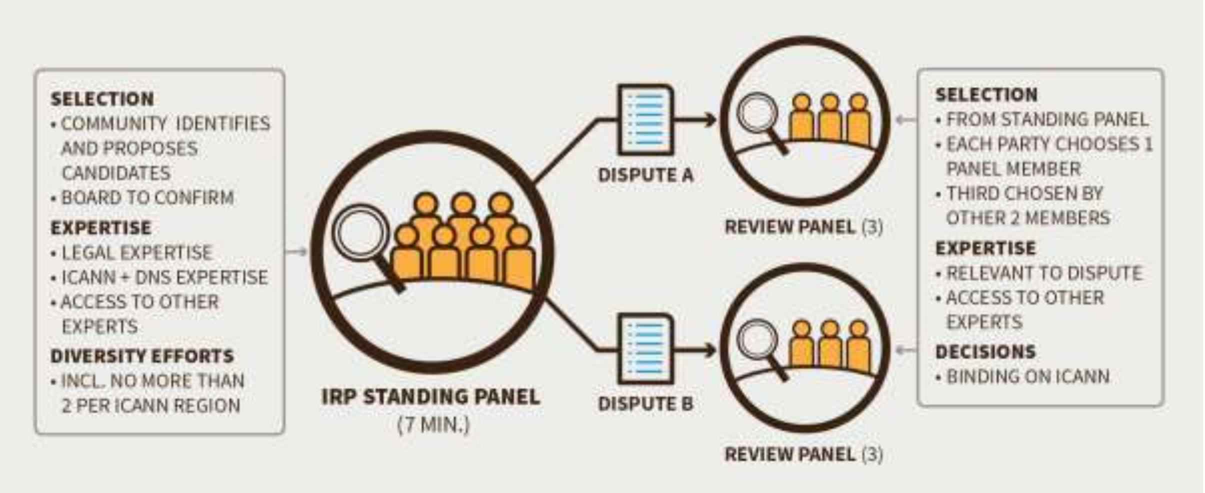
35 With respect to PTI cases, the standard of review will be an independent assessment of whether there was a material breach of PTI obligations under the contract with ICANN, whether through action or inaction, where the alleged breach has resulted in material harm to the complainant.

36 Composition of Panel and Expertise

37 Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration, is necessary. Panelists should either already possess expertise about the DNS and ICANN’s policies, practices, and procedures, or commit to develop an expertise through training, at a minimum, on the workings and management of the DNS. Panelists must have access to skilled technical experts upon request. In addition to legal expertise and a strong understanding of the DNS, panelists may confront issues where highly technical, civil society, business, diplomatic, and regulatory skills are needed. To the extent that

[1] https://archive.icann.org/en/aso/aso-mou-29oct04.htm

individual Panelists have one or more of these areas of expertise, the process must ensure that this expertise is available upon request.



38 ## Diversity

39 English will be the primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).

40 ## Size of Panel

- Standing Panel: Minimum of seven panelists.
- Decisional Panel: Three panelists.

41 ## Independence

42 Panel members must be independent of ICANN, including ICANN SOs and ACs. Members should be compensated at a rate that cannot decline during their fixed term. To ensure independence, term limits should apply (five years, no renewal), and post-term appointment to the ICANN Board, Nominating Committee, or other positions within ICANN will be prohibited for a specified time period. Panelists will have an ongoing obligation to disclose any material relationship with ICANN, SOs, ACs, or any other party in an IRP. Panelists will be supported by a clerk's office that is separate from ICANN.

43 ## Selection and Appointment

44 The selection of panelists would follow a four-step process:

1. ICANN, in consultation with the community, will initiate a tender process for an organization to provide administrative support for the IRP, beginning by consulting the community on a draft tender document.

2. ICANN will then issue a call for expressions of interest from potential panelists, work with the community and Board to identify and solicit applications from well-qualified candidates with the goal of securing diversity, conduct an initial review and vetting of applications, and work with ICANN and community to develop operational rules for IRP.
3. The community would nominate a slate of proposed panel members.
4. Final selection is subject to ICANN Board confirmation.

45 **Recall**

46 Appointments shall be made for a fixed term of five years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed by the IRP subgroup.

47 **Settlement Efforts**

48 Reasonable efforts, as specified in a published policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case.

49 Parties may cooperatively engage informally, but either party may inject an independent dispute resolution facilitator (mediator) after an initial Cooperative Engagement Process (CEP) meeting. Either party can terminate informal dispute resolution efforts (CEP or mediation) if, after a specified period, that party concludes in good faith that further efforts are unlikely to produce agreement.

50 The process must be governed by clearly understood and prepublished rules applicable to both parties and be subject to strict time limits. In particular, the CCWG-Accountability will review the CEP as part of Work Stream 2.

51 **Decision-Making**

52 In each case, a three-member panel will be drawn from the Standing Panel. Each party will select one panelist, and those panelists will select the third. The CCWG-Accountability anticipates that the Standing Panel would draft, issue for comment, and revise procedural rules. The Standing Panel should focus on streamlined, simplified processes with rules that conform with international arbitration norms and are easy to understand and follow.

53 Panel decisions will be based on each IRP Panelist's assessment of the merits of the claimant's case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts. All decisions will be documented and made public, and will reflect a well-reasoned application of the standard to be applied.

54 **Decisions**

55 Panel decisions would be determined by a simple majority. Alternatively, this could be included in the category of procedures that the IRP Panel itself should be empowered to set.

56 The CCWG-Accountability recommends that IRP decisions be precedential, meaning that IRP Panelists shall consider and give precedential effect to prior IRP decisions. By conferring precedential weight on panel decisions, the IRP can provide valuable guidance for future actions and inaction by ICANN decision-makers. It also reduces the chances of inconsistent treatment of

one claimant over another, based on the specific individuals making up the Decisional Panel in particular cases.

57 The CCWG-Accountability intends that if the panel determines that an action or inaction by the Board or staff is in violation of ICANN's Articles of Incorporation or Bylaws, then that decision is binding and the ICANN Board and staff shall be directed to take appropriate action to remedy the breach. However, the Panel shall not replace the Board's fiduciary judgment with its own judgment.

58 It is intended that judgments of a Decisional Panel or the Standing Panel would be enforceable in the court of the United States and other countries that accept international arbitration results.

59 Accessibility and Cost

60 The CCWG-Accountability recommends that ICANN bear all the administrative costs of maintaining the system (including panelist salaries and the costs of technical experts), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. The panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access – for example access to pro bono representation for community, non-profit complainants, and other complainants that would otherwise be excluded from utilizing the process.

61 The panel should complete work expeditiously, issuing a scheduling order early in the process and in the ordinary course, and should issue decisions within a standard time frame (six months). The panel will issue an update and estimated completion schedule in the event it is unable to complete its work within that period.

62 Implementation

63 The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, the CCWG-Accountability proposes to subject the IRP to periodic community review.

64 Transparency

65 The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust IRP, and as such, the CCWG-Accountability recommends reviewing and enhancing the ICANN Documentary Information Disclosure Policy as part of the accountability enhancements in Work Stream 2.

66 All IRP proceedings will be conducted on the record, in public, except for settlement negotiations or other proceedings which could materially and unduly harm participants if conducted in public, such as by exposing trade secrets or violating rights of personal privacy.

4. Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"

- The scope of of the IRP will be restricted to the IANA naming functions for claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN.
- The scope of the IRP will include actions and inactions of PTI by way of the PTI Board being bound to ensure that PTI complies with its contractual obligations with ICANN in the Bylaws. ICANN's failure to enforce material obligations will be appealable by way of the IRP as a Bylaws violation.
- The scope of the IRP will include claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
- Clarified that ICANN must modify Registry Agreements with gTLD Operators to expand scope of arbitration available thereunder to cover PTI service complaints.
- Exclusion: The IRP will not be applicable to protocols parameters.
- Exclusion: An IRP cannot be launched that challenges the result(s) of an SO's policy development process (PDP) without the support of the SO that developed such PDP or, in the case of joint PDPs, without the support of all of the SOs that developed such PDP.
- Limitation: An IRP challenge of expert panel decisions is limited to a challenge of whether the panel decision is consistent with ICANN's Bylaws.
- The legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN.

5. Stress Tests Related to this Recommendation

- ST3 & 4
- ST5, 6, 7, 8
- ST11
- ST14
- ST19, 20
- ST10, 16, 24
- ST13
- ST22
- ST23
- ST25
- ST26
- ST29, 30

6. How does this meet the CWG-Stewardship Requirements?

67 The recommendations as outlined above meet the CWG-Stewardship requirements by:

- Creating the IRP directly meets the requirement of the CWG-Stewardship for an IRP.
- Excluding ccTLD delegation/re-delegation from the IRP.
- As requested by the CWG-Stewardship, decisions regarding country code top-level domains delegations or re-delegations would be excluded from standing, until the country code top-level domains community, in coordination with other parties, has developed relevant appeals mechanisms.
- Excluding Number Resources from the IRP. The ASO has indicated that disputes related to Internet Number Resources should be out of scope for the IRP. As requested by the ASO, decisions regarding numbering resources would be excluded from standing.

7. How does this address NTIA Criteria?

68 **Support and enhance the multistakeholder model.**

- By enhancing ICANN's appeals mechanisms and binding arbitration processes and further fortifying and expanding their remit, the community is further empowered.

---

69 **Maintain the security, stability and resiliency of the Internet DNS.**

- These accountability measures were designed to contribute to maintaining the operational functioning of the organization.

---

70 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- These accountability measures were designed to contribute to maintaining the operational functioning of the organization.

---

71 **Maintain the openness of the Internet.**

- The accountability measures help to mitigate the likelihood of problematic scenarios by ensuring that robust accountability mechanisms are in place.

---

72 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- N/A

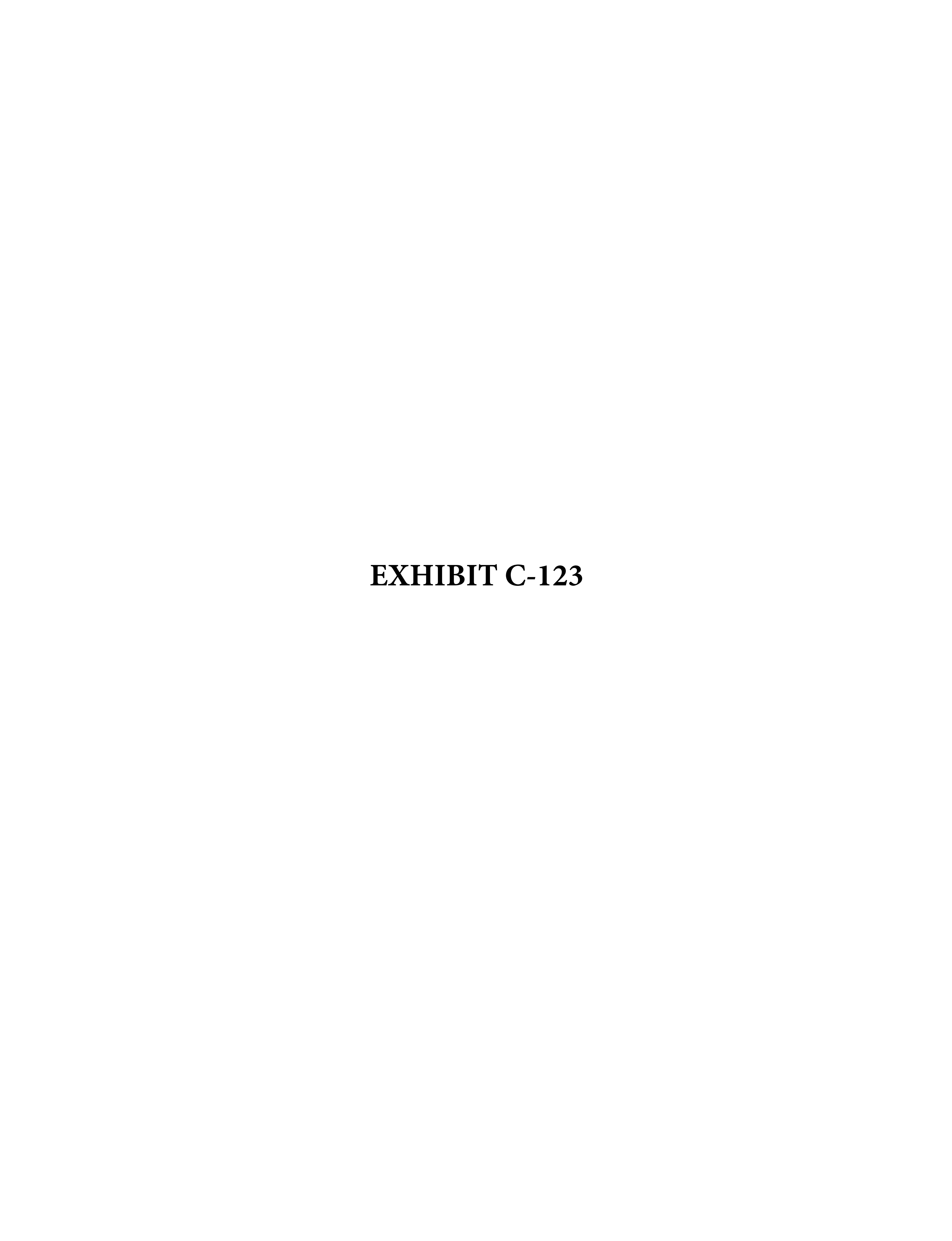


EXHIBIT C-123

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Afilias' Cynical Attempt to Secure a Windfall at Community Expense

By Paul Livesay

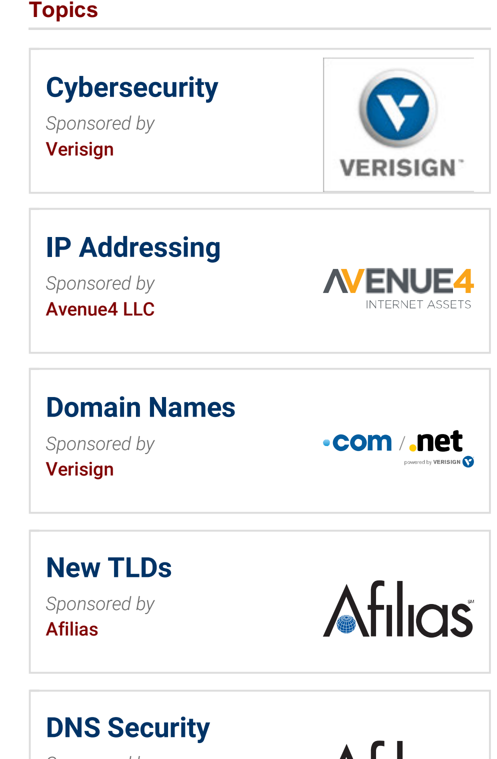
Nov 07, 2016 10:03 AM PDT | Comments: 2 | Views: 8,840 Comment | Print

Co-authored by Paul Livesay, Verisign, and Jose Ignacio Rasco, Nu Dotco, LLC

On Friday, October 28, Afilias issued a public statement urging the Internet Corporation for Assigned Names and Numbers (ICANN) to nullify the results of its July 27, 2016 public auction for the .web new generic top level domain (gTLD) — in which Nu Dotco, LLC (NDC) submitted the highest bid for .web — and disqualify NDC from participation in the .web contention. The real issue here is whether ICANN should enforce the results of a fair and competitive public auction — where the proceeds will fund infrastructure projects in the interests of the entire Internet community — or give in to false and self-interested claims by a small group of competitors seeking to hold a private auction — where those competitors (rather than the public) would split up the proceeds of the auction among themselves.

More concisely, Afilias seeks to divert $135 million from the Internet community to be divided among Afilias, Donuts and several others (or to secure the .web new gTLD for itself at a below market price) by disqualifying NDC. Afilias' motivation could not be more transparent: in a private auction, either tens of millions of dollars will be paid to it for losing the auction or, if NDC is disqualified, Afilias stands to secure the .web new gTLD at a much lower non-competitive price. Indeed, it was just such maneuvering that caused Afilias to commit, in writing, a demonstrable violation of the Blackout Period as it sought agreement among the contention set to substitute a private for a public auction a few days before the public auction took place. Pursuant to the express terms of the Guidebook, this violation in and of itself could disqualify Afilias.

In June 2012, NDC, along with others, submitted an application to ICANN to acquire rights to operate the .web new gTLD. In accordance with application requirements, NDC identified its corporate officers and ownership. NDC continues to be managed and owned by the same people and entities listed on NDC's application. Prior to the .web auction, ICANN reviewed the claims by Afilias and other members of the .web contention set that NDC has had a change of control, and determined they were unfounded on three separate occasions. Moreover, shortly thereafter, a federal district judge reached the same conclusion, rejecting an application by Ruby Glen (a Donuts' affiliate applicant) for a temporary restraining order enjoining the public ICANN auction for .web. In its order, the court specifically commented on "the weakness of Plaintiff's efforts" and concluded that Ruby Glen had failed to "establish that it is likely to succeed on the merits and failed to demonstrate that its allegations 'raise[d] serious issues.'"



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Afilias' claim that NDC assigned its rights to the .web new gTLD to Verisign is likewise wrong. Like many other new gTLD applicants, prior to the auction for the .web new gTLD, NDC entered into an arms-length contract pursuant to which it agreed that if it won the .web auction (using financing provided by the other party), then after executing a Registry Agreement with ICANN, it would seek ICANN's consent to assign the Registry Agreement to such other party (which in this case was Verisign). The contract between NDC and Verisign did not assign to Verisign any rights in NDC's application, nor did Verisign take any ownership or management interest in NDC (let alone control of it). NDC has always been and always will be the owner of its application (with full control thereof) and all rights associated therewith unless and until it seeks and obtains ICANN's consent to transfer an executed Registry Agreement in accordance with ICANN's established rules and procedures for such assignments. In substance, NDC's arrangement with Verisign is no different than similar arrangements agreed to by other new gTLD applicants, including Donuts' arrangement with Rightside to finance Donuts' applications for up to 107 new gTLDs in exchange for an assignment of rights to those new gTLDs to Rightside. Even Afilias presumably financed the auction bids of its affiliate, Afilias Domains No. 3 Limited, for the .web new gTLD.

Afilias' allegations of Applicant Guidebook violations by NDC are nothing more than a pretext to conduct a "private" instead of a "public" auction, or to eliminate a competitor for the .web new gTLD and capture it for less than the market price. Afilias has claimed that it submitted the second-highest bid for .web at the July 27th public auction. Afilias appears to believe that if it can disqualify NDC from the .web auction, then Afilias will obtain the rights to operate the .web new gTLD. And contrary to Afilias' claim, the full contention set did not agree to a private auction; however, they did all sign agreements for a public auction. Before the public ICANN auction, Afilias and other members of the .web contention set attempted to coerce NDC to resolve the contention by private auction — whereby the losing applicants divide the winning bid amongst themselves. Afilias even offered in writing to guarantee a payout to NDC if it would forego a public auction. Under Afilias' preferred private resolution, Afilias and the other members of the .web contention set each would stand to make millions of dollars if they lost the auction. As a result of NDC's refusal to resolve this contention set privately, the $135 million winning bid for .web will be used by ICANN entirely for the benefit of the Internet community. In short, Afilias is not interested in enhancing "competition and choice in domain names" — it is interested in serving its own bottom line, either by obtaining the .web new gTLD outright or playing to "lose" at a private auction.

Finally, it is Afilias, not NDC, that should be disqualified from the .web contention set. The Applicant Guidebook prohibits all applicants within a contention set from discussing "bidding strategies" in advance of an auction — termed the Blackout Period. Violation of the Blackout Period is a "serious violation" of ICANN's rules under the Bidder Agreement, and may result in forfeiture of an applicant's application. Afilias committed such a violation, and should be disqualified. On July 22, just four days before the public ICANN auction for .web, Afilias contacted NDC again to try to negotiate a private auction if ICANN would delay the public auction. Afilias knew the Blackout Period was in effect, but nonetheless violated it in an attempt to persuade NDC to participate in a private auction that would net Afilias millions of dollars even if it lost.

In the end analysis, the ICANN .web auction was an open and competitive public auction won by NDC by bidding the highest price, which Afilias never disputes. From the community's perspective, the important facts are that the auction price was maximized, the funds from the auction will be used for the benefit of the entire Internet community (not

losing bidders) and the .web new gTLD will provide the registrant community with additional choice in domain names. ICANN will be serving the best interest of the Internet community by standing by its processes and standing up to the bullying efforts of Afilias and others that seek to cast baseless aspersions for their own self-interest.

Any effect on the market of this new gTLD will be to enhance competition, whoever operates it. There is no doubt that NDC or Verisign would grow .web aggressively so that new domains are offered to as many businesses and consumers as quickly as possible. And Verisign's record for security and stability would bring justified confidence in the new gTLD. That is a winning combination for Internet consumers and competition. There is no principled reason that ICANN should reverse course now simply because of Afilias' transparent efforts to generate community outrage to serve its own economic interests.

Afilias does a great disservice to ICANN and the entire Internet community by attempting to make this issue a referendum on ICANN by entitling its post "ICANN's First Test of Accountability." Afilias frames its test for ICANN's new role as an "independent manager of the Internet's addressing system," by asserting that ICANN can only pass this test if it disqualifies NDC and bars Verisign from acquiring rights to the .web new gTLD. In this case, Afilias' position is based on nothing more than deflection, smoke and cynical self-interest.

By Paul Livesay, VP and Counsel at Verisign

Related topics: ICANN, Policy & Regulation, New TLDs

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Fighting over stolen goods. How quaint. .Web

Christopher Ambler – Nov 08, 2016 7:40 AM PDT

Fighting over stolen goods. How quaint.

.Web was applied-for in 2000, after being proposed in 1994. ICANN chose to not assign it to Afilias in 2000 because of the pioneering work of the original applicant, who was shut out of the most recent round. Vint Cerf was on the record in 2000 in holding the TLD for the original applicant, a promise which was broken.

At an auction price of over a hundred million dollars, the original applicant had no chance.

The history and culture of rough consensus and running code, the basis of innovation on the internet is dead as vultures fight over valuable property and money wins the day.

Reply | Link | Report Problems # 1

I have been operating cavebear.web - registered with IOD - for a decade and a half
Karl Auerbach – Nov 08, 2016 2:22 PM PDT

I agree with Chris Ambler - .web is an operational domain name registry in California operated by IOD. I have a fully paid up contract with them for cavebear.web; and I have been operating a website under that name and had operational DNS servers for that name since around year 2000 (I would have to go find my paid-up invoice to find the exact date.)

Were an ICANN delegated .web to try to establish itself in California that could raise some "interesting" business and legal issues as it tries to preempt an existing business, product, and users.

Reply | Link | Report Problems # 2

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03.

Afilias plans to file IRP to halt .Web

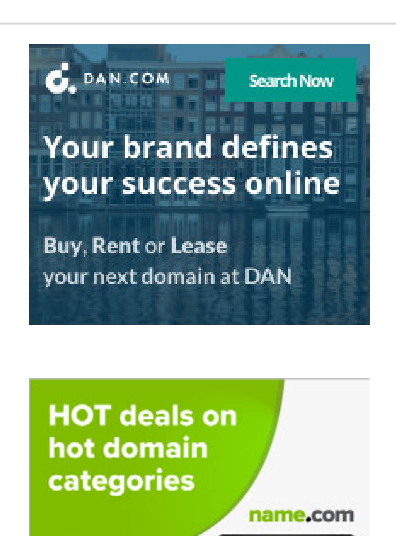
BY ANDREW ALLEMANN — APRIL 24, 2018 POLICY & LAW

10 COMMENTS

More slowdowns for .web domain name.

A lawyer for domain name registry Afilias says the company plans to file a Cooperative Engagement Process (CEP) and subsequent Independent Review Process (IRP) should ICANN move forward with delegating .Web to Nu Dot Co.

Nu Dot Co won the auction to operate .web for $135 million. It was bankrolled by Verisign (NASDAQ:VRSN), and Nu Dot Co had an agreement with Verisign to



Breaking: Neustar retains .co registry, at a cost
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assign rights to the domain after it completed contracting.

Afilias was one of the companies that was upset; it was the runner-up in the auction.

Donuts pursued the matter as well. It was disappointed that Nu Dot Co forced an auction of last resort rather than a private auction in which Donuts would get to split the proceeds. After going through ICANN's accountability processes it sued ICANN. A court tossed the case out because new TLD applicants agreed not to sue, but Donuts appealed. The appeals court has yet to hand down its decision. Oral arguments will likely occur this fall.

Adding to the delays was the U.S. government, which launched an antitrust investigation into Verisign running what many people think is the best new top level domain. The government closed its investigation without taking action.

Afilias is asking ICANN to give it a 60 day "heads up" when it starts contracting with Nu Dot Co so that it can file for CEP.

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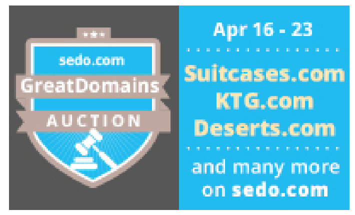

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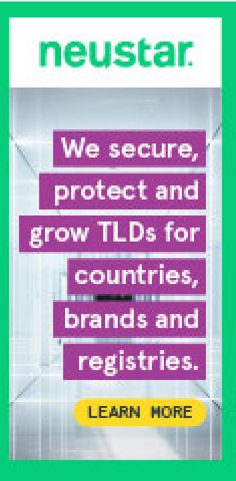

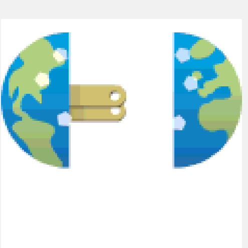

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1. Afilias files for Independent Review on .Web, further delaying domain name
2. Verisign jumps in on .Web dispute, here's what it could mean
3. ICANN responds to Afilias' .Web emergency stay request

10 Comments

Tags: .web, afilias, icann, VeriSign, vrsn

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Comments

Nick says
April 24, 2018 at 12:57 pm

Is their goal just to delay?

Like

Reply

Andrew Allemann says
April 24, 2018 at 5:03 pm

Good question. Another strategy could be to wait and see what happens with the donuts lawsuit, so delay filing the irp until then. Honestly I think affiliate is lucky it didn't win the domain at such a high price

Like

Reply

Rubens Kuhl says
April 25, 2018 at 11:31 am

That price is what Affilias was willing to pay for .web. Verisign actually offered more, but only has to pay what Afilias offered.

Like

Reply

Andrew Allemann says

April 25, 2018 at 12:32 pm

Right, and I think they would have regretted paying so much

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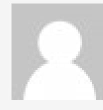
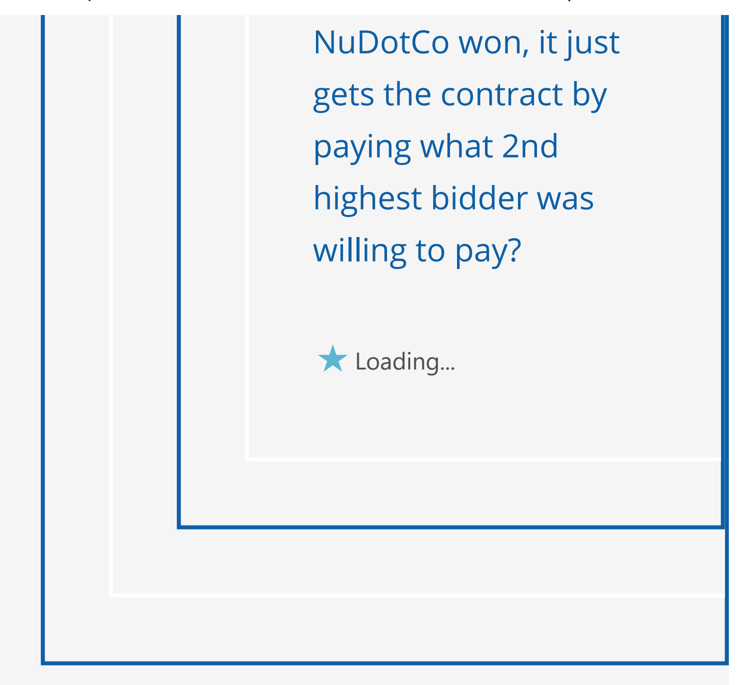
Reply



krish says

April 25, 2018 at 6:07 pm

If I understand this right, are you saying affilias bid was for 135M and NuDotCo's bid was even more. It is just because



krish says
April 25, 2018 at 6:28 pm

On another note, I think 135M for .web might be a fair price to pay for verisign. Assuming It is priced at 8$(for first time and renewals like COM), that investment can be recovered in 8 years assuming average net of registrations and renewals are about 2.5M a year. I think 2.5M will be a number that will be hit first 3,4 years. This is a very conservative estimate.

I don't think, operating .WEB doesn't amount to much expense wise given they have been operating a much bigger TLD very well. This can be just a plug and play.

★ Loading...

Reply

Mark Thorpe says
April 26, 2018 at 7:46 am

The .Web soap opera continues. Until next time, on the Web We Weave. Lol

★ Loading...

Reply

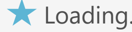
Joseph Peterson says
April 28, 2018 at 7:37 pm

By the time .WEB launches, it might have the field to itself, in a sense.

During 2014-2016, there were many nTLD releases – each distracting from the others. So if .WEB launches during a lull in TLD releases, its impact might be greater. Even if it arrives after the army of early nTLDS has already stormed the castle, it will be alone on stage when it arrives.

Unless, of course, .WEB's release is delayed to coincide with a 2nd round of nTLDs.

With or without incentives from Verisign, registrars will want to promote .WEB. After all, it gives them something new to sell. And if nothing else around that time is new, then .WEB will be the only news, the only story.



Reply

Mark Thorpe says
April 30, 2018 at 5:03 pm

Verisign would be crazy to wait until the 2nd round of nTLD's.

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Reply

Ed says
September 23, 2018 at 12:01 pm

Do we have any news?

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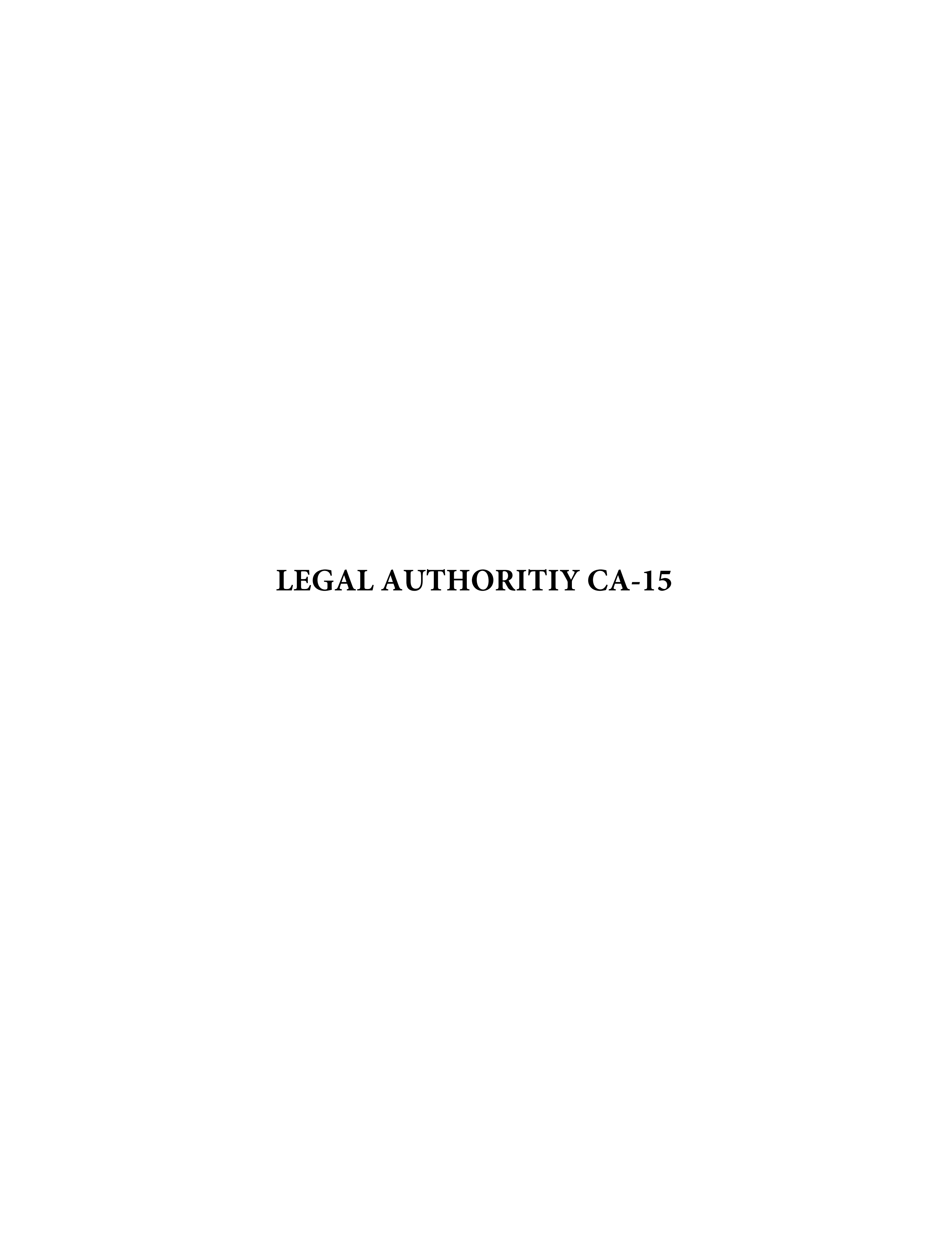


LEGAL AUTHORITIY CA-15

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Panel

CASE #50 2013 001083

FINAL DECLARATION

In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation For Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* (ICDR Rules) and the *Supplementary Procedures for ICANN Independent Review Process* of the International Centre for Dispute Resolution (ICDR),

Between: **DotConnectAfrica Trust**;
("Claimant" or "DCA Trust")

Represented by Mr. Arif H. Ali, Ms. Meredith Craven, Ms. Erin Yates and Mr. Ricardo Ampudia of Weil, Gotshal & Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 2005, U.S.A.

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent" or "ICANN")

Represented by Mr. Jeffrey A. LeVee and Ms. Rachel Zernik of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

IRP Panel

Prof. Catherine Kessedjian
Hon. William J. Cahill (Ret.)
Babak Barin, *President*

I. BACKGROUND

1. DCA Trust is non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya.

2. DCA Trust was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and not for the public good.

3. In March 2012, DCA Trust applied to ICANN for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains ("gTLD") Internet Expansion Program (the "New gTLD Program"), an internet resource available for delegation under that program.

4. ICANN is a non-profit corporation established on 30 September 1998 under the laws of the State of California, and headquartered in Marina del Rey, California, U.S.A. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions and local law.

5. On 4 June 2013, the ICANN Board New gTLD Program Committee ("NGPC") posted a notice that it had decided not to accept DCA Trust's application.

6. On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee ("BGC"), which denied the request on 1 August 2013.

7. On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN's Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process ("CEP") to try and resolve the issues relating to DCA Trust's application. Despite several meetings, no resolution was reached.

8. On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3 of ICANN's Bylaws.

9. In an effort to safeguard its rights pending the ongoing constitution of the IRP Panel, on 22 January 2014, DCA Trust wrote to ICANN requesting that it immediately cease any further processing of all applications for the delegation of the .AFRICA gTLD, failing which DCA Trust would seek emergency relief under Article 37 of the ICDR Rules.

10. DCA Trust also indicated that it believed it had the right to seek such relief because there was no standing panel as anticipated in the Supplementary Procedures for ICANN Independent Review Process ("Supplementary Procedures"), which could otherwise hear requests for emergency relief.

11. In response, on 5 February 2014, ICANN wrote:

> Although ICANN typically is refraining from further processing activities in conjunction with pending gTLD applications where a competing applicant has a pending reconsideration request, ICANN does not intend to refrain from further processing of applications that relate in some way to pending independent review proceedings. In this particular instance, ICANN believes that the grounds for DCA's IRP are exceedingly weak, and that the decision to refrain from the further processing of other applications on the basis of the pending IRP would be unfair to others.

12. In its Request for Emergency Arbitrator and Interim Measures of Protection subsequently submitted on 28 March 2014, DCA Trust pleaded, *inter alia*, that, in an effort to preserve its rights, in January 2014, DCA requested that ICANN suspend its processing of applications for .AFRICA during the pendency of this proceeding. ICANN, however, summarily refused to do so.

13. DCA Trust also submitted that "on 23 March 2014, DCA became aware that ICANN intended to sign an agreement with DCA's competitor (a South African company called ZACR) on 26 March 2014 in Beijing […] Immediately upon receiving this information, DCA contacted ICANN and asked it to refrain from signing the agreement with ZACR in light of the fact that this proceeding was still pending. Instead, according to ICANN's website, ICANN *signed its agreement with ZACR the very next day, two days ahead of plan, on 24 March instead of 26 March*."

14. According to DCA Trust, that same day, "ICANN then responded to DCA's request by presenting the execution of the contract as a *fait accompli*, arguing that DCA should have sought to stop ICANN from proceeding with ZACR's application, as ICANN had already informed DCA of its intention [to] ignore its obligations to participate in this proceeding in good faith."

15. DCA Trust also submitted that on 25 March 2014, as per ICANN's email to the ICDR, "ICANN for the first time informed DCA that it would accept the application of Article 37 of the ICDR Rules to this proceeding contrary to the express provisions of the Supplementary Procedures of ICANN has put in place for the IRP Process."

16. In its Request, DCA Trust argued that it "is entitled to an accountability proceeding with legitimacy and integrity, with the capacity to provide a meaningful remedy. […] DCA has requested the opportunity to compete for rights to .AFRICA pursuant to the rules that ICANN put into place. Allowing ICANN to delegate .AFRICA to DCA's only competitor – which took actions that were instrumental in the process leading to ICANN's decision to reject DCA's application – would eviscerate the very purpose of this proceeding and deprive DCA of its rights under ICANN's own constitutive instruments and international law."

17. Finally, among other things, DCA Trust requested the following interim relief:

    > a. An order compelling *ICANN to refrain from any further steps toward delegation of the .AFRICA gTLD*, including but not limited to execution or assessment of pre-delegation testing, negotiations or discussions relating to delegation with the entity ZACR or any of its officers or agents; […]

18. On 24 April and 12 May 2014, the Panel issued Procedural Order No. 1, a Decision on Interim Measures of Protection, and a list of questions for the Parties to answer.

19. In its 12 May 2014 Decision on Interim Measures of Protection, the Panel required ICANN to "immediately refrain from any further processing of any application for .AFRICA until [the Panel] heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same".

20. In the Panel's unanimous view, among other reasons, it would have been "unfair and unjust to deny DCA Trust's request for interim relief when the need for such a relief…[arose] out of ICANN's failure to follow its own Bylaws and procedures." The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

21. On 27 May and 4 June 2015, the Panel issued Procedural Order No. 2 and a Decision on ICANN's request for Partial Reconsideration of certain portions of its Decision on Interim Measures of Protection.

22. In its 4 June 2014 Decision on ICANN's request for Partial Reconsideration, the Panel unanimously concluded that ICANN's request must be denied. In that Decision, the Panel observed:

> 9. After careful consideration of the Parties' respective submissions, the Panel is of the unanimous view that ICANN's Request must be denied for two reasons.
>
> 10. First, there is nothing in ICANN's Bylaws, the International Dispute Resolution Procedures of the ICDR effective as at 1 June 2009 or the Supplementary Procedures for ICANN Independent Review Process that in any way address the Panel's ability to address ICANN's Request. The Panel has not been able to find any relevant guidance in this regard in any of the above instruments and ICANN has not pointed to any relevant provision or rule that would support its argument that the Panel has the authority to reconsider its Decision of 12 May 2014.
>
> 11.Moreover, ICANN has not pointed to any clerical, typographical or computation error or shortcoming in the Panel's Decision and it has not requested an interpretation of the Panel's Decision based on any ambiguity or vagueness. To the contrary, ICANN has asked the Panel to reconsider its prior findings with respect to certain references in its Decision that ICANN disagrees with, on the basis that those references are in ICANN's view, inaccurate.
>
> 12. Second, even if the Panel were to reconsider based on any provision or rule available, its findings with respect to those passages complained of by ICANN as being inaccurate in its Decision – namely paragraphs 29 to 33 – after deliberation, the Panel would still conclude that ICANN has failed to follow its own Bylaws as more specifically explained in the above paragraphs, in the context of addressing which of the Parties should be viewed as responsible for the delays associated with DCA Trust's Request for Interim Measures of Protection. It is not reasonable to construe the By-law proviso for consideration by a provider-appointed *ad hoc* panel when a standing panel is not in place as relieving ICANN indefinitely of forming the required standing panel. Instead, the provider appointed panel is properly viewed as an interim procedure to be used before ICANN has a chance to form a standing panel. Here, more than a year has elapsed, and ICANN has offered no explanation why the standing panel has not been formed, nor indeed any indication that formation of that panel is in process, or has begun, or indeed even is planned to begin at some point.

The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

23. On 14 August 2014, the Panel issued a Declaration on the IRP Procedure ("2014 Declaration") pursuant to which it (1) ordered a reasonable documentary exchange, (2) permitted the Parties to benefit from additional filings and supplementary briefing, (3) allowed a video hearing, and (4) permitted both Parties at the hearing to

challenge and test the veracity of any written statements made by witnesses.

The Panel also concluded that its Declaration on the IRP and its future Declaration on the Merits of the case were binding on the Parties. In particular, the Panel decided:

> 98. Various provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the Panel's decisions, opinions and declarations are binding. There is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the Panel either advisory or non-binding.
>
> […]
>
> 100. Section 10 of the Supplementary Procedures resembles Article 27 of the ICDR Rules. Whereas Article 27 refers to "Awards", section 10 refers to "Declarations". Section 10 of the Supplementary Procedures, however, is silent on whether Declarations made by the IRP Panel are "final and binding" on the parties.
>
> 101. As explained earlier, as per Article IV, Section 3, paragraph 8 of the Bylaws, the Board of Directors of ICANN has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP set out in section 3. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures. These Rules have been supplemented with the Supplementary Procedures.
>
> 102. This is clear from two different parts of the Supplementary Procedures. First, in the preamble, where the Supplementary Procedures state that: "These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws".
>
> 103. And second, under section 2 entitled (Scope), that states that the "ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws". It is therefore clear that ICANN intended the operating rules and procedures for the independent review to be an international set of arbitration rules supplemented by a particular set of additional rules.
>
> 104. There is also nothing inconsistent between section 10 of the Supplementary Procedures and Article 27 of the ICDR Rules.
>
> 105. One of the hallmarks of international arbitration is the binding and final nature of the decisions made by the adjudicators. Binding arbitration is the essence of what the ICDR Rules, the ICDR itself and its parent, the American Arbitration Association, offer. The selection of the ICDR Rules as the baseline set of procedures for IRP's, therefore, points to a binding adjudicative process.

> 106. Furthermore, the process adopted in the Supplementary Procedures is an adversarial one where counsel for the parties present competing evidence and arguments, and a panel decides who prevails, when and in what circumstances. The panellists who adjudicate the parties' claims are also selected from among experienced arbitrators, whose usual charter is to make binding decisions.
>
> 107. The above is further supported by the language and spirit of section 11 of ICANN's Bylaws. Pursuant to that section, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the Panel would not be considered advisory.
>
> […]
>
> 110. ICANN points to the extensive public and expert input that preceded the formulation of the Supplementary Procedures. The Panel would have expected, were a mere advisory decision, opinion or declaration the objective of the IRP, that this intent be clearly articulated somewhere in the Bylaws or the Supplementary Procedures. In the Panel's view, this could have easily been done.
>
> 111. The force of the foregoing textual and construction considerations as pointing to the binding effect of the Panel's decisions and declarations are reinforced by two factors: 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor; and, 2) the special, unique, and publicly important function of ICANN. As explained before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource.
>
> […]
>
> 115. Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process. The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, *and* b) the IRP process touted by ICANN as the "ultimate guarantor" of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN. [Underlining is from the original decision.]

The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

24. On 5 September and 25 September 2014, the Panel issued Procedural Orders No. 3 and No. 4. In Procedural Order No. 3, the Panel notably required the Parties to complete their respective filing of briefs in accordance with the IRP Procedure Guidelines by 3 November 2014 for DCA Trust and 3 December 2014 for ICANN.

25. In Procedural Order No. 4 dated 25 September 2014, the Panel reached a decision regarding document production issues.

26. On 3 November 2014 and 3 December 2014, the Parties filed their Memorial and Response Memorial on the Merits in accordance with the timetable set out in Procedural Order No. 3.

27. On 26 February 2015, following the passing away of the Hon. Richard C. Neal (Ret.) and confirmation by the ICDR of his replacement arbitrator, the Hon. William J. Cahill (Ret.), ICANN requested that this Panel consider revisiting the part of this IRP relating to the issue of hearing witnesses addressed in the Panel's 2014 Declaration.

28. In particular, ICANN submitted that given the replacement of Justice Neal, Article 15.2 of the ICDR Rules together with the Supplementary Procedures permitted this IRP to in its sole discretion, determine "whether all or part" of this IRP should be repeated.

29. According to ICANN, while it was not necessary to repeat all of this IRP, since the Panel here had exceeded its authority under the Supplementary Procedures when it held in its 2014 Declaration that it could order live testimony of witnesses, the Panel should then at a minimum consider revisiting that issue.

30. According to ICANN, panelists derived "their powers and authority from the relevant applicable rules, the parties' requests, and the contractual provisions agreed to by the Parties (in this instance, ICANN's Bylaws, which establish the process of independent review). The authority of panelists is limited by such rules, submissions and agreements."

31. ICANN emphasized that "compliance with the Supplementary Procedures [was] critical to ensure predictability for ICANN, applicants for and objectors to gTLD applications, and the entire ICANN community…", and while "ICANN [was] committed to fairness and accessibility…ICANN [was] also committed to predictability and the like treatment of all applicants. For this Panel to change the rules

for this single applicant [did] not encourage any of these commitments."

32. ICANN also pleaded that, DCA specifically agreed to be bound by the Supplementary Procedures when it initially submitted its application, the Supplementary Procedures apply to both ICANN and DCA alike, ICANN is now in the same position when it comes to testing witness declarations and finally, in alternative dispute resolution proceedings where cross examination of witnesses is allowed, parties often waive cross-examination.

33. Finally, ICANN advanced that:

> [T]he Independent Review process is an alternative dispute resolution procedure adapted to the specific issues to be addressed pursuant to ICANN's Bylaws. The process cannot be transformed into a full-fledged trial without amending ICANN's Bylaws and the Supplementary Procedures, which specifically provide for a hearing that includes counsel argument only. Accordingly, ICANN strongly urges the Panel to follow the rules for this proceeding and to declare that the hearing in May will be limited to argument of counsel.

34. On 24 March 2015, the Panel issued its Declaration on ICANN's Request for Revisiting of the 14 August Declaration on the IRP Procedure following the Replacement of Panel Member. In that Declaration, the newly constituted Panel unanimously concluded that it was not necessary for it to reconsider or revisit its 2014 Declaration.

35. In passing and not at all as a result of any intended or inadvertent reconsideration or revisiting of its 2014 Declaration, the Panel referred to Articles III and IV of ICANN's Bylaws and concluded:

> Under the general heading, Transparency, and title "Purpose", Section 1 of Article III states: "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Under the general heading, Accountability and Review, and title "Purpose", Section 1 of Article IV reads: "In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws." In light of the above, and again in passing only, it is the Panel's unanimous view, that the filing of fact witness statements (as ICANN has done in this IRP) and limiting telephonic or in-person hearings to argument only is inconsistent with the objectives setout in Articles III and IV setout above.

The Panel again reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

36. On 24 March and 1 April 2015, the Panel rendered Procedural Orders No. 5 and 6, in which, among other things, the Panel recorded the Parties' "agreement that there will no cross-examination of any of the witnesses" at the hearing of the merits.

37. On 20 April 2015, the Panel rendered its Third Declaration on the IRP Procedure. In that Declaration, the Panel decided that the hearing of this IRP should be an in-person one in Washington, D.C. and required all three witnesses who had filed witness statements to be present at the hearing.

38. The Panel in particular noted that:

> 13. […] Article IV, Section 3, and Paragraph 4 of ICANN's Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, an accountability process that would ensure that ICANN acted in a manner consistent with ICANN's Articles of Incorporation and Bylaws.
>
> 14. Both ICANN's Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. As ICANN's Bylaws explicitly put it, an IRP Panel is "*charged with* comparing contested actions of the Board […], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.
>
> 15. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:
>
>> "Applicant hereby releases ICANN […] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN […] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM."
>
> Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate "accountability" remedy for an applicant is the IRP.
>
> 16. Accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.

[…]

21. In order to keep the costs and burdens of independent review as low as possible, ICANN's Bylaws, in Article IV, Section 3 and Paragraph 12, suggests that the IRP Panel conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible, and where necessary the IRP Panel may hold meetings by telephone. Use of the words "should" and "may" versus "shall" are demonstrative of this point. In the same paragraph, however, ICANN's Bylaws state that, "in the unlikely event that a telephonic or in-person hearing is convened, the hearing *shall* be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance."

22. The Panel finds that this last sentence in Paragraph 12 of ICANN's Bylaws, unduly and improperly restricts the Panel's ability to conduct the "independent review" it has been explicitly mandated to carryout in Paragraph 4 of Section 3 in the manner it considers appropriate.

23. How can a Panel compare contested actions of the Board and declare whether or not they are consistent with the provisions of the Articles of Incorporation and Bylaws, without the ability to fact find and make enquiries concerning those actions in the manner it considers appropriate?

24. How can the Panel for example, determine, if the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, or exercised independent judgment in taking decisions, if the Panel cannot ask the questions it needs to, in the manner it needs to or considers fair, just and appropriate in the circumstances?

25. How can the Panel ensure that the parties to this IRP are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case with respect to the mandate the Panel has been given, if as ICANN submits, "ICANN's Bylaws do not permit any examination of witnesses by the parties or the Panel during the hearing"?

26. The Panel is unanimously of the view that it cannot. The Panel is also of the view that any attempt by ICANN in this case to prevent it from carrying out its independent review of ICANN Board's actions in the manner that the Panel considers appropriate under the circumstances deprives the accountability and review process set out in the Bylaws of any meaning.

27. ICANN has filed two 'Declarations' in this IRP, one signed by Ms. Heather Dryden, a Senior Policy Advisor at the International Telecommunications Policy and Coordination Directorate at Industry Canada, and Chair of ICANN Government Advisory Committee from 2010 to 2013, and the other by Mr. Cherine Chalaby, a member of the Board of Directors of ICANN since 2010. Mr. Chalaby is also, since its inception, one of three members of the Subcommittee on Ethics and Conflicts of ICANN's Board of Governance Committee.

28. In their respective statements, both individuals have confirmed that they "have personal knowledge of the matters set forth in [their] declaration and [are] competent to testify to these matters *if called as a witness*."

[…]

29. In his Declaration, Mr. Chalaby states that "all members of the NGPC were asked to and did specifically affirm that they did not have a conflict of interest related to DCA's application for .AFRICA when they voted on the GAC advice. In addition, the NGPC asked the BGC to look into the issue further, and the BGC referred the matter to the Subcommittee. After investigating the matter, the Subcommittee concluded that Chris Disspain and Mike Silber did not have conflicts of interest with respect to DCA's application for .AFRICA."

30. The Panel considers it important and useful for ICANN's witnesses, and in particular, Mr. Chalaby as well as for Ms. Sophia Bekele Eshete to be present at the hearing of this IRP.

31. While the Panel takes note of ICANN's position depicted on page 2 of its 8 April 2015 letter, the Panel nonetheless invites ICANN to reconsider its position.

32. The Panel also takes note of ICANN's offer in that same letter to address written questions to its witnesses before the hearing, and if the Panel needs more information after the hearing to clarify the evidence presented during the hearing. The Panel, however, is unanimously of the view that this approach is fundamentally inconsistent with the requirements in ICANN's Bylaws for it to act openly, transparently, fairly and with integrity.

33. As already indicated in this Panel's August 2014 Declaration, analysis of the propriety of ICANN's decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN's top personnel. Even though the Parties have explicitly agreed that neither will have an opportunity to cross-examine the witnesses of the other in this IRP, the Panel is of the view that ICANN should not be allowed to rely on written statements of its top officers attesting to the propriety of their actions and decisions without an opportunity for the Panel and thereafter DCA Trust's counsel to ask any follow-up questions arising out of the Panel's questions of ICANN's witnesses. The same opportunity of course will be given to ICANN to ask questions of Ms. Bekele Eshete, after the Panel has directed its questions to her.

34. The Parties having agreed that there will be no cross-examination of witnesses in this IRP, the procedure for asking witnesses questions at the hearing shall be as follows:

a) The Panel shall first have an opportunity to ask any witness any questions it deems necessary or appropriate;

b) Each Party thereafter, shall have an opportunity to ask any follow-up questions the Panel permits them to ask of any witness.

The Panel again reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

39. On 27 April and 4 May 2015, the Panel issued its Procedural Order No. 7 and 8, and on that last date, it held a prehearing conference call with the Parties as required by the ICDR Rules. In Procedural

Order No. 8, the Panel set out the order of witness and party presentations agreed upon by the Parties.

40. On 18 May 2015, and in response to ZA Central Registry's (ZACR) request to have two of its representatives along with a representative from the African Union Commission (AUC) attend at the IRP hearing scheduled for 22 and 23 May 2015 in Washington, D.C., the Panel issued its Procedural Order No. 9, denying the requests made by ZACR and AUC to be at the merits hearing of this matter in Washington, D.C.

41. In a letter dated 11 May 2015, ZACR and AUC's legal representative had submitted that both entities had an interest in this matter and it would be mutually beneficial for the IRP to permit them to attend at the hearing in Washington, D.C.

42. ZACR's legal representative had also argued that "allowing for interests of a materially affected party such as ZACR, the successful applicant for the dotAfrica gTLD, as well as broader public interests, to be present enhances the legitimacy of the proceedings and therefore the accountability and transparency of ICANN and its dispute resolution procedures."

43. For the Panel, Article 20 of the ICDR Rules, which applied in this matter, stated that the hearing of this IRP was "private unless the parties agree otherwise". The Parties in this IRP did not consent to the presence of ZACR and AUC. While ICANN indicated that it had no objection to the presence of ZACR and AUC, DCA Trust was not of the same view. Therefore, ZACR and AUC were not permitted to attend.

44. The in-person hearing of the merits of this IRP took place on 22 and 23 May 2015 at the offices of Jones Day LLP in Washington, D.C. All three individuals who had filed witness statements in this IRP, namely Ms. Sophia Bekele Eshete, representative for DCA Trust, Ms. Heather Dryden and Mr. Cherine Chalaby, representatives for ICANN, attended in person and answered questions put to them by the Panel and subsequently by the legal representatives of both Parties. In attendance at the hearing was also Ms. Amy Stathos, Deputy General Counsel of ICANN.

45. The proceedings of the hearing were reported by Ms. Cindy L. Sebo of TransPerfect Legal Solutions, who is a Registered Merit Real-Time Court Reporter.

46. On the last day of the hearing, DCA Trust was asked by the Panel to clearly and explicitly articulate its prayers for relief. In a document entitled Claimant's Final Request for Relief which was signed by the Executive Director of DCA Trust, Ms. Sophia Bekele and marked at the hearing as Hearing Exhibit 4, DCA Trust asked the Panel to:

> Declare that the Board violated ICANN's Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB) by:
>
> - Discriminating against DCA and wrongfully assisting the AUC and ZACR to obtain rights to the .AFRICA gTLD;
> - Failing to apply ICANN's procedures in a neutral and objective manner, with procedural fairness when it accepted the GAC Objection Advice against DCA; and
> - Failing to apply its procedures in a neutral and objective manner, with procedural fairness when it approved the BGC's recommendation not to reconsider the NGPC's acceptance of the GAC Objection Advice against DCA;
>
> And to declare that:
>
> - DCA is the prevailing party in this IRP and, consequently, shall be entitled to its costs in this proceeding; and
> - DCA is entitled to such other relief as the Panel may find appropriate under the circumstances described herein.
>
> Recommend, as a result of each of these violations, that:
>
> - ICANN cease all preparations to delegate the .AFRICA gTLD to ZACR;
> - ICANN permit DCA's application to proceed through the remainder of the new gTLD application process and be granted a period of no less than 18 months to obtain Government support as set out in the AGB and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA; and
> - ICANN compensate DCA for the costs it has incurred as a result of ICANN's violations of its Articles of Incorporation, Bylaws and AGB.

47. In its response to DCA Trust's Final Request for Relief, ICANN submitted that, "the Panel should find that no action (or inaction) of the ICANN Board was inconsistent with the Articles of Incorporation or Bylaws, and accordingly none of DCA's requested relief is appropriate."

48. ICANN also submitted that:

> DCA urges that the Panel issue a declaration in its favor…and also asks that the Panel declare that DCA is the prevailing party and entitled to its costs. Although ICANN believes that the evidence does not support the

> declarations that DCA seeks, ICANN does not object to the form of DCA's requests.
>
> At the bottom of DCA's Final Request for Relief, DCA asks that the Panel recommend that ICANN cease all preparations to delegate the .AFRICA gTLD to ZACR, and that ICANN permit DCA's application to proceed and give DCA no less than 18 additional months from the date of the Panel's declaration to attempt to obtain the requisite support of the countries in Africa. ICANN objects to that appropriateness of these requested recommendations because they are well outside the Panel's authority as set forth in the Bylaws.
>
> […]
>
> Because the Panel's authority is limited to declaring whether the Board's conduct was inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question and refrain from recommending how the Board should then proceed in light of the Panel's declaration. Pursuant to Paragraph 12 of that same section of the Bylaws, the Board will consider the Panel's declaration at its next meeting, and if the Panel has declared that the Board's conduct was inconsistent with the Articles or the Bylaws, the Board will have to determine how to act upon the opinion of the Panel.
>
> By way of example only, if the Panel somehow found that the unanimous NGPC vote on 4 June 2013 was not properly taken, the Board might determine that the vote from that meeting should be set aside and that the NGPC should consider the issue anew. Likewise, if the Panel were to determine that the NGPC did not adequately consider the GAC advice at [the] 4 June 2013 meeting, the Board might require that the NGPC reconsider the GAC advice.
>
> In all events, the Bylaws mandate that the Board has the responsibility of fashioning the appropriate remedy once the Panel has declared whether or not it thinks the Board's conduct was inconsistent with ICANN's Articles of Incorporation and Bylaws. The Bylaws do not provide the Panel with the authority to make any recommendations or declarations in this respect.

49. In response to ICANN's submissions above, on 15 June 2015, DCA Trust advanced that the Panel had already ruled that its declaration on the merits will be binding on the Parties and that nothing in ICANN's Bylaws, the Supplementary Procedures or the ICDR Rules applicable in these proceedings prohibits the Panel from making a recommendation to the ICANN Board of Directors regarding an appropriate remedy. DCA Trust also submitted that:

> According to ICANN's Bylaws, the Independent Review Process is designed to provide a remedy for "any" person materially affected by a decision or action by the Board. Further, "in order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation. Indeed, the ICANN New gTLD Program Committee, operating under the delegated authority of the ICANN Board, itself suggested that DCA could seek relief through ICANN's accountability

> mechanisms or, in other words, the Reconsideration process and the Independent Review Process. If the IRP mechanism – the mechanism of last resort for gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.

50. On 25 June 2015, the Panel issued its Procedural Order No. 10, directing the Parties to by 1 July 2015 simultaneously file their detailed submissions on costs and their allocation in these proceedings.

51. The additional factual background and reasons in the above decisions, procedural orders and declarations rendered by the Panel are hereby adopted and incorporated by reference in this Final Declaration.

52. On 1 and 2 July 2015, the Parties filed their respective positions and submissions on costs.

II. BRIEF SUMMARY OF THE PARTIES' POSITIONS ON THE MERITS & REQUEST FOR RELIEF

53. According to DCA Trust and as elaborated on in it's Memorial on Merits dated 3 November 2014, the central dispute between it and ICANN in this IRP may be summarized as follows:

> 32. By preventing DCA'S application from proceeding through the new gTLD review process and by coordinating with the AUC and others to ensure that the AUC obtained the rights to .AFRICA, ICANN breached its obligations of independence, transparency and due process contained in its Articles of Incorporation and Bylaws, including its obligation to conduct itself consistent with its duty of good faith under relevant principles of international law.

54. According to DCA Trust, among other things, "instead of functioning as a disinterested regulator of a fair and transparent gTLD application process, ICANN used its authority and oversight over that process to assist ZACR and to eliminate its only competitor, DCA, from the process."

55. DCA Trust also advanced that, "as a result, ICANN deprived DCA of the right to compete for .AFRICA in accordance with the rules ICANN established for the new gTLD program, in breach of the Applicant Guidebook ("AGB") and ICANN's Articles of Incorporation and Bylaws."

56. In its 3 December 2014 Response to DCA's Memorial on the Merits, among other things, ICANN submitted that, "ICANN's conduct with respect to DCA's application for .AFRICA was fully consistent with ICANN's Bylaws, its Articles of Incorporation and the Applicant Guidebook. ICANN also pleaded that it acted through open and transparent processes, evaluated DCA's application for .AFRICA in accordance with the procedures set forth in the Guidebook, and followed the procedures set forth in its Bylaws in evaluating DCA's Request for Reconsideration."

57. ICANN advanced that, "DCA is using this IRP as a mean to challenge the right of African countries to support a specific (and competing) application for .AFRICA, and to rewrite the Guidebook."

58. ICANN also added that, "ICANN provided assistance to those who requested, cooperated with governmental authorities, and respected the consensus advice issued by the GAC, which speaks on behalf of the governments of the world."

59. In its Final Request for Relief filed on 23 May 2015, DCA Trust asked this Panel to:

    1.Declare that the Board violated ICANN's Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB);
    2.Declare that DCA Trust is the prevailing party in this IRP and, consequently entitled to its costs in this proceeding; and
    3.Recommend as a result of the Board violations a course of action for the Board to follow going forward.

60. In its response letter of 1 June 2015, ICANN confirmed that it did not object to the form of DCA Trust's requests above, even though it believes that the evidence does not support the declarations that DCA Trust seeks. ICANN did, however, object to the appropriateness of the request for recommendations on the ground that they are outside of the Panel's authority as set forth in the Bylaws.

III. THE ISSUES RAISED AND THE PANEL'S DECISION

61. After carefully considering the Parties' written and oral submissions, perusing the three witness statements filed and hearing *viva voce* the testimonies of the witnesses at the in-person hearing of this IRP in Washington, D.C., the Panel answers the following four questions put to it as follows:

1. Did the Board act or fail to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?

Answer: Yes.

2. Can the IRP Panel recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook (AGB)?

Answer: Yes.

3. Who is the prevailing party in this IRP?

Answer: DCA Trust

4. Who is responsible for bearing the costs of this IRP and the cost of the IRP Provider?

Answer: ICANN, in full.

Summary of Panel's Decision

For reasons explained in more detail below, and pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.

Finally, DCA Trust is the prevailing party in this IRP and ICANN is responsible for bearing, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider.

As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN shall each bear their own expenses. The Parties shall also each bear their own legal representation fees.

IV. ANALYSIS OF THE ISSUES AND REASONS FOR THE PANEL'S DECISION

1) Did the Board act or fail to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?

62. Before answering this question, the Panel considers it necessary to quickly examine and address the issue of "standard of review" as referred to by ICANN in its 3 December 2014 Response to DCA's Memorial on the Merits or the "law applicable to these proceedings" as pleaded by DCA Trust in its 3 November 2014 Memorial on the Merits.

63. According to DCA Trust:

> 30. The version of ICANN's Articles of Incorporation and its Bylaws in effect at the time DCA filed its Request for IRP applies to these proceedings. [Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (21 November 1998) and Bylaws of the Internet Corporation for Assigned Names and Numbers (11 April 2013)]. ICANN's agreement with the U.S. Department of Commerce, National Telecommunications & Information Administration ("NTIA"), the "Affirmation of Commitments," is also instructive, as it explains ICANN's obligations in light of its role as regulator of the Domain Name System ("DNS"). The standard of review is a *de novo* "independent review" of whether the actions of the Board violated the Bylaws, with focus on whether the Board acted without conflict of interest, with due diligence and care, and exercised independent judgment in the best interests of ICANN and its many stakeholders. (Underlining added).
>
> 31. All of the obligations enumerated in these documents are to be carried out *first* in conformity with "relevant principles of international law" and *second* in conformity with local law. As explained by Dr. Jack Goldsmith in his Expert Report submitted in *ICM v. ICANN*, the reference to "principles of international law" in ICANN's Articles of Incorporation should be understood to include both customary international law and general principles of law.

64. In response, ICANN submits that:

> 11. The IRP is a unique process available under ICANN's Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, but only to the extent that Board action was inconsistent with ICANN's Bylaws or Articles. This IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN's Bylaws or Articles. ICANN's Bylaws specifically identify the deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, focusing on:

> a. Did the Board act without conflict of interest in taking its decision?;
>
> b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
>
> c. Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

> 12. DCA disregards the plain language of ICANN's Bylaws and relies instead on the IRP Panel's declaration in a prior Independent Review proceeding, *ICM v. ICANN*. However, *ICM* was decided in 2010 under a previous version of ICANN's Bylaws. In its declaration, the *ICM* Panel explicitly noted that ICANN's then-current Bylaws "d[id] not specify or imply that the [IRP] process provided for s[hould] (or s[hould] not) accord deference to the decisions of the ICANN Board." As DCA acknowledges, the version of ICANN's Bylaws that apply to this proceeding are the version as amended in April 2013. <u>The current Bylaws provide for the deferential standard of review set forth above</u>. [Underlining is added]

65. For the following reasons, the Panel is of the view that the standard of review is a *de novo*, objective and independent one examining whether the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws.

66. ICANN is not an ordinary California nonprofit organization. Rather it has a large international purpose and responsibility to coordinate and ensure the stable and secure operation of the Internet's unique identifier systems.

67. Indeed, Article 4 of ICANN's Articles of Incorporation require ICANN to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets." ICANN's Bylaws also impose duties on it to act in an open, transparent and fair manner with integrity.

68. ICANN's Bylaws (as amended on 11 April 2013) which both Parties explicitly agree that applies to this IRP, reads in relevant parts as follows:

> **ARTICLE IV: ACCOUNTABILITY AND REVIEW**
>
> **Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS**

> 1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
>
> […]
>
> 4. Requests for such independent review shall be referred to an Independent Review Process Panel […], which shall be charged with comparing contested actions of the Board to Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
>
>   a. did the Board act without conflict of interest in taking its decision?
>   b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
>   c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

69. Section 8 of the Supplementary Procedures similarly subject the IRP to the standard of review set out in subparagraphs a., b., and c., above, and add:

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

70. In the Panel's view, Article IV, Section 3, and Paragraph 4 of ICANN's Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, a *de novo, objective and independent* accountability process that would ensure that ICANN acted in a manner consistent with ICANN's Articles of Incorporation and Bylaws.

71. Both ICANN's Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. As ICANN's Bylaws explicitly put it, an IRP Panel is "*charged with* comparing contested actions of the Board […], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.

72. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

> Applicant hereby releases ICANN […] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN […] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM.

73. Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate "accountability" remedy for an applicant is the IRP.

74. As previously decided by this Panel, such accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.

75. Such accountability also requires, to use the words of the IRP Panel in the *Booking.com B.V. v. ICANN* (ICDR Case Number: 50-20-1400-0247), this IRP Panel to "objectively" determine whether or not the Board's actions are in fact consistent with the Articles of Incorporation, Bylaws and Guidebook, which this Panel, like the one in *Booking.com* "understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness."

76. The Panel therefore concludes that the "standard of review" in this IRP is a *de novo, objective and independent* one, which does not require any presumption of correctness.

77. With the above in mind, the Panel now turns it mind to whether or not the Board in this IRP acted or failed to act in a manner inconsistent

with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook.

DCA Trust's Position

78. In its 3 November 2014 Memorial on the Merits, DCA Trust criticizes ICANN for variety of shortcomings and breaches relating to the Articles of Incorporation, Bylaws and Applicant Guidebook. DCA Trust submits:

> 32. By preventing DCA's application from proceeding through the new gTLD review process and by coordinating with the AUC and others to ensure that the AUC obtained the rights to .AFRICA, ICANN breached its obligations of independence, transparency and due process contained in its Articles of Incorporation and Bylaws, including its obligation to conduct itself consistent with its duty of good faith under relevant principles of international law.

79. DCA Trust also pleads that ICANN breached its Articles of Incorporation and Bylaws by discriminating against DCA Trust and failing to permit competition for the .AFRICA gTLD, ICANN abused it Regulatory authority in its differential treatment of the ZACR and DCA Trust applications, and in contravention of the rules for the New gTLD Program, ICANN colluded with AUC to ensure that the AUC would obtain control over .AFRICA.

80. According to DCA Trust:

> 34. ICANN discriminated against DCA and abused its regulatory authority over new gTLDs by treating it differently from other new gTLD applicants without justification or any rational basis— particularly relative to DCA's competitor ZACR—and by applying ICANN's policies in an unpredictable and inconsistent manner so as to favor DCA's competitor for .AFRICA. ICANN staff repeatedly disparaged DCA and portrayed it as an illegitimate bidder for .AFRICA, and the Board failed to stop the discriminatory treatment despite protests from DCA.
>
> 35. Moreover, ICANN staff worked with InterConnect to ensure that ZACR, but not DCA, would be able to pass the GNP evaluation, even going so far as to draft a letter supporting ZACR for the AUC to submit back to ICANN. While ICANN staff purported to hold DCA to the strict geographic support requirement set forth in the AGB, once DCA was removed from contention for .AFRICA, ICANN staff immediately bypassed these very same rules in order to allow ZACR's application to pass the GNP evaluation. After DCA's application was pulled from processing on 7 June 2013, ICANN staff directed InterConnect to equate the AUC's support for ZACR's application as support from 100% of African governments. This was a complete change of policy for ICANN, which had insisted (until DCA's application was no longer being considered) that the AUC endorsement was not material to the geographic requirement.

> 36. However, none of the AUC statements ZACR submitted were adequate endorsements under the AGB, either. ICANN staff then took the remarkable step of drafting the AUC endorsement letter in order to enable ZACR to pass review. The Director of gTLD Operations, Trang Nguyen, personally composed an endorsement letter corresponding to all the AGB requirements for Commissioner Ibrahim's signature. Once Commissioner Ibrahim responded with a signed, stamped copy of the letter incorporating minor additions, ICANN staff rushed to pass ZACR's application just over one week later.
>
> 37. In its Response to the GAC Advice rendered against its application, DCA raised concerns that the two .AFRICA applications had been treated differently, though at the time it had no idea of just how far ICANN was going or would go to push ZACR's application through the process. Apparently the NGPC failed to make any inquiry into those allegations. .AFRICA was discussed at one meeting only, and there is no rationale listed for the NGPC's decision in the "Approved Resolutions" for the 4 June 2013 meeting. An adequate inquiry into ICANN staff's treatment of DCA's and ZACR's application—even simply asking the Director of gTLD Operations whether there was any merit to DCA's concerns—would have revealed a pattern of discriminatory behavior against DCA and special treatment by both ICANN staff and the ICANN Board in favor of ZACR's application.
>
> 38. In all of these acts and omissions, ICANN breached the AGB and its own Articles of Incorporation and Bylaws, which require it to act in good faith, avoid discriminating against any one party, and ensure open, accurate and unbiased application of its policies. Furthermore, ICANN breached principles of international law by failing to exercise its authority over the application process in good faith and committing an abuse of right by ghost-writing an endorsement letter for ZACR and the AUC, and then decreeing that the letter was all that would be needed for ZACR to pass. Finally, the Board's failure to inquire into the actions of its staff, even when on notice of the myriad of discriminatory actions, violates its obligation to comply with its Bylaws with appropriate care and diligence.

81. DCA Trust submits that the NGPC breached ICANN's Articles of Incorporation and Bylaws by failing to apply ICANN's Procedures in a neutral and objective manner with procedural fairness, when it accepted the GAC Objection Advice against DCA Trust, the NGPC should have investigated questions about the GAC Objection Advice being obtained through consensus, and the NGPC should have consulted with an independent expert about the GAC advice given that the AUC used the GAC to circumvent the AGB's community objection procedures.

82. According to DCA Trust:

> 44. The decision of the NGPC, acting pursuant to the delegated authority of the ICANN Board, to accept the purported "consensus" GAC Objection Advice, violated ICANN's Articles of Incorporation and Article III § 1 of its Bylaws, requiring transparency, consistency and fairness. ICANN ignored

the serious issues raised by DCA and others with respect to the rendering and consideration of the GAC Objection Advice, breaching its obligation to operate "to the maximum extent possible in an open and transparent manner and consistent with procedures designed to ensure fairness." It also breaches ICANN's obligation under Article 4 of its Articles of Incorporation to abide by principles of international law, including good faith application of rules and regulations and the prohibition on the abuse of rights.

45. The NGPC gave undue deference to the GAC and failed to investigate the serious procedural irregularities and conflicts of interest raised by DCA and others relating to the GAC's Objection Advice on .AFRICA. ICANN had a duty under principles of international law to exercise good faith and due diligence in evaluating the GAC advice rather than accepting it wholesale and without question, despite having notice of the irregular manner in which the advice was rendered. Importantly, ICANN was well aware that the AUC was using the GAC to effectively reserve .AFRICA for itself, pursuant to ICANN's own advice that it should use the GAC for that purpose and contrary to the New gTLD Program objective of enhancing competition for TLDs. The AUC's very presence on the GAC as a member rather than an observer demonstrates the extraordinary lengths ICANN took to ensure that the AUC was able to reserve .AFRICA for its own use notwithstanding the new gTLD application process then underway.

46. The ICANN Board and staff members had actual knowledge of information calling into question the notion that there was a consensus among the GAC members to issue the advice against DCA's application, prohibiting the application of the rule in the AGB concerning consensus advice (which creates a "strong presumption" for the Board that a particular application "should not proceed" in the gTLD evaluation process).The irregularities leading to the advice against DCA's application included proposals offered by Alice Munyua, who no longer represented Kenya as a GAC advisor at the time, and the fact that the genuine Kenya GAC advisor expressly refused to endorse the advice. Redacted - GAC Designated Confidential Information

Finally, the ICANN Board knew very well that the AUC might attempt to use the GAC in an anticompetitive manner, since it was ICANN itself that informed the AUC it could use the GAC to achieve that very goal.

47. At a bare minimum, this information put ICANN Board and staff members on notice that further investigation into the rationale and support for the GAC's decision was necessary. During the very meeting wherein the NGPC accepted the Objection Advice, the NGPC acknowledged that due diligence required a conversation with the GAC, even where the advice *was* consensus advice. The evidence shows that ICANN simply decided to push through the AUC's appointed applicant in order to allow the AUC to control .AFRICA, as it had previously requested.

48. Even if the GAC's Objection Advice could be characterized as "consensus" advice, the NGPC's failure to consult with an independent expert about the GAC's Objection Advice was a breach of ICANN's duty to act to the "maximum extent feasible in an open and transparent manner

> and consistent with procedures designed to ensure fairness." The AGB specifically provides that when the Board is considering any form of GAC advice, it "may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures."
>
> 49. Given the unique circumstances surrounding the applications for .AFRICA—namely that one applicant was the designee of the AUC, which wanted to control .AFRICA without competition— ICANN should not have simply accepted GAC Objection Advice, proposed and pushed through by the AUC. If it was in doubt as to how to handle GAC advice sponsored by DCA's only competitor for .AFRICA, it could have and should have consulted a third-party expert in order to obtain appropriate guidance. Its failure to do so was, at a minimum, a breach of ICANN's duty of good faith and the prohibition on abuse of rights under international law. In addition, in light of the multiple warning signs identified by DCA in its Response to the GAC Objection Advice and its multiple complaints to the Board, failure to consult an independent expert was certainly a breach of the Board's duty to ensure its fair and transparent application of its policies and its duty to promote and protect competition.

83. DCA Trust also submits that the NGPC breached ICANN's Articles of Incorporation and Bylaws by failing to apply its procedures in a neutral and objective manner, with procedural fairness, when it approved the BGC's recommendation not to reconsider the NGPC's acceptance of the GAC Objection Advice against DCA.

84. According to DCA Trust:

> 50. Not only did the NGPC breach ICANN's Articles of Incorporation and its Bylaws by accepting the GAC's Objection Advice, but the NGPC also breached ICANN's Articles of Incorporation and its Bylaws by approving the BGC's recommendation not to reconsider the NGPC's earlier decision to accept the GAC Objection Advice. Not surprisingly, the NGPC concluded that its earlier decision should not be reconsidered.
>
> 51. First, the NGPC's decision not to review its own acceptance of the GAC Objection Advice lacks procedural fairness, because the NGPC literally reviewed its own decision to accept the Objection Advice. It is a well-established general principle of international law that a party cannot be the judge of its own cause. No independent viewpoint entered into the process. In addition, although Mr. Silber recused himself from the vote on .AFRICA, he remained present for the entire discussion of .AFRICA, and Mr. Disspain apparently concluded that he did not feel conflicted, so both participated in the discussion and Mr. Disspain voted on DCA's RFR.
>
> 52. Second, the participation of the BGC did not provide an independent intervention into the NGPC's decision-making process, because the BGC is primarily a subset of members of the NGPC. At the time the BGC made its recommendation, the majority of BGC members were also members of the NGPC.

> 53. Finally, the Board did not exercise due diligence and care in accepting the BGC's recommendation, because the BGC recommendation essentially proffered the NGPC's inadequate diligence in accepting the GAC Objection Advice in the first place, in order to absolve the NGPC of the responsibility to look into any of DCA's grievances in the context of the Request for Review. The basis for the BGC's recommendation to deny was that DCA did not state proper grounds for reconsideration, because failure to follow correct procedure is not a ground for reconsideration, and DCA did not identify the actual information an independent expert would have provided, had the NGPC consulted one. Thus, the BGC essentially found that the NGPC did not fail to take account of material information, because the NGPC did not have before it the material information that would have been provided by an independent expert's viewpoint. The BGC even claimed that if DCA had wanted the NGPC to exercise due diligence and consult an independent expert, DCA should have made such a suggestion in its Response to the GAC Objection Advice. Applicants should not have to remind the Board to comply with its Bylaws in order for the Board to exercise due diligence and care.
>
> 54. ICANN's acts and omissions with respect to the BGC's recommendation constitute further breaches of ICANN's Bylaws and Articles of Incorporation, including its duty to carry out its activities in good faith and to refrain from abusing its position as the regulator of the DNS to favor certain applicants over others.

85. Finally, DCA Trust pleads that:

> [As] a result of the Board's breaches of ICANN's Articles of Incorporation, Bylaws and general principles of international law, ICANN must halt the process of delegating .AFRICA to ZACR and ZACR should not be permitted to retain the rights to .AFRICA it has procured as a result of the Board's violations. Because ICANN's handling of the new gTLD application process for .AFRICA was so flawed and so deeply influenced by ICANN's relationships with various individuals and organizations purporting to represent "the African community," DCA believes that any chance it may have had to compete for .AFRICA has been irremediably lost and that DCA's application could not receive a fair evaluation even if the process were to be re-set from the beginning. Under the circumstances, DCA submits that ICANN should remove ZACR's application from the process altogether and allow DCA's application to proceed under the rules of the New gTLD Program, allowing DCA up to 18 months to negotiate with African governments to obtain the necessary endorsements so as to enable the delegation and management of the .AFRICA string.

ICANN's Position

86. In its Response to DCA's Memorial on the Merits filed on 3 December 2014 ("ICANN Final Memorial"), ICANN submits that:

> 2. […] Pursuant to ICANN's New gTLD Applicant Guidebook ("Guidebook"), applications for strings that represent geographic regions—such as "Africa"—require the support of at least 60% of the respective national governments in the relevant region. As DCA has acknowledged on

multiple occasions, including in its Memorial, DCA does not have the requisite governmental support; indeed, DCA now asks that ICANN be required to provide it with eighteen more months to try to gather the support that it was supposed to have on the day it submitted its application in 2012.

3. DCA is using this IRP as a means to challenge the right of African countries to support a specific (and competing) application for .AFRICA, and to rewrite the Guidebook. The Guidebook provides that countries may endorse multiple applications for the same geographic string. However, in this instance, the countries of Africa chose to endorse only the application submitted by ZA Central Registry ("ZACR") because ZACR prevailed in the Request for Proposal ("RFP") process coordinated by the African Union Commission ("AUC"), a process that DCA chose to boycott. There was nothing untoward about the AUC's decision to conduct an RFP process and select ZACR, nor was there anything inappropriate about the African countries' decision to endorse only ZACR's application.

4. Subsequently, as they had every right to do, GAC representatives from Africa urged the GAC to issue advice to the ICANN Board that DCA's application for .AFRICA not proceed (the "GAC Advice"). One or more countries from Africa—or, for that matter, from any continent—present at the relevant GAC meeting could have opposed the issuance of this GAC Advice, yet not a single country stated that it did not want the GAC to issue advice to the ICANN Board that DCA's application should not proceed. As a result, under the GAC's rules, the GAC Advice was "consensus" advice.

5. GAC consensus advice against an application for a new gTLD creates a "strong presumption" for ICANN's Board that the application should not proceed. In accordance with the Guidebook's procedures, the Board's New gTLD Program Committee (the "NGPC") considered the GAC Advice, considered DCA's response to the GAC Advice, and properly decided to accept the GAC Advice that DCA's application should not proceed. As ZACR's application for .AFRICA subsequently passed all evaluation steps, ICANN and ZACR entered into a registry agreement for the operation of .AFRICA. Following this Panel's emergency declaration, ICANN has thus far elected not to proceed with the delegation of the .AFRICA TLD into the Internet root zone.

6. DCA's papers contain much mudslinging and many accusations, which frankly do not belong in these proceedings. According to DCA, the entire ICANN community conspired to prevent DCA from being the successful applicant for .AFRICA. However, the actions that DCA views as nefarious were, in fact, fully consistent with the Guidebook. They also were not actions taken by the Board or the NGPC that in any way violated ICANN's Bylaws or Articles, the only issue that this IRP Panel is tasked with assessing.

87. ICANN submits that the Board properly advised the African Union's member states of the Guidebook Rules regarding geographic strings, the NGPC did not violate the Bylaws or Articles of Incorporation by accepting the GAC Advice, the AUC and the African GAC members properly supported the .AFRICA applicant chosen through the RFP

process, the GAC issued consensus advice opposing DCA's application and the NGPC properly accepted the consensus GAC Advice.

88. According to ICANN:

> 13. DCA's first purported basis for Independent Review is that ICANN improperly responded to a 21 October 2011 communiqué issued by African ministers in charge of Communication and Information Technologies for their respective countries ("Dakar Communiqué"). In the Dakar Communiqué, the ministers, acting pursuant to the Constitutive Act of the African Union, committed to continued and enhanced participation in ICANN and the GAC, and requested that ICANN's Board take numerous steps aimed at increasing Africa's representation in the ICANN community, including that ICANN "include ['Africa'] and its representation in any other language on the Reserved Names List in order [for those strings] to enjoy [] special legislative protection, so [they could be] managed and operated by the structure that is selected and identified by the African Union."
>
> 14. As DCA acknowledges, in response to the request in the Dakar Communiqué that .AFRICA (and related strings) be reserved for a operator of the African ministers' own choosing, ICANN advised that .AFRICA and its related strings could not be placed on the Reserved Names List because ICANN was "not able to take actions that would go outside of the community-established and documented guidelines of the program." Instead, ICANN explained that, pursuant to the Guidebook, "protections exist that w[ould] allow the African Union and its member states to play a prominent role in determining the outcome of any application for these top-level domain name strings."
>
> 15. It was completely appropriate for ICANN to point the AU member states to the publicly-stated Guidebook protections for geographic names that were put in place to address precisely the circumstance at issue here—where an application for a string referencing a geographic designation did not appear to have the support of the countries represented by the string. DCA argues that ICANN was giving "instructions . . . as to how to bypass ICANN's own rules," but all ICANN was doing was responding to the Dakar Communiqué by explaining the publicly-available rules that ICANN already had in place. This conduct certainly did not violate ICANN's Bylaws or Articles.
>
> 16. In particular, ICANN explained that, pursuant to the Guidebook, "Africa" constitutes a geographic name, and therefore any application for .AFRICA would need: (i) documented support from at least 60% of the national governments in the region; and (ii) no more than one written statement of objection . . . from "relevant governments in the region and/or from public authorities associated with the continent and region." Next, ICANN explained that the Guidebook provides an opportunity for the GAC, whose members include the AU member states, to provide "Early Warnings" to ICANN regarding specific gTLD applications. Finally, ICANN explained that there are four formal objection processes that can be initiated by the public, including the Community Objection process, which may be filed where there is "substantial opposition to the gTLD application from a significant

portion of the community to which the gTLD string may be explicitly or implicitly targeted. Each of these explanations was factually accurate and based on publicly available information. Notably, ICANN did not mention the possibility of GAC consensus advice against a particular application (and, of course, such advice could not have occurred if even a single country had voiced its disagreement with that advice during the GAC meeting when DCA's application was discussed).

17. DCA's objection to ICANN's response to the Dakar Communiqué reflects nothing more than DCA's dissatisfaction with the fact that African countries, coordinating themselves through the AUC, opposed DCA's application. However, the African countries had every right to voice that opposition, and ICANN's Board acted properly in informing those countries of the avenues the Guidebook provided them to express that opposition.

18. In another attempt to imply that ICANN improperly coordinated with the AUC, DCA insinuates that the AUC joined the GAC at ICANN's suggestion. ICANN's response to the Dakar Communiqué does not even mention this possibility. Further, in response to DCA's document requests, ICANN searched for communications between ICANN and the AUC relating to the AUC becoming a voting member of the GAC, and the search revealed no such communications. This is not surprising given that ICANN has no involvement in, much less control over, whether the GAC grants to any party voting membership status, including the AUC; that decision is within the sole discretion of the GAC. ICANN's Bylaws provide that membership in the GAC shall be open to "multinational governmental organizations and treaty organizations, on the invitation of the [GAC] through its Chair." In any event, whether the AUC was a voting member of the GAC is irrelevant to DCA's claims. As is explained further below, the AUC alone would not have been able to orchestrate consensus GAC Advice opposing DCA's application.

19. DCA's next alleged basis for Independent Review is that ICANN's NGPC improperly accepted advice from the GAC that DCA's application should not proceed. However, nearly all of DCA's Memorial relates to conduct of the AUC, the countries of the African continent, and the GAC. None of these concerns is properly the subject of an Independent Review proceeding because they do not implicate the conduct of the ICANN Board or the NGPC. The only actual decision that the NGPC made was to accept the GAC Advice that DCA's application for .AFRICA should not proceed, and that decision was undoubtedly correct, as explained below.

20. Although the purpose of this proceeding is to test whether ICANN's Board (or, in this instance, the NGPC) acted in conformance with its Bylaws and Articles, ICANN addresses the conduct of third parties in the next few sections because that additional context demonstrates that the NGPC's decision to accept the GAC Advice—the only decision reviewable here—was appropriate in all aspects.

21. After DCA's application was posted for public comment (as are all new gTLD applications), sixteen African countries—Benin, Burkina Faso, Comoros, Cameroon, Democratic Republic of Congo, Egypt, Gabon, Ghana, Kenya, Mali, Morocco, Nigeria, Senegal, South Africa, Tanzania and Uganda—submitted GAC Early Warnings regarding DCA's application.

Early Warnings are intended to “provid[e] [] applicant[s] with an indication that the[ir] application is seen as potentially sensitive or problematic by one or more governments.” These African countries used the Early Warnings to notify DCA that they had requested the AUC to conduct an RFP for .AFRICA, that ZACR had been selected via that RFP, and that they objected to DCA’s application for .AFRICA. They further notified DCA that they did not believe that DCA had the requisite support of 60% of the countries on the African continent.

22. DCA minimizes the import of these Early Warnings by arguing that they did not involve a “permissible reason” for objecting to DCA’s application. But DCA does not explain how any of these reasons was impermissible, and the Guidebook explicitly states that Early Warnings “may be issued for any reason.” DCA demonstrated the same dismissive attitude towards the legitimate concerns of the sixteen governments that issued Early Warnings by arguing to the ICANN Board and the GAC that the objecting governments had been “teleguided (or manipulated).”

23. In response to these Early Warnings, DCA conceded that it did not have the necessary level of support from African governments and asked the Board to “waive th[e] requirement [that applications for geographic names have the support of the relevant countries] because of the confusing role that was played by the African Union.” DCA did not explain how the AUC’s role was “confusing,” and DCA ignored the fact that, pursuant to the Guidebook, the AUC had every right to promote one applicant over another. The AUC’s decision to promote an applicant other than DCA did not convert the AUC’s role from proper to improper or from clear to confusing.

24. Notably, long before the AUC opposed DCA’s application, DCA itself recognized the AUC’s important role in coordinating continent-wide technology initiatives. In 2009, DCA approached the AUC for its endorsement prior to seeking the support of individual African governments. DCA obtained the AUC’s support at that time, including the AUC’s commitment to “assist[] in the coordination of [the] initiative with African Ministers and Governments.”

25. The AUC, however, then had a change of heart (which it was entitled to do, particularly given that the application window for gTLD applications had not yet opened and would not open for almost two more years). On 7 August 2010, African ministers in charge of Communication and Information Technologies for their respective countries signed the Abuja Declaration. In that declaration, the ministers requested that the AUC coordinate various projects aimed at promoting Information and Communication Technologies projects on the African continent. Among those projects was “set[ting] up the structure and modalities for the [i]mplementation of the DotAfrica Project.”

26. Pursuant to that mandate, the AUC launched an open RFP process, seeking applications from private organizations (including DCA) interested in operating the .AFRICA gTLD. The AUC notified DCA that “following consultations with relevant stakeholders . . . [it] no longer endorse[d] individual initiatives [for .AFRICA].” Instead, “in coordination with the Member States . . . the [AUC] w[ould] go through [an] open [selection]

process"—hardly an inappropriate decision (and not a decision of ICANN or its Board). DCA then refused to participate in the RFP process, thereby setting up an inevitable clash with whatever entity the AUC selected. When DCA submitted its gTLD application in 2012 and attached its 2009 endorsement letter from the AUC, DCA knew full well (but did not disclose) that the AUC had retracted its support.

27. In sum, the objecting governments' concerns were the result of DCA's own decision to boycott the AUC's selection process, resulting in the selection of a different applicant, ZACR, for .AFRICA. Instead of addressing those governments' concerns, and instead of obtaining the necessary support of 60% of the countries on the African continent, DCA asked ICANN to re-write the Guidebook in DCA's favor by eliminating the most important feature of any gTLD application related to a geographic region—the support of the countries in that region. ICANN, in accordance with its Bylaws, Articles and Guidebook, properly ignored DCA's request to change the rules for DCA's benefit.

28. At its 10 April 2013 meeting in Beijing, the GAC advised ICANN that DCA's application for .AFRICA should not proceed.[40] As noted earlier, the GAC operates on the basis of consensus: if a single GAC member at the 10 April 2013 meeting (from any continent, not just from Africa) had opposed the advice, the advice would not have been considered "consensus."[41] As such, the fact that the GAC issued consensus GAC Advice against DCA's application shows that not a single country opposed that advice. Most importantly, this included Kenya: Michael Katundu, the GAC Representative for Kenya, and Kenya's only official GAC representative,was present at the 10 April 2013 Beijing meeting and did not oppose the issuance of the consensus GAC Advice.

29. DCA attempts to argue that the GAC Advice was not consensus advice and relies solely on the purported email objection of Sammy Buruchara, Kenya's GAC advisor (as opposed to GAC representative). As a preliminary matter (and as DCA now appears to acknowledge), the GAC's Operating Principles require that votes on GAC advice be made in person. Operating Principle 19 provides that:

If a Member's accredited representative, or alternate representative, is not present at a meeting, then it shall be taken that the Member government or organisation is not represented at that meeting. Any decision made by the GAC without the participation of a Member's accredited representative shall stand and nonetheless be valid.

Similarly, Operating Principle 40 provides:

One third of the representatives of the Current Membership with voting rights shall constitute a quorum at any meeting. A quorum shall only be necessary for any meeting at which a decision or decisions must be made. The GAC may conduct its general business face-to-face or online.

25. DCA argues that Mr. Buruchara objected to the GAC Advice via email, but even if objections could be made via email (which they cannot), Mr. Katundu, Kenya's GAC representative who was in Beijing at the GAC

meeting, not Mr. Buruchara, Kenya's GAC advisor, was authorized to speak on Kenya's behalf. Accordingly, under the GAC rules, Mr. Buruchara's email exchanges could not have constituted opposition to the GAC Advice.

26. Redacted - GAC Designated Confidential Information

And, tellingly, DCA did not to submit a declaration from Mr. Buruchara, which might have provided context or support for DCA's argument.

27. Redacted - GAC Designated Confidential Information

28. Notably, immediately prior to becoming Kenya's GAC advisor, Mr. Buruchara had served as the chairman of DCA's Strategic Advisory Board. But despite Mr. Buruchara's close ties with DCA and with Ms. Bekele, the Kenyan government had: (i) endorsed the Abuja Declaration; (ii) supported the AUC's processes for selecting the proposed registry operator; and (iii) issued an Early Warning objecting to DCA's application.

In other words, the Kenyan government was officially on record as supporting ZACR's application and opposing DCA's application, regardless of what Mr. Buruchara was writing in emails.

29. Furthermore, correspondence produced by DCA in this proceeding (but not referenced in either of DCA's briefs) shows that, despite Ms. Bekele's and Mr. Buruchara's efforts to obtain the support (or at least non-opposition) of the Kenyan government, the Kenyan government had rescinded its earlier support of DCA in favor of ZACR. For example, in February 2013, Ms. Bekele emailed a Kenyan government official asking that Kenya issue an Early Warning regarding ZACR's application. The official responded that he would have to escalate the matter to the Foreign Ministry because the Kenyan president "was part of the leaders of the AU who endorsed AU to be the custodian of dot Africa." On 10 April 2013, Ms. Bekele emailed Mr. Buruchara, asking him to make further points objecting to the proposed GAC advice. Mr. Buruchara responded that he was unable to do so because the Kenyan government had been informed (erroneously informed, according to Mr. Buruchara), that Mr. Buruchara was "contradict[ing] the Heads of State agreement in Abuja." On 8 July 2013,

Mr. Buruchara explained to Ms. Bekele that he "stuck [his] neck out for DCA inspite [*sic*] of lack of Govt support."

30. Because DCA did not submit a declaration from Mr. Buruchara (and because Ms. Bekele's declaration is, of course, limited to her own interpretation of email correspondence drafted by others), the Panel is left with a record demonstrating that: (i) Mr.

Buruchara was not authorized by the Kenyan government to oppose the GAC Advice; Redacted - GAC Designated Confidential Information and (iii) the actual GAC representative from Kenya (Mr. Katundu) attended the 10 April 2013 meeting in Beijing and did not oppose the issuance of the consensus GAC Advice that DCA's application for .AFRICA should not proceed.

31. In short, DCA's primary argument in support of this Independent Review proceeding—that the GAC should not have issued consensus advice against DCA's application—is not supported by any evidence and is, instead, fully contradicted by the evidence. And, of course, Independent Review proceedings do not test whether the GAC's conduct was appropriate (even though in this instance there is no doubt that the GAC appropriately issued consensus advice).

32. As noted above, pursuant to the Guidebook, GAC consensus advice that a particular application should not proceed creates a "strong presumption for the ICANN Board that the application should not be approved." The ICANN Board would have been required to develop a reasoned and well-supported rationale for not accepting the consensus GAC Advice; no such reason existed at the time the NGPC resolved to accept that GAC Advice (5 June 2013), and no such reason has since been revealed. The consensus GAC Advice against DCA's application was issued in the ordinary course, it reflected the sentiment of numerous countries on the African continent, and it was never rescinded.

33. DCA's objection to the Board's acceptance of the GAC Advice is twofold. First, DCA argues that the NGPC failed to investigate DCA's allegation that the GAC advice was not consensus advice. Second, DCA argues that the NGPC should have consulted an independent expert prior to accepting the advice. DCA also argued in its IRP Notice that two NGPC members had conflicts of interest when they voted to accept the GAC Advice, but DCA does not pursue that argument in its Memorial (and the facts again demonstrate that DCA's argument is incorrect).

34. As to the first argument, the Guidebook provides that, when the Board receives GAC advice regarding a particular application, it publishes that advice and notifies the applicant. The applicant is given 21 days from the date of the publication of the advice to submit a response to the Board. Those procedures were followed here. Upon receipt of the GAC Advice, ICANN posted the advice and provided DCA with an opportunity to respond. DCA submitted a lengthy response explaining "[w]hy DCA Trust disagree[d]" with the GAC Advice. A primary theme was that its application had been unfairly blocked by the very countries whose support the Guidebook required DCA to obtain, and that the AUC should not have been allowed to endorse an applicant for .AFRICA. DCA argued that it had been

unfairly "victimized" and "muzzled into insignificance" by the "collective power of the governments represented at ICANN," and that "the issue of government support [should] be made irrelevant in the process so that both contending applications for .Africa would be allowed to move forward . . . ." In other words, DCA was arguing that the AUC's input was inappropriate, and DCA was requesting that ICANN change the Guidebook requirement regarding governmental support for geographic names in order to accommodate DCA. ICANN's NGPC reviewed and appropriately rejected DCA's arguments.

35. One of DCA's three "supplementary arguments," beginning on page 10 of its response to the GAC Advice, was that there had been no consensus GAC advice, in part allegedly evidenced by Mr. Buruchara's (incomplete) email addressed above. DCA, however, chose not to address the fact that: (i) DCA lacked the requisite support of the African governments; (ii) Mr. Buruchara was not the Kenyan GAC representative; (iii) Mr. Buruchara was not at the Beijing meeting; (iv) the government of Kenya had withdrawn any support it may have previously had for DCA's application; and (iv) the actual Kenyan GAC representative (Mr. Katundu) was at the ICANN meeting in Beijing and did not oppose the issuance of the GAC Advice against DCA's application for .AFRICA. All of these facts were well known to DCA at the time of its response to the GAC Advice.

36. The NGPC's resolution accepting the GAC Advice states that the NGPC considered DCA's response prior to accepting the GAC Advice, and DCA presents no evidence to the contrary. DCA's disagreement with the NGPC's decision does not, of course, demonstrate that the NGPC failed to exercise due diligence in determining to accept the consensus GAC Advice.

37. As to DCA's suggestion that the NGPC should have consulted an independent expert, the Guidebook provides that it is within the Board's discretion to decide whether to consult with an independent expert:

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.

The NGPC clearly did not violate its Bylaws, Articles or Guidebook in deciding that it did not need to consult any independent expert regarding the GAC Advice. Because DCA's challenge to the GAC Advice was whether one or more countries actually had opposed the advice, there was no reason for the NGPC to retain an "expert" on that subject, and DCA has never stated what useful information an independent expert possibly could have provided.

89. ICANN also submits that the NGPC properly denied DCA's request for reconsideration, ICANN's actions following the acceptance of the GAC Advice are not relevant to the IRP, and in any event they were not improper, the ICANN staff directed the ICC to treat the two

African applications consistently, and ICANN staff did not violate any policy in drafting a template letter at the AUC request.

90. According to ICANN:

> 38. DCA argues that the NGPC improperly denied DCA's Reconsideration Request, which sought reconsideration of the NGPC's acceptance of the GAC Advice. Reconsideration is an accountability mechanism available under ICANN's Bylaws and administered by ICANN's Board Governance Committee ("BGC"). DCA's Reconsideration Request asked that the NGPC's acceptance of the GAC Advice be rescinded and that DCA's application be reinstated. Pursuant to the Bylaws, reconsideration of a Board (or in this case NGPC) action is appropriate only where the NGPC took an action "without consideration of material information" or in "reliance on false or inaccurate material information."
>
> 39. In its Reconsideration Request, DCA argued (as it does here) that the NGPC failed to consider material information by failing to consult with an independent expert prior to accepting the GAC Advice. The BGC noted that DCA had not identified any material information that the NGPC had not considered, and that DCA had not identified what advice an independent expert could have provided to the NGPC or how such advice might have altered the NGPC's decision to accept the GAC Advice. The BGC further noted that, as discussed above, the Guidebook is clear that the decision to consult an independent expert is at the discretion of the NGPC.
>
> 40. DCA does not identify any Bylaws or Articles provision that the NGPC violated in denying the Reconsideration Request. Instead, DCA simply disagrees with the NGPC's determination that DCA had not identified any material information on which the NGPC failed to rely. That disagreement is not a proper basis for a Reconsideration Request or an IRP. DCA also argues (again without citing to the Bylaws or Articles) that, because the NGPC accepted the GAC Advice, the NGPC could not properly consider DCA's Reconsideration Request. In fact, the DCA's Reconsideration Request was handled exactly in the manner prescribed by ICANN's Bylaws: the BGC—a separate Board committee charged with considering Reconsideration Requests—reviewed the material and provided a recommendation to the NGPC. The NGPC then reviewed the BGC's recommendation and voted to accept it. In short, the various Board committees conducted themselves exactly as ICANN's Bylaws require.
>
> 41. The NGPC accepted the GAC Advice on 4 June 2013. As a result, DCA's application for .AFRICA did not proceed. In its Memorial, DCA attempts to cast aspersions on ICANN's evaluation of ZACR's application, but that evaluation has no bearing on whether the NGPC acted consistently with its Bylaws and Articles in handling the GAC advice related to DCA's application. Indeed, the evaluation of ZACR's application did not involve any action by ICANN's Board (or NGPC), and is therefore not a proper basis for Independent Review. Although the actions of ICANN's staff are not relevant to this proceeding, ICANN addresses DCA's allegations for the sake of thoroughness and because the record demonstrates that ZACR's application was evaluated fully in conformance with the Guidebook requirements.

42. DCA alleges that "ICANN staff worked with [the ICC] to ensure that ZACR, but not DCA, would be able to pass the GNP evaluation." DCA's argument is based on false and unsupported characterizations of the ICC's evaluation of the two .AFRICA applications.

43. First, DCA claims (without relevant citation) that ICANN determined that the AUC's endorsement would count as an endorsement from each of the AU's member states only after ICANN had stopped processing DCA's application. In fact, the record indicates that ICANN accepted the ICC's recommendation that the AUC's endorsement would qualify as an endorsement from each of the AU's member states while DCA's application was still in contention, at a time when the recommendation had the potential to benefit both applicants for .AFRICA (had DCA also in fact received the AUC's support).

44. The Guidebook provides that the Geographic Names Panel is responsible for "verifying the relevance and authenticity of supporting documentation." Accordingly, it was the ICC's responsibility to evaluate how the AUC's endorsement should be treated. The ICC recommended that the AUC's endorsement should count as an endorsement from each of the AU's member states. The ICC's analysis was based on the Abuja Declaration, which the ICC interpreted as "instruct[ing] the [AUC] to pursue the DotAfrica project, and in [the ICC's] independent opinion, provide[d] suitable evidence of support from relevant governments or public authorities." The evidence shows that ICANN accepted the ICC's recommendation before the NGPC accepted the GAC Advice regarding DCA's application— in a 26 April 2013 email discussing the preparation of clarifying questions regarding the AUC's letters of support, ICANN explained to the ICC that "if the applicant(s) is/are unable to obtain a revised letter of support from the AU [], they may be able to fulfill the requirements by approaching the individual governments."

45. DCA also claims that ICANN determined that endorsements from the UNECA would not be taken into account for geographic evaluations. This simply is not true. Pursuant to the ICC's advice, the UNECA's endorsement was taken into account. Like the AUC, the UNECA had signed letters of support for both DCA and ZACR. The ICC advised that because the UNECA was specifically named in the Abuja Declaration, it too should be treated as a relevant public authority. ICANN accepted the ICC's advice.

46. DCA argues that, after ICANN had stopped processing DCA's application, ICANN staff improperly assisted the AUC in drafting a support letter for ZACR. As is reflected in the clarifying questions the ICC drafted regarding the endorsement letters submitted on behalf of each of the two .AFRICA applications, the Guidebook contains specific requirements for letters of support from governments and public authorities. In addition to "clearly express[ing] the government's or public authority's support for or non- objection to the applicant's application," letters must "demonstrate the government's or public authority's understanding of the string being requested and its intended use" and that "the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available, i.e., entry into a registry agreement with ICANN . . . ". In light of these specific requirements, the Guidebook even includes a sample letter of support.

> 47. The first letter of support that the AUC submitted for ZACR's application did not follow the correct format and resulted in a clarifying question from the ICC. As a result, the AUC requested ICANN staff's assistance in drafting a letter that conformed to the Guidebook's requirements. ICANN staff drafted a template based on the sample letter of support in the Guidebook, and the AUC then made significant edits to that template. DCA paints this cooperation as nefarious, but there was absolutely nothing wrong with ICANN staff assisting the AUC, assistance that DCA would certainly have welcomed, and which ICANN would have provided, had the AUC been supporting DCA instead of ZACR.

91. Finally, ICANN submits:

> 50. ICANN's conduct with respect to DCA's application for .AFRICA was fully consistent with ICANN's Bylaws, its Articles of Incorporation and the Applicant Guidebook. ICANN acted through open and transparent processes, evaluated DCA's application for .AFRICA in accordance with the procedures set forth in the Guidebook, and followed the procedures set forth in its Bylaws in evaluating DCA's Request for Reconsideration. ICANN provided assistance to those who requested, cooperated with governmental authorities, and respected the consensus advice issued by the GAC, which speaks on behalf of the governments of the world.
>
> 51. DCA knew, as did all applicants for new gTLDs, that some of the applications would be rejected. There can only be one registry operator for each gTLD string, and in the case of strings that relate to geographic regions, no application can succeed without the significant support of the countries in that region. There is no justification whatsoever for DCA's repeated urging that the support (or lack thereof) of the countries on the African continent be made irrelevant to the process.
>
> 52. Ultimately, the majority of the countries in Africa chose to support another application for the .AFRICA gTLD, and decided to oppose DCA's application. At a critical time, no country stood up to defend DCA's application. These countries—and the AUC— had every right to take a stand and to support the applicant of their choice. In this instance, that choice resulted in the GAC issuing consensus advice, which the GAC had every right to do. Nothing in ICANN's Bylaws or Articles, or in the Guidebook, required ICANN to challenge that decision, to ignore that decision, or to change the rules so that the input of the AUC, much less the GAC, would become irrelevant. To the contrary, the AUC's role with respect to the African community is critical, and it was DCA's decision to pursue a path at odds with the AUC that placed its application in jeopardy, not anything that ICANN (or ICANN's Board or the NGPC) did. The NGPC did exactly what it was supposed to do in this circumstance, and ICANN urges this IRP Panel to find as such. Such a finding would allow the countries of Africa to soon provide their citizens with what all parties involved believe to be a very important step for Africa – access to .AFRICA on the internet.

The Panel's Decision

92. The Panel in this IRP, has been asked to determine whether, in the case of the application of DCA Trust for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains ("gTLD") Internet Expansion Program (the "New gTLD Program"), the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?

93. After reviewing the documentation filed in this IRP, reading the Parties' respective written submissions, reading the written statements and listening to the testimony of the three witnesses brought forward, listening to the oral presentations of the Parties' legal representatives at the hearing in Washington, D.C., reading the transcript of the hearing, and deliberating, the Panel is of the unanimous view that certain actions and inactions of the ICANN Board (as described below) with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

94. ICANN is bound by its own Articles of Incorporation to act fairly, neutrally, non-discriminatorily and to enable competition. Article 4 of ICANN's Articles of Incorporation sets this out explicitly:

> 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.

95. ICANN is also bound by its own Bylaws to act and make decisions "neutrally and objectively, with integrity and fairness."

96. These obligations and others are explicitly set out in a number of provisions in ICANN's Bylaws:

> **ARTICLE I: MISSION AND CORE (Council of Registrars) VALUES**
>
> **Section 2. CORE (Council of Registrars) VALUES**
>
> In performing its mission, the following core values should guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):

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

[…]

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

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

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

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

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

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN (Internet Corporation for Assigned Names and Numbers) body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

ARTICLE II: POWERS

Section 1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.

Section 3. NON-DISCRIMINATORY TREATMENT

ICANN (Internet Corporation for Assigned Names and Numbers) shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by

substantial and reasonable cause, such as the promotion of effective competition.

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN (Internet Corporation for Assigned Names and Numbers) and **its constituent bodies** shall operate to the maximum extent feasible in an open and transparent manner and consistent **with procedures designed to ensure fairness.** [Underlining and bold is that of the Panel]

97. As set out in Article IV (Accountability and Review) of ICANN's Bylaws, in carrying out its mission as set out in its Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of the Bylaws.

98. As set out in Section 3 (Independent Review of Board Actions) of Article IV, "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. In order to be materially affected, the person must suffer injury or harm that is directly and casually connected to the Board's alleged violation of the Bylaws or Articles of Incorporation, and not as a result of third parties acting in line with the Board's action."

99. In this IRP, among the allegations advanced by DCA Trust against ICANN, is that the ICANN Board, and its constituent body, the GAC, breached their obligation to act transparently and in conformity with procedures that ensured fairness. In particular, DCA Trust criticizes the ICANN Board here, for allowing itself to be guided by the GAC, a body "with apparently no distinct rules, limited public records, fluid definitions of membership and quorums" and unfair procedures in dealing with the issues before it.

100. According to DCA Trust, ICANN itself asserts that the GAC is a "constituent body." The exchange between the Panel and counsel for ICANN at the in-person hearing in Washington, D.C. is a living proof of that point.

HONORABLE JUDGE CAHILL:

Are you saying we should only look at what the Board does? The reason I'm asking is that your -- the Bylaws say that ICANN and its constituent bodies shall operate, to the maximum extent feasible, in an open and transparent manner. Does the constituent bodies include, I don't know,

GAC or anything? What is "constituent bodies"?

MR. LEVEE:

Yeah. What I'll talk to you about tomorrow in closing when I lay out what an IRP Panel is supposed to address, the Bylaws are very clear. Independent Review Proceedings are for the purpose of testing conduct or inaction of the ICANN Board. They don't apply to the GAC. They don't apply to supporting organizations. They don't apply to Staff.

HONORABLE JUDGE CAHILL:

So you think that the situation is a -- we shouldn't be looking at what the constituent -- whatever the constituent bodies are, even though that's part of your Bylaws?

MR. LEVEE:

Well, when I say not -- when you say not looking, part of DCA's claims that the GAC did something wrong and that ICANN knew that.

HONORABLE JUDGE CAHILL:

So is GAC a constituent body?

MR. LEVEE:

It is a constituent body, to be clear –

HONORABLE JUDGE CAHILL:

Yeah.

MR. LEVEE:

-- whether -- I don't think an IRP Panel -- if the only thing that happened here was that the GAC did something wrong --

HONORABLE JUDGE CAHILL:

Right.

MR. LEVEE:

-- an IRP Panel would not be -- an Independent Review Proceeding is not supposed to address that, whether the GAC did something wrong.

Now, if ICANN knew -- the Board knew that the GAC did something wrong, and that's how they link it, they say, Look, the GAC did something wrong, and ICANN knew it, the Board -- if the Board actually knew it, then we're dealing with Board conduct.

The Board knew that the GAC did not, in fact, issue consensus advice. That's the allegation. So it's fair to look at the GAC's conduct.

101. The Panel is unanimously of the view that the GAC is a constituent body of ICANN. This is not only clear from the above exchange between the Panel and counsel for ICANN, but also from Article XI (Advisory Committees) of ICANN's Bylaws and the Operating Principles of the GAC. Section 1 (General) of Article XI of ICANN's Bylaws states:

> The Board may create one or more Advisory Committees in addition to those set forth in this Article. Advisory Committee membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees shall have no legal authority to act for ICANN (Internet Corporation for Assigned Names and Numbers), but shall report their findings and recommendations to the Board.

Section 2, under the heading, Specific Advisory Committees states:

> There shall be at least the following Advisory Committees:
>
> 1. Governmental Advisory Committee
>
> a. The Governmental Advisory Committee should consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation for Assigned Names and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues. [Underlining is that of the Panel]

Section 6 of the preamble of GAC's Operating Principles is also relevant. That Section reads as follows:

> The GAC commits itself to implement efficient procedures in support of ICANN and to provide thorough and timely advice and analysis on relevant matters of concern with regard to government and public interests.

102. According to DCA Trust, based on the above, and in particular, Article III (Transparency), Section 1 of ICANN's Bylaws, therefore, the GAC was bound to the transparency and fairness obligations of that provision to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness", but as ICANN's own witness, Ms. Heather Dryden acknowledged during the hearing, the GAC did not act with transparency or in a manner designed to insure fairness.

> **Mr. ALI:**
>
> Q. But what was the purpose of the discussion at the Prague meeting with respect to AUC? If there really is no difference or distinction between voting/nonvoting, observer or whatever might be the opposite of observer,

or the proper terminology, what was -- what was the point?

THE WITNESS:

A. I didn't say there was no difference. The issue is that there isn't GAC agreement about what are the -- the rights, if you will, of -- of entities like the AUC. And there might be in some limited circumstances, but it's also an extremely sensitive issue. And so not all countries have a shared view about what those -- those entities, like the AUC, should be able to do.

Q. So not all countries share the same view as to what entities, such as the AUC, should be able to do. Is that what you said? I'm sorry. I didn't --

A. Right, because that would only get clarified if there is a circumstance where that link is forced. In our business, we talk about creative ambiguity. We leave things unclear so we don't have conflict.

103. As explained by ICANN in its Closing Presentation at the hearing, ICANN's witness, Ms. Heather Dryden also asserted that the GAC Advice was meaningless until the Board acted upon it. This last point is also clear from examining Article I, Principle 2 and 5 of ICANN GAC's Operating Principles. Principle 2 states that "the GAC is not a decision making body" and Principle 5 states that "the GAC shall have no legal authority to act for ICANN".

MR. ALI:

Q. I would like to know what it is that you, as the GAC Chair, understand to be the consequences of the actions that the GAC will take --

HONORABLE JUDGE CAHILL:

The GAC will take?

MR. ALI:

Q. -- the GAC will take -- the consequences of the actions taken by the GAC, such as consensus advice?

HONORABLE JUDGE CAHILL:

There you go.

THE WITNESS:

That isn't my concern as the Chair. It's really for the Board to interpret the outputs coming from the GAC.

104. Ms. Dryden also stated that the GAC made its decision without providing any rationale and primarily based on politics and not on potential violations of national laws and sensitivities.

ARBITRATOR KESSEDJIAN:

So, basically, you're telling us that the GAC takes a decision to object to an applicant, and no reasons, no rationale, no discussion of the concepts that are in the rules?

THE WITNESS:

I'm telling you the GAC did not provide a rationale. And that was not a requirement for issuing a GAC --

HONORABLE JUDGE CAHILL:

But you also want to check to see if the countries are following the right -- following the rules, if there are reasons for rejecting this or it falls within the three things that my colleague's talking about.

THE WITNESS:

The practice among governments is that governments can express their view, whatever it may be. And so there's a deference to that.

That's certainly the case here as well.

105. ICANN was bound by its Bylaws to conduct adequate diligence to ensure that it was applying its procedures fairly. Section 1 of Article III of ICANN's Bylaws, require it and its constituent bodies to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. The Board must also as per Article IV, Section 3, Paragraph 4 exercise due diligence and care in having a reasonable amount of facts in front of it.

106. In this case, on 4 June 2013, the NGPC accepted the GAC Objection Advice to stop processing DCA Trust's application. On 1 August 2013, the BGC recommended to the NGPC that it deny DCA Trust's Request for Reconsideration of the NGPC's 4 June 2013 decision, and on 13 August 2013, the NGPC accepted the BGC's recommendation (i.e., the NGPC declined to reconsider its own decision) without any further consideration.

107. In this case, ICANN through the BGC was bound to conduct a meaningful review of the NGPC's decision. According to ICANN's Bylaws, Article IV, Section 2, the Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The [BGC] shall have the authority to, among other things, conduct whatever factual investigation is deemed appropriate, and request additional written submissions from the affected party, or from others.

108. Finally, the NGPC was not bound by – nor was it required to give deference to – the decision of the BGC.

109. The above, combined with the fact that DCA Trust was never given any notice or an opportunity in Beijing or elsewhere to make its position known or defend its own interests before the GAC reached consensus on the GAC Objection Advice, and that the Board of ICANN did not take any steps to address this issue, leads this Panel to conclude that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were not procedures designed to insure the fairness required by Article III, Sec. 1 above, and are therefore inconsistent with the Articles of Incorporation and Bylaws of ICANN.

110. The following excerpt of exchanges between the Panel and one of ICANN's witnesses, Ms. Heather Dryden, the then Chair of the GAC, provides a useful background for the decisions reached in this IRP:

> **PRESIDENT BARIN:**
>
> But be specific in this case. Is that what happened in the .AFRICA case?
>
> **THE WITNESS:**
>
> The decision was very quick, and --
>
> **PRESIDENT BARIN:**
>
> But what about the consultations prior? In other words, were -- were you privy to --
>
> **THE WITNESS:**
>
> No. If -- if colleagues are talking among themselves, then that's not something that the GAC, as a whole, is -- is tracking or -- or involved in. It's really those interested countries that are.
>
> **PRESIDENT BARIN:**
>
> Understood. But I assume -- I also heard you say, as the Chair, you never want to be surprised with something that comes up. So you are aware of -- or you were aware of exactly what was happening?
>
> **THE WITNESS:**
>
> No. No. You do want to have a good sense of where the problems are, what's going to come unresolved back to the full GAC meeting, but that's -- that's the extent of it.

And that's the nature of -- of the political process.

Redacted - GAC Designated Confidential Information

HONORABLE JUDGE CAHILL:

Okay.

THE WITNESS:

-- that question was addressed via having that meeting.

PRESIDENT BARIN:

And what's your understanding of what -- what the consequence of that decision is or was when you took it? So what happens from that moment on?

THE WITNESS:

It's conveyed to the Board, so all the results, the agreed language coming out of GAC is conveyed to the Board, as was the case with the communiqué from the Beijing meeting.

PRESIDENT BARIN:

And how is that conveyed to the Board?

THE WITNESS:

Well, it's a written document, and usually Support Staff are forwarding it to Board Staff.

ARBITRATOR KESSEDJIAN:

Could you speak a little bit louder? I don't know whether I am tired, but I --

THE WITNESS:

Okay. So as I was saying, the document is conveyed to the Board once it's concluded.

PRESIDENT BARIN:

When you say “the document”, are you referring to the communiqué?

THE WITNESS:

Yes.

PRESIDENT BARIN:

Okay. And there are no other documents?

THE WITNESS:

The communiqué --

PRESIDENT BARIN:

In relation to .AFRICA. I'm not interested in any other.

THE WITNESS:

Yes, it's the communiqué.

PRESIDENT BARIN:

And it's prepared by your staff? You look at it?

THE WITNESS:

Right --

PRESIDENT BARIN:

And then it's sent over to --

THE WITNESS:

-- right, it's agreed by the GAC in full, the contents.

PRESIDENT BARIN:

And then sent over to the Board?

THE WITNESS:

And then sent, yes.

PRESIDENT BARIN:

And what happens to that communiqué? Does the Board receive that and say, Ms. Dryden, we have some questions for you on this, or --

THE WITNESS:

Not really. If they have questions for clarification, they can certainly ask that in a meeting. But it is for them to receive that and then interpret it and -- and prepare the Board for discussion or decision.

PRESIDENT BARIN:

Okay. And in this case, you weren't asked any questions or anything?

THE WITNESS:

I don't believe so. I don't recall.

PRESIDENT BARIN:

Any follow-ups, right?

THE WITNESS:

Right.

PRESIDENT BARIN:

And in the subsequent meeting, I guess the issue was tabled. The Board meeting that it was tabled, were you there?

THE WITNESS:

Yes. I don't particularly recall the meeting, but yes.

[…]

ARBITRATOR KESSEDJIAN:

Can I turn your attention to Paragraph 5 of your declaration?

Here, you basically repeat what is in the ICANN Guidebook literature, whatever. These are the exact words, actually, that you use in your declaration in terms of why there could be an objection to an applicant -- to a specific applicant. And you use three criteria: problematic, potentially violating national law, and raise sensitivities.

Now, I'd like you to, for us -- for our benefit, to explain precisely, as concrete as you can be, what those three concepts -- how those three concepts translate in the DCA case. Because this must have been discussed in order to get this very quick decision that you are mentioning. So I'd like to understand, you know, because these are the criteria -- these are the three criteria; is that correct?

THE WITNESS:

That is what the witness statement says, but the link to the GAC and the role that I played in terms of the GAC discussion did not involve me interpreting those three things. In fact, the GAC did not provide rationale for the consensus objection.

ARBITRATOR KESSEDJIAN:

No.

But, I mean, look, the GAC is taking a decision which -- very quickly -- I'm using your words, "very quickly" -- erases years and years and years of work, a lot of effort that have been put by a single applicant. And the way I understand the rules is that the -- the GAC advice -- consensus advice against that applicant are -- is based on those three criteria. Am I wrong in that analysis?

THE WITNESS:

I'm saying that the GAC did not identify a rationale for those governments that put forward a string or an application for consensus objection. They might have identified their reasons, but there was not GAC agreement about those reasons or -- or -- or -- or rationale for that. We had some discussion earlier about Early Warnings. So Early Warnings were issued by individual countries, and they indicated their rationale. But, again, that's not a GAC view.

ARBITRATOR KESSEDJIAN:

So, basically, you're telling us that the GAC takes a decision to object to an applicant, and no reasons, no rationale, no discussion of the concepts that are in the rules?

THE WITNESS:

I'm telling you the GAC did not provide a rationale. And that was not a requirement for issuing a GAC --

HONORABLE JUDGE CAHILL:

But you also want to check to see if the countries are following the right -- following the rules, if there are reasons for rejecting this or it falls within the three things that my colleague's talking about.

THE WITNESS:

The practice among governments is that governments can express their view, whatever it may be. And so there's […] deference to that. That's certainly the case here as well. The -- if a country tells -- tells the GAC or says it has a concern, that's not really something that -- that's evaluated, in the sense you mean, by the other governments. That's not the way governments work with each other.

HONORABLE JUDGE CAHILL:

So you don't go into the reasons at all with them?

THE WITNESS:

To issue a consensus objection, no.

HONORABLE JUDGE CAHILL:

Okay. ---

[…]

PRESIDENT BARIN:

I have one question for you. We spent, now, a bit of time or a considerable amount of time talking to you about the process, or the procedure leading to the consensus decision.

Can you tell me what your understanding is of why the GAC consensus objection was made finally?

[…]

But in terms of the .AFRICA, the decision -- the issue came up, the agenda -- the issue came up, and you made a decision, correct?

THE WITNESS:

The GAC made a decision.

PRESIDENT BARIN:

Right. When I say "you", I mean the GAC.

Do you know -- are you able to express to us what your understanding of the substance behind that decision was? I mean, in other words, we've spent a bit of time dealing with the process.

Can you tell us why the decision happened?

THE WITNESS:

The sum of the GAC's advice is reflected in its written advice in the communiqué. That is the view to GAC. That's -- that's --

[…]

ARBITRATOR KESSEDJIAN:

I just want to come back to the point that I was making earlier. To your Paragraph 5, you said -- you answered to me saying that is my declaration, but it was not exactly what's going on. Now, we are here to --

at least the way I understand the Panel's mandate, to make sure that the rules have been obeyed by, basically. I'm synthesizing. So I don't understand how, as the Chair of the GAC, you can tell us that, basically, the rules do not matter -- again, I'm rephrasing what you said, but I'd like to give you another opportunity to explain to us why you are mentioning those criteria in your written declaration, but, now, you're telling us this doesn't matter.

If you want to read again what you wrote, or supposedly wrote, it's Paragraph 5.

THE WITNESS:

I don't need to read again my declaration. Thank you. The header for the GAC's discussions throughout was to refer to strings or applications that were controversial or sensitive. That's very broad. And –

ARBITRATOR KESSEDJIAN:

I'm sorry. You say the rules say problematic, potentially violate national law, raise sensitivities. These are precise concepts.

THE WITNESS:

Problematic, violate national law -- there are a lot of laws -- and sensitivities does strike me as being quite broad.

[…]

ARBITRATOR KESSEDJIAN:

Okay. So we are left with what? No rules?

THE WITNESS:

No rationale with the consensus objections.

That's the -- the effect.

ARBITRATOR KESSEDJIAN:

I'm done.

HONORABLE JUDGE CAHILL:

I'm done.

PRESIDENT BARIN:

So am I.

111. The Panel understands that the GAC provides advice to the ICANN Board on matters of public policy, especially in cases where ICANN activities and policies may interact with national laws or international agreements. The Panel also understands that GAC advice is developed through consensus among member nations. Finally, the Panel understands that although the ICANN Board is required to consider GAC advice and recommendations, it is not obligated to follow those recommendations.

112. Paragraph IV of ICANN's Beijing, People's Republic of China 11 April 2013 Communiqué [Exhibit C-43] under the heading "GAC Advice to the ICANN Board" states:

> **IV. GAC Advice to the ICANN Board**
>
> **1. New gTLDs**
>
> **a. GAC Objections to the Specific Applications**
>
> **i. The GAC Advises the ICANN Board that:**
>
> i. The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:
>
> 1. The application for .africa (Application number 1-1165-42560)
>
> […]

Footnote 3 to Paragraph IV.1. (a)(i)(i) above in the original text adds, "Module 3.1: The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved." A similar statement in this regard can be found in paragraph 5 of Ms. Dryden's 7 February 2014 witness statement.

113. In light of the clear "Transparency" obligation provisions found in ICANN's Bylaws, the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust's application.

114. The Panel would have had a similar expectation with respect to the NGPC Response to the GAC Advice regarding .AFRICA which was expressed in ANNEX 1 to NGPC Resolution No. 2013.06.04.NG01 [Exhibit C-45]. In that document, in response to DCA Trust's application, the NGPC stipulated:

> The NGPC accepts this advice. The AGB provides that "if GAC advised ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved. The NGPC directs staff that pursuant to the GAC advice and Section 3.1 of the Applicant Guidebook, Application number 1-1165-42560 for .africa will not be approved. In accordance with the AGB the applicant may with draw […] or seek relief according to ICANN's accountability mechanisms (see ICANN's Bylaws, Articles IV and V) subject to the appropriate standing and procedural requirements.

115. Based on the foregoing, after having carefully reviewed the Parties' written submissions, listened to the testimony of the three witness, listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

116. As indicated above, there are perhaps a number of other instances, including certain decisions made by ICANN, that did not proceed in the manner and spirit in which they should have under the Articles of Incorporation and Bylaws of ICANN.

117. DCA Trust has criticized ICANN for its various actions and decisions throughout this IRP and ICANN has responded to each of these criticisms in detail. However, the Panel, having carefully considered these criticisms and decided that the above is dispositive of this IRP, it does not find it necessary to determine who was right, to what extent and for what reasons in respect to the other criticisms and other alleged shortcomings of the ICANN Board identified by DCA Trust.

2) Can the IRP Panel recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?

118. In the conclusion of its Memorial on the Merits filed with the Panel on 3 November 2014, DCA Trust submitted that ICANN should remove ZACR's application from the process altogether and allow DCA's application to proceed under the rules of the New gTLD Program, allowing DCA up to 18 months to negotiate with African governments

to obtain the necessary endorsements so as to enable the delegation and management of the .AFRICA string.

119. In its Final Request for Relief filed with the Panel on 23 May 2015, DCA Trust requested that this Panel recommend to the ICANN Board that it cease all preparations to delegate the .AFRICA gTLD to ZACR and recommend that ICANN permit DCA's application to proceed through the remainder of the new gTLD application process and be granted a period of no less than 18 months to obtain Government support as set out in the AGB and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA.

120. DCA Trust also requested that this Panel recommend to ICANN that it compensate DCA Trust for the costs it has incurred as a result of ICANN's violations of its Articles of Incorporation, Bylaws and AGB.

121. In its response to DCA Trust's request for the recommendations set out in DCA Trust's Memorial on the Merits, ICANN submitted that this Panel does not have the authority to grant the affirmative relief that DCA Trust had requested.

122. According to ICANN:

> 48. DCA's request should be denied in its entirety, including its request for relief. DCA requests that this IRP Panel issue a declaration requiring ICANN to "rescind its contract with ZACR" and to "permit DCA's application to proceed through the remainder of the application process." Acknowledging that it currently lacks the requisite governmental support for its application, DCA also requests that it receive "18 months to negotiate with African governments to obtain the necessary endorsements." In sum, DCA requests not only that this Panel remove DCA's rival for .AFRICA from contention (requiring ICANN to repudiate its contract with ZACR), but also that it rewrite the Guidebook's rules in DCA's favor.
>
> 49. IRP Panels do not have authority to award affirmative relief. Rather, an IRP Panel is limited to stating its opinion as to "whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" and recommending (as this IRP Panel has done previously) that the Board stay any action or decision, or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel. The Board will, of course, give extremely serious consideration to the Panel's recommendations.

123. In its response to DCA Trust's amended request for recommendations filed on 23 May 2015, ICANN argued that because the Panel's authority is limited to declaring whether the Board's conduct was inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question and refrain from

recommending how the Board should then proceed in light of the Panel's declaration.

124. In response, DCA Trust submitted that according to ICANN's Bylaws, the Independent Review Process is designed to provide a remedy for "any" person materially affected by a decision or action by the Board. Further, "in order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation.

125. According to ICANN, "indeed, the ICANN New gTLD Program Committee, operating under the delegated authority of the ICANN Board, itself [suggests] that DCA could seek relief through ICANN's accountability mechanisms or, in other words, the Reconsideration process and the Independent Review Process." Furthermore:

> If the IRP mechanism – the mechanism of last resort for gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.

126. After considering the Parties' respective submissions in this regard, the Panel is of the view that it does have the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook.

127. Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws states:

> **ARTICLE IV: ACCOUNTABILITY AND REVIEW**
> **Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS**
>
> 11. The IRP Panel shall have the authority to:
>
> d. 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.

128. The Panel finds that both the language and spirit of the above section gives it authority to recommend how the ICANN Board might fashion a remedy to redress injury or harm that is directly related and causally connected to the Board's violation of the Bylaws or the Articles of Incorporation.

129. As DCA Trust correctly points out, with which statement the Panel agrees, "if the IRP mechanism – the mechanism of last resort for

gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm."

130. Use of the imperative language in Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, is clearly supportive of this point. That provision clearly states that the IRP Panel has the authority to recommend a course of action until such time as the Board considers the opinion of the IRP and acts upon it.

131. Furthermore, use of the word "opinion", which means the formal statement by a judicial authority, court, arbitrator or "Panel" of the reasoning and the principles of law used in reaching a decision of a case, is demonstrative of the point that the Panel has the authority to recommend affirmative relief. Otherwise, like in section 7 of the Supplementary Procedures, the last sentence in paragraph 11 would have simply referred to the "declaration of the IRP". Section 7 under the heading "Interim Measures of Protection" says in part, that an "IRP PANEL may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration."

132. The scope of Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws is clearly broader than Section 7 of the Supplementary Procedures.

133. Pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, therefore, the Panel recommends that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.

3) Who is the prevailing party in this IRP?

134. In its letter of 1 July 2015, ICANN submits that, "ICANN believes that the Panel should and will determine that ICANN is the prevailing party. Even so, ICANN does not seek in this instance the putative effect that would result if DCA were required to reimburse ICANN for all of the costs that ICANN incurred. This IRP was much longer [than] anticipated (in part due to the passing of one of the panelists last summer), and the Panelists' fees were far greater than an ordinary IRP, particularly because the Panel elected to conduct a live hearing."

135. DCA Trust on the other hand, submits that, "should it prevail in this IRP, ICANN should be responsible for all of the costs of this IRP, including the interim measures proceeding." In particular, DCA Trust writes:

> On March 23, 2014, DCA learned via email from a supporter of ZA Central Registry ("ZACR"), DCA's competitor for .AFRICA, that ZACR would sign a registry agreement with ICANN in three days' time (March 26) to be the registry operator for .AFRICA. The very same day, we sent a letter on behalf of DCA to ICANN's counsel asking ICANN to refrain from executing the registry agreement with ZACR in light of the pending IRP proceedings. *See* DCA's Request for Emergency Arbitrator and Interim Measures of Protection, Annex I (28 Mar. 2014). Instead, ICANN entered into the registry agreement with ZACR the very next day—two days ahead of schedule. […] Later that same day, ICANN responded to DCA's request by treating the execution of the contract as a *fait accompli* and, for the first time, informed DCA that it would accept the application of Rule 37 of the 2010 [ICDR Rules], which provides for emergency measures of protection, even though ICANN's Supplementary Procedures for ICANN Independent Review Process expressly provide that Rule 37 does not apply to IRPs. A few days later, on March 28, 2014, DCA filed a Request for Emergency Arbitrator and Interim Measures of Protection with the ICDR. ICANN responded to DCA's request on April 4, 2014. An emergency arbitrator was appointed by the ICDR; however, the following week, the original panel was fully constituted and the parties' respective submissions were submitted to the Panel for its review on April 13, 2014. After a teleconference with the parties on April 22 and a telephonic hearing on May 5, the Panel ruled that "ICANN must immediately refrain from any further processing of any application for .AFRICA" during the pendency of the IRP. Decision on Interim Measures of Protection, ¶ 51 (12 May 2014).

136. A review of the various procedural orders, decisions, and declarations in this IRP clearly indicates that DCA Trust prevailed in many of the questions and issues raised.

137. In its letter of 1 July 2015, DCA Trust refers to several instances in which ICANN was not successful in its position before this Panel. According to DCA Trust, the following are some examples, "ICANN's Request for Partial Reconsideration, ICANN's request for the Panel to rehear the proceedings, and the evidentiary treatment of ICANN's written witness testimony in the event it refused to make its witnesses available for questioning during the merits hearing."

138. The Panel has no doubt, as ICANN writes in its letter of 1 July 2015, that the Parties' respective positions in this IRP "were asserted in good faith." According to ICANN, "although those positions were in many instances diametrically opposed, ICANN does not doubt that DCA believed in the credibility of the positions that it took, and

[ICANN believes] that DCA feels the same about the positions ICANN took."

139. The above said, after reading the Parties' written submissions concerning the issue of costs and deliberation, the Panel is unanimously of the view that DCA Trust is the prevailing party in this IRP.

4) Who is responsible for bearing the costs of this IRP and the cost of the IRP Provider?

140. DCA Trust submits that ICANN should be responsible for *all* costs of this IRP, including the interim measures proceeding. Among other arguments, DCA Trust submits:

> This is consistent with ICANN's Bylaws and Supplementary Procedures, which together provide that in ordinary circumstances, the party not prevailing shall be responsible for all costs of the proceeding. Although ICANN's Supplementary Procedures do not explain what is meant by "all costs of the proceeding," the ICDR Rules that apply to this IRP provide that "costs" include the following:
>
> > (a) the fees and expenses of the arbitrators;
> >
> > (b) the costs of assistance required by the tribunal, including its experts;
> >
> > (c) the fees and expenses of the administrator;
> >
> > (d) the reasonable costs for legal representation of a successful party; and
> >
> > (e) any such costs incurred in connection with an application for interim or emergency relief pursuant to Article 21.
>
> Specifically, these costs include all of the fees and expenses paid and owed to the [ICDR], including the filing fees DCA paid to the ICDR (totaling $4,750), all panelist fees and expenses, including for the emergency arbitrator, incurred between the inception of this IRP and its final resolution, legal costs incurred in the course of the IRP, and all expenses related to conducting the merits hearing (*e.g.*, renting the audiovisual equipment for the hearing, printing hearing materials, shipping hard copies of the exhibits to the members of the Panel).
>
> Although in "extraordinary" circumstances, the Panel may allocate up to half of the costs to the prevailing party, DCA submits that the circumstances of this IRP do not warrant allocating costs to DCA should it prevail. The reasonableness of DCA's positions, as well as the meaningful contribution this IRP has made to the public dialogue about both ICANN's accountability mechanisms and the appropriate deference owed by ICANN to its Governmental Advisory Committee, support a full award of costs to

> DCA.
>
> […]
>
> To the best of DCA's knowledge, this IRP was the first to be commenced against ICANN under the new rules, and as a result there was little guidance as to how these proceedings should be conducted. Indeed, at the very outset there was controversy about the applicable version of the Supplemental Rules as well as the form to be filed to initiate a proceeding. From the very outset, ICANN adopted positions on a variety of procedural issues that have increased the costs of these proceedings. In DCA's respectful submission, ICANN's positions throughout these proceedings are inconsistent with ICANN's obligations of transparency and the overall objectives of the IRP process, which is the only independent accountability mechanism available to parties such as DCA.

141. DCA Trust also submits that ICANN's conduct in this IRP increased the duration and expense of this IRP. For example, ICANN failed to appoint a standing panel, it entered into a registry agreement with DCA's competitor for .AFRICA during the pendency of this IRP, thereby forcing DCA Trust to request for interim measures of protection in order to preserve its right to a meaningful remedy, ICANN attempted to appeal declarations of the Panel on procedural matters where no appeal mechanism was provided for under the applicable procedures and rules, and finally, ICANN refused only a couple of months prior to the merits hearing, to make its witnesses available for viva voce questioning at the hearing.

142. ICANN in response submits that, "both the Bylaws and the Supplementary Procedures provide that, in the ordinary course, costs shall be allocated to the prevailing party. These costs include the Panel's fees and the ICDR's fees, [they] would also include the costs of the transcript."

143. ICANN explains on the other hand that this case was extraordinary and this Panel should exercise its discretion to have each side bear its own costs as this IRP "was in many senses a first of its kind." According to ICANN, among other things:

> This IRP was the first associated with the Board's acceptance of GAC advice that resulted in the blocking of an application for a new gTLD under the new gTLD Program;
>
> This was the first IRP associated with a claim that one or more ICANN Board members had a conflict of interest with a Board vote; and
>
> This was the first (and still only) IRP related to the New gTLD Program that involved a live hearing, with a considerable amount of debate associated with whether to have a hearing.

144. After reading the Parties' written submissions concerning the issue of costs and their allocation, and deliberation, the Panel is unanimous in deciding that DCA Trust is the prevailing party in this IRP and ICANN shall bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider.

145. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, however, DCA Trust and ICANN shall each bear their own expenses, and they shall also each bear their own legal representation fees.

146. For the avoidance of any doubt therefore, the Panel concludes that ICANN shall be responsible for paying the following costs and expenses:

a) the fees and expenses of the panelists;
b) the fees and expenses of the administrator, the ICDR;
c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington, D.C.

147. The above amounts are easily quantifiable and the Parties are invited to cooperate with one another and the ICDR to deal with this part of this Final Declaration.

V. DECLARATION OF THE PANEL

148. Based on the foregoing, after having carefully reviewed the Parties' written submissions, listened to the testimony of the three witness, listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

149. Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends that ICANN continue to

refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.

150. The Panel declares DCA Trust to be the prevailing party in this IRP and further declares that ICANN is to bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider as follows:

a) the fees and expenses of the panelists;
b) the fees and expenses of the administrator, the ICDR;
c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington, D.C.
e) As a result of the above, the administrative fees of the ICDR totaling US$4,600 and the Panelists' compensation and expenses totaling US$403,467.08 shall be born entirely by ICANN, therefore, ICANN shall reimburse DCA Trust the sum of US$198,046.04

151. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN shall each bear their own expenses. The Parties shall also each bear their own legal representation fees.

The Panel finally would like to take this opportunity to fondly remember its collaboration with the Hon. Richard C. Neal (Ret. and now Deceased) and to congratulate both Parties' legal teams for their hard work, civility and responsiveness during the entire proceedings. The Panel was extremely impressed with the quality of the written work presented to it and oral advocacy skills of the Parties' legal representatives.

This Final Declaration has sixty-three (63) pages.

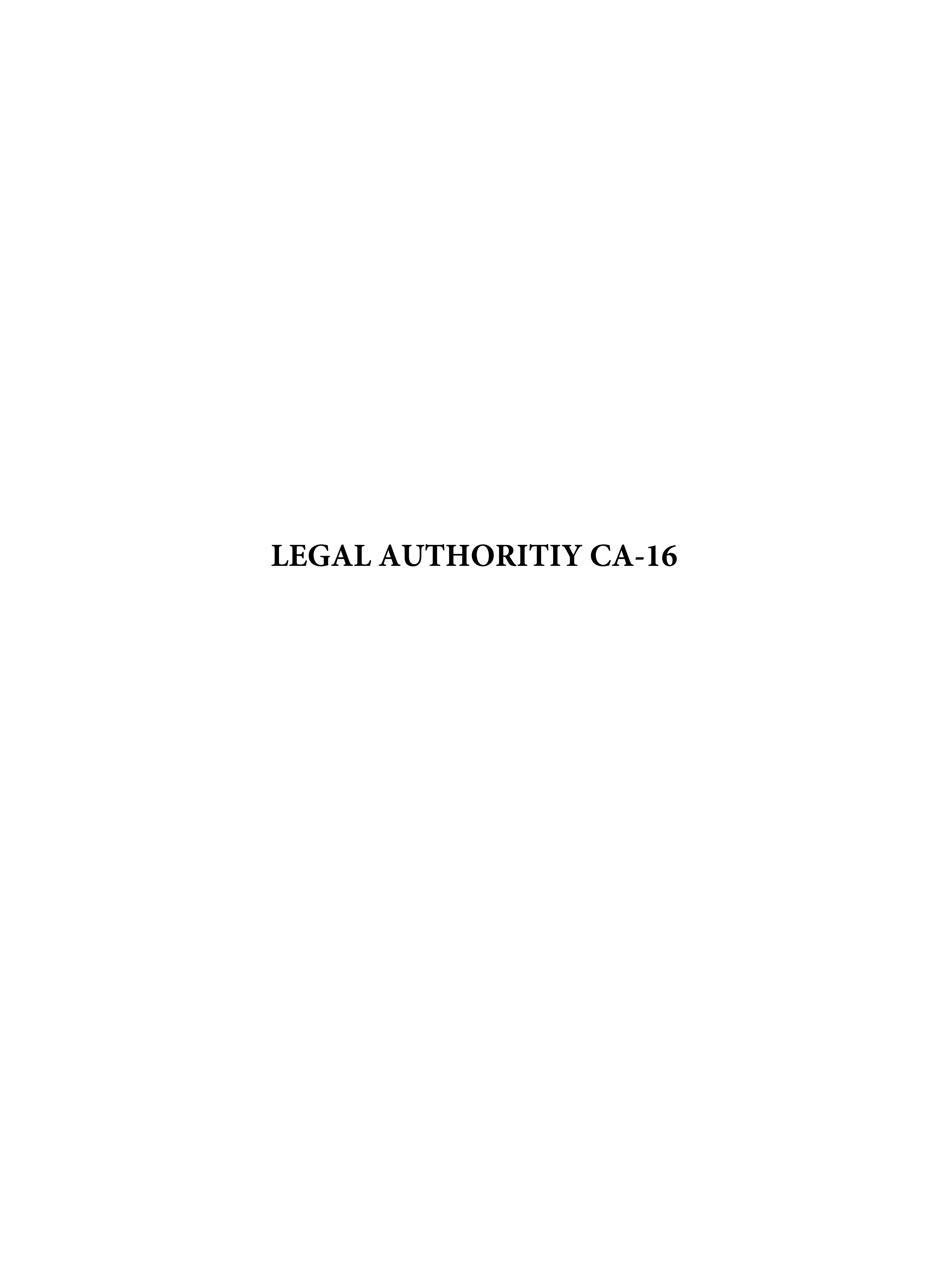
Date: Thursday, 9 July 2015.

Place of the IRP, Los Angeles, California.

Professor Catherine Kessedjian

Hon. William J. Cahill (Ret.)

Babak Barin, President



LEGAL AUTHORITIY CA-16

Ex. CA-16

ICDR CASE NO. 01-15-0002-9938

BETWEEN

CORN LAKE, LLC

Claimant

-and-

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Respondent

FINAL DECLARATION

Independent Review Panel
Mark Morril
Michael Ostrove
Wendy Miles QC (Chair)

Dated 17 October 2016

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1. OVERVIEW

1.1 ICANN's Approved Board Resolutions, dated 12 October 2014 and 12 February 2014, established a new 'Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections' in the context of ICANN's New gTLD Program. Such perceived inconsistent Expert Determinations were not considered to be "in the best interest of the New gTLD Program and the Internet community". ICANN limited the scope of the new review mechanism to certain expert determinations concerning specifically designated string confusion objections. ICANN excluded from the new review mechanism the Claimant's .CHARITY Expert Determination concerning community objections.

1.2 The Claimant contends that the .CHARITY Expert Determinations "follow a pattern identical to the objection determinations for which the Board did order review." The Claimant asks the Panel in this Independent Review Process: to review the "decision or action by the Board" to exclude the Claimant's inconsistent .CHARITY Expert Determinations from the scope of the new review mechanism; to declare that "decision or action" to be "inconsistent with the Articles of Incorporation or Bylaws" of ICANN; and that this "materially affected" the Claimant. The Claimant appears also to seek review of the Expert Determination itself and/or its Request for Reconsideration of that Determination. This Final Declaration deals with the Claimant's requests for review.

2. THE PARTIES AND THEIR LAWYERS

2.1 The Claimant is Corn Lake, LLC, a limited liability company organised and existing under the laws of the State of Delaware.

2.2 The Claimant is represented by:

John Genga, Esq.
Genga & Associates P.C.
15260 Ventura Boulevard
Suite 1810
Sherman Oaks, CA
91403
USA

and

Don Moody Esq. and Khurram Nizami

The IP and Technology Legal Group P.C.
15260 Ventura Boulevard
Suite 1810
Sherman Oaks, CA
91403
USA

2.3 The Respondent is the Internet Corporation for Assigned Names and Numbers ("ICANN"), a non-profit public corporation organised and existing under the State of California with its principal place of business at:

12025 Waterfront Drive
Suite 300
Los Angeles, CA
90094-2536
USA

2.4 The Respondent is represented by:

Kate Wallace, Jeffrey LeVee and Eric Enson
Jones Day
555 South Flower Street
50th Floor
Los Angeles, CA
90071-2300
USA

3. THE PANEL

3.1 On 17 September 2015, the full Independent Review Process ("**IRP**") Panel was confirmed in accordance with the International Centre for Dispute Resolution's International Arbitration Rules (the "**ICDR Rules**") and its Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process issued in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws (the "**Supplementary Rules**").

3.2 The members of the IRP Panel are:

Mark Morril
Michael Ostrove
Wendy Miles QC (Chair)

4. PROCEDURAL HISTORY

4.1 On 24 March 2015, the Claimant filed a Request for Independent Review Process (the "**Request**") with the ICDR. The Claimant alleges that ICANN's Board of Directors (the "**Board**") divested the Claimant of its right to compete for the .CHARITY new generic top level domain ("**gTLD**"), on the basis that "a single ICC panelist upheld a community objection against Corn Lake's application for the .CHARITY gTLD and, at the same time, that same panelist denied an identical objection against a similarly situated applicant for the same string."[1]

4.2 On 15 May 2015, the Respondent filed ICANN's Response to the Claimant's Request for Independent Review Process (the "**Response to Request**").

4.3 On 3 November 2015, the Parties and the Panel conducted by telephone the first procedural hearing.

4.4 On 9 November 2015, following the first procedural hearing, the Panel issued Procedural Order No. 1 ("**PO1**") setting out the procedural stages and timetable for the proceedings and page limits for the Parties' respective submissions.

4.5 On 17 November 2015, the Panel issued Procedural Order No. 2 ("**PO2**") ruling on document production requests.

4.6 On 4 December 2015, the Parties produced documents as directed under PO2.

4.7 On 9 December 2015, the Claimant submitted its Reply (the "**Reply**").

4.8 On 8 January 2016, the Respondent submitted its Sur-Reply (the "**Sur-Reply**"). In its Sur-Reply, the Respondent objected to the Claimant allegedly having exceeded the mandate for its Reply as set out by the Panel at PO1.[2]

4.9 On 20 January 2016, the Panel noted that certain aspects of the Claimant's Reply did exceed the scope of PO1. The Panel notified the parties that it would take this into account when considering their respective written and oral submissions but that it was not inclined to

[1] Claimant's Request for independent Review Process ("**Claimant Request**"), at page 1, para. 2.

[2] Respondent's Sur-Reply (the "**ICANN Sur-Reply**"), at para. 1.

strike the Reply, instead reserving its position to take its scope into account in any costs decision.

4.10 Also on 20 January 2016, the Panel notified the parties that it had set time aside to meet together in London for the hearing and deliberations thereafter. It invited the parties' views as to whether or not this would be acceptable and whether they considered it necessary for the party representatives also to attend the hearing in person in London, or to join by videoconference.

4.11 On 20 January 2016, the Respondent informed the Panel that it had no objection to the Panel convening in London. It further proposed that, as all counsel were in Los Angeles, they could meet together at Jones Day's Los Angeles office, and the Panel could convene at Jones Day's London office to facilitate the video link.

4.12 On 8 February 2016, the Independent Review Process hearing proceeded by video link with the Panel convened in London and counsel convened in Los Angeles. Claimant and Respondent each submitted PowerPoint slides summarizing their hearing arguments. The Panel accepted the PowerPoint slides as part of the record.

4.13 On 17 February 2016, as requested by the Panel at the close of the hearing on 8 February 2016, the Claimant and Respondent each submitted a supplemental submission concerning the 3 February 2016 Board Resolution regarding .HOSPITAL (the "**Claimant Supplemental Submission**" and "**Respondent Supplemental Submission**", respectively).

4.14 Subsequently, on 16 May 2016, ICANN sent to the Panel the Final Declaration in the *Donuts v. ICANN* IRP proceeding issued 5 May 2016, involving the .SPORTS and .RUGBY strings. ICANN submitted that the Final Declaration addressed many issues relevant to the *Corn Lake v. ICANN* IRP and invited the Panel to permit each party to submit a four-page supplemental brief to address ***only*** the *Donuts* Final Declaration and its relevance to these proceedings.

4.15 On 18 May 2016, the Claimant disagreed with the need for additional briefing regarding the IRP Final Declaration involving the strings .SPORTS and .RUGBY and set out its detailed reasons for disagreement.

4.16 On 19 May 2016, ICANN provided its response to the Claimant's reasons in the form of a further written submission. On 20 May 2016, the Panel directed that the Claimant provide

its response submission, not more than 4 pages, by 25 May 2016, which was submitted (and accepted) on 27 May 2016.

4.17 On 11 July 2016, the ICDR notified the parties that the Panel had determined that the record for this matter had been closed as of 27 June 2016 and that the Panel expected to have the determination issued by no later than 26 August 2016.

4.18 On 3 August 2016, the Claimant sent to the Panel the Final Declaration in the *Dot Registry v. ICANN* IRP proceeding issued 29 July 2016. The Claimant submitted that the Final Declaration addressed many issues relevant to the *Corn Lake v. ICANN* IRP and invited the Panel to permit each party to submit a four-page supplemental brief to address ***only*** the *Dot Registry* Final Declaration and its relevance to these proceedings.

4.19 On 10 August 2016, the Panel directed that the record for this matter be reopened for the limited purpose of each party providing a brief of no more than 4 pages to address the Final Declaration in the *Dot Registry v. ICANN* IRP proceeding. On 15 August and 19 August, respectively, the Claimant and ICANN submitted further briefs accordingly.

4.20 On 26 August 2016, the Panel notified the parties that it had determined that the record for this matter had been reclosed as of 22 August 2016.

5. OVERVIEW OF THE ICANN NEW GTLD PROGRAM

5.1 This section sets out the relevant factual background to the ICANN Board's 12 October 2014 Resolutions, including a brief description of: (i) the ICANN New gTLD Program; (ii) the New gTLD Program application process; (iii) the New gTLD Program dispute resolution procedure; (iv) the GAC Beijing Communiqué and ICANN's response; and (v) the New Inconsistent Determinations Review Process.

(i) ICANN's New gTLD Program

5.2 ICANN is responsible for allocating Internet Protocol ("**IP**") address space, assigning protocol identifiers and Top-Level Domain names, and managing the Domain Name System. ICANN's Domain Name System ("**DNS**") centrally allocates Internet domain names for use in place of IP addresses. Top-Level Domains ("**TLDs**") exist at the top of the DNS naming hierarchy. These characters, which follow the rightmost dot in domain names, and are either generic TLDs ("**gTLDs**") or country code TLDs ("**ccTLDs**").

5.3 The main ICANN policy-making body for gTLDs is the Generic Names Supporting Organization ("**GNSO**"). In June 2008, the ICANN Board approved the GNSO recommendations for new gTLDs and adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with certain allocation criteria and contractual conditions. Based on the GNSO recommendations as adopted, in June 2011, ICANN's Board of Directors approved a new Applicant Guidebook (the "**Applicant Guidebook**") and authorized the launch of the 2012 gTLD Program (the "**New gTLD Program**").[3]

5.4 ICANN describes the New gLTD Program's goals as:

"enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains."[4]

(ii) The New gTLD Program Application Process

5.5 The three-month registration period for the New gLTD Program opened on 12 January 2012 and closed on 12 April 2012, with applications due by June 2013.[5] The stages of the application process are as follows:[6]

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[3] In relation to the Dispute Resolution Procedure, the Applicant Guidebook states that: "[f]or a comprehensive statement of filing requirements applicable generally, refer to the New gTLD Dispute Resolution Procedure ("Procedure") included as an attachment to this module. In the event of any discrepancy between the information presented in this module and the Procedure, the Procedure shall prevail", Applicant Guidebook, **ICANN Appendix C**, page 3-11, para. 3.3.

[4] ICANN Response, para. 18.

[5] Applicant Guidebook, Module 1, **ICANN Appendix C**, pages 1-2 to 1-3.

[6] Applicant Guidebook, **ICANN Appendix C**, page 1-4.

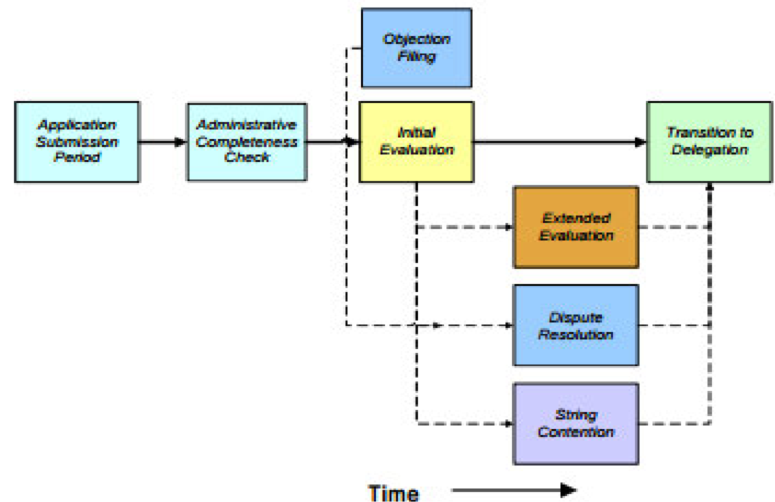

Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.

5.6 The application process allows for public comment and a formal objection procedure. The formal objection procedure is to allow full and fair consideration of objections based on certain limited grounds outside ICANN's evaluation of applications on their merits. Formal objections may be filed on four grounds:

"***String Confusion Objection*** – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied for gTLD string in the same round of applications.

Legal Rights Objection – The applied-for gTLD string infringes the existing legal rights of the objector.

Limited Public Interest Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted."[7]

5.7 Community objections – as in the current case – may be made by (i) "[e]stablished institutions associated with clearly delineated communities"; or (ii) the Independent Objector ("**IO**").[8] In both scenarios, "[t]he community named by the objector must be a

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[7] Claimant Request, para. 10. Applicant Guidebook, **ICANN Appendix C**, page 3-4, para. 3.2.1.

[8] Applicant Guidebook, **ICANN Appendix C**, pages 3-7 to 3-8, para. 3.2.2.4, and pages 3-9 to 3-10, para. 3.2.5.

community strongly associated with the applied-for gTLD string in the application that is the subject of the objection".[9]

5.8 The IO's limited mandate and scope permit it to file objections against "'highly objectionable' gTLD applications to which no objection has been filed."[10] The Applicant Guidebook sets out that:[11]

> "The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet. In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Limited Public Interest and Community. Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest."

5.9 Following any formal objection (including a Community Objection), the applicant can (i) "work to reach a settlement with the objector, resulting in withdrawal of the objection or the application"; (ii) "file a response to the objection and enter the dispute resolution process" (within 30 days of notification); or (iii) "withdraw, in which case the objector will prevail by default and the application will not proceed further." [12]

(iii) The New gTLD Program Dispute Resolution Procedure

5.10 In the event that an applicant elects to file a response to an objection, the parties' dispute resolution process is governed by the Applicant Guidebook, Module 3, which sets out the New gTLD Dispute Resolution Procedure (the "**Procedure**"). The designated Dispute Resolution Service Provider ("DRSP") for disputes arising out of community objections in particular is the International Centre for Expertise of the International Chamber of Commerce (the "**ICC Centre for Expertise**").[13]

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[9] Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5. See also ICANN Response, para. 21.
[10] Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5.
[11] Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5.
[12] Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.4.
[13] Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 3.

5.11 Following an initial administrative review by the ICC Centre for Expertise for procedural compliance, a response to an objection is deemed filed and the application will proceed.[14] Consolidation of Objections is encouraged.[15] Within 30 days after receiving the response to an objection, the ICC Centre for Expertise must appoint a panel comprising a single expert (the "**Expert Panel**").[16]

5.12 The procedure is governed by the Rules for Expertise of the ICC, supplemented by the ICC as needed. In the event of any discrepancy, the Procedure prevails.[17] The Expert Panel must remain impartial and independent of the parties.[18] The ICC Centre for Expertise and the Expert Panel must make reasonable efforts to ensure that the Expert Determination is rendered within 45 days of the constitution of the Expert Panel. The Expert Panel is required to submit its Expert Determination in draft form to the ICC Centre for Expertise's scrutiny as to form before it is signed. The ICC Centre for Expertise can make suggested modifications limited to the form of the Expert Determination only. The ICC Centre for Expertise communicates the Expert Determination to the parties and to ICANN.[19]

5.13 Substantively, the Expert Determination proceedings arising out of a Community Objection consider four tests to "enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted."[20] These four tests, based on the Applicant Guidebook, require objector to prove[21]:

(a) "that the community expressing opposition can be regarded as a clearly delineated community", taking into account various identified factors;

(b) "substantial opposition within the community it has identified itself as representing", taking into account various identified factors;

(c) "a strong association between the applied-for gTLD string and the community represented by the objector", taking into account various identified factors; and

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[14] Applicant Guidebook, **ICANN Appendix C**, page 3-14, para. 3.4.1.
[15] Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 12.
[16] Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 13.
[17] Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 4.
[18] Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 13.
[19] Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 21.
[20] Applicant Guidebook, **ICANN Appendix C**, page 3-22, para. 3.5.4.
[21] Applicant Guidebook, **ICANN Appendix C**, pages 3-22 to 3-24, para. 3.5.4

(d) "that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted", taking into account the:

(i) "nature and extent of damage to the reputation of the community . . . that would result from the applicant's operation of the applied-for gTLD string";

(ii) "evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely";

(iii) "interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string";

(iv) "dependence of the community represented on the DNS for its core activities";

(v) "nature and extent of concrete or economic damage to the community that would result from the applicant's operation of the applied-for gTLD string"; and

(vi) "level of certainty that alleged detrimental outcomes would occur".[22]

"The objector must meet all four tests in the standard for the objection to prevail".[23]

5.14 Following an Expert Determination, the applicant may further apply for: (i) reconsideration by ICANN's Board Governance Committee (the "**BGC**") through a ("**Reconsideration Request**"); and/or (ii) independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws through an IRP.

5.15 ICANN has designated the International Centre for Dispute Resolution ("**ICDR**") to operate the IRP for String Confusion, Existing Legal Rights, Morality and Public Order and Community Objections. The ICDR constitutes the panel of independent experts and

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[22] Applicant Guidebook, **ICANN Appendix C**, page 3-24, para. 3.5.4

[23] Applicant Guidebook, **ICANN Appendix C**, page 3-25, para. 3.5.4

administers the proceedings in accordance with ICANN's New gTLD Dispute Resolution Procedure, which incorporates by reference the ICDR's International Rules.[24]

5.16 Every applicant in the New gTLD Application Process expressly agrees to the resolution of disputes arising from objections in accordance with the new gTLD Dispute Resolution Procedure (and, by reference, the relevant ICDR rules) when submitting an application to ICANN.

(iv) The GAC Beijing Communiqué and ICANN's Response

5.17 On 11 April 2013, the ICANN Board Governmental Advisory Committee ("**GAC**") proposed new safeguards for certain "sensitive strings" in sectors the GAC viewed as "regulated" or "highly regulated" (the "**Beijing GAC Communiqué**").[25] Specifically, the GAC recommended that ICANN adopt certain pre-registration eligibility restrictions in connection with the "sensitive strings" that it designated as "Category 1" and "Category 2." The GAC identified .CHARITY as a Category 1 sensitive string.[26] In this regard, the Beijing Communiqué contained important departures from the Applicant Guidebook. However, the Beijing GAC Communiqué was not binding on applicants until or unless it was adopted by the ICANN Board.

5.18 On 12 July 2013, ICANN sent to the gTLD Board a paper prepared for the New gTLD Program Committee (the "**NGPC**") setting out its concerns relating to the GAC Beijing Communiqué.[27] ICANN's cover email described the paper as having been "prepared for the NGPC dialogue with the GAC" taking place the following Sunday.[28]

5.19 On 29 October 2013, ICANN wrote to the GAC to inform it that the NGPC intended "to accept the GAC Beijing Communiqué's advice concerning Category 1 and Category 2 Safeguards."[29] In relation to the proposed safeguards for Category 1, ICANN noted that:

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[24] ICANN Bylaws, **ICANN Appendix A**, Article IV, Section 3(4) (*See also:* https://www.icdr.org/icdr/faces/icdrservices/icann?_afrLoop=290874254740950&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D290874254740950%26_afrWindowMode%3D0%26_adf.ctrl-state%3D108xg7by0c_22.

[25] https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf

[26] Id., Annex I, page 9.

[27] NGPC Memo and Attachment, 12 July 2013, **Claimant Exhibit 22**.

[28] NGPC Memo and Attachment, 12 July 2013, **Claimant Exhibit 22**.

[29] ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**, page 1.

"The text of the Category 1 Safeguards has been modified as appropriate to meet the spirit and intent of the advice in a manner that allows the requirements to be implemented as public interest commitments in Specification 11 of the New gTLD Registry Agreement ("PIC Spec"). The PIC Spec and a rationale explaining the modifications are attached."[30]

5.20 The effect of ICANN's 29 October 2013 statement was publicly to announce that new, mandatory registration requirements would be imposed in any and all registration agreements for Category 1 and Category 2 strings. In the case of .CHARITY, a Category 1 string, this would mean the imposition of a mandatory registration requirement under any .CHARITY registry agreement requiring that any domain operators using the .CHARITY gTLD demonstrate that they were a registered charity.[31] This requirement would be imposed in any registry agreement, irrespective of the content of any existing PIC or gTLD application content relating to .CHARITY. As discussed in further detail below, ICANN's 29 October 2013 announcement came while the Expert Determination process arising out of the .CHARITY community objections were underway.[32]

5.21 On 5 February 2014, the ICANN Board passed Resolution 2014.02.05.NG01, formally adopting the GAC's Beijing Communiqué recommendation.[33] Annexed to that Resolution was a list of eight safeguards that would apply to certain Category 1 strings (including .CHARITY) and that would be included in Specification 11 of the New gTLD Registry Agreement.[34]

(v) ICANN's New Inconsistent Determinations Review Process

5.22 In the course of the New gTLD Program, in late 2013, concerns arose in respect of a small number of Expert Determinations involving the same or similar string confusion objections ("**SCO**"s) which resulted in different outcomes. These initially included:

(a) three separate Expert Determinations arising out of SCOs by the registrants of .COM to applications to register .CAM, whereby two objections were overruled and one was upheld; and

[30] ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**, page 1.
[31] ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**.
[32] See paragraphs 6.24 to 6.25, below.
[33] **Claimant Exhibit 14**.
[34] **Claimant Exhibit 14**, Annex 2, pages 1 and 3.

(b) three separate Expert Determination arising out of SCOs by the registrants of .CAR to applications to register .CARS, whereby two objections were overruled and one was upheld.[35]

5.23 On 10 October 2013, as a result of these perceived inconsistent decisions, the BGC requested that:

"staff draft a report for the NGPC on String Confusion Objections (SCOs) 'setting out options for dealing with the situation raised within this [Reconsideration] Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon's Applied – for String and TLDH's Applied-for String'".[36]

5.24 The NGPC then:

"considered potential paths forward to address perceived inconsistent Expert Determinations from the New gTLD Program SCO process, including possibly implementing a new review mechanism".[37]

5.25 On 5 February 2014, the NGPC published Approved Resolutions, which included discussion of the report prepared in response to the BGC's 10 October 2013 request. The NGPC directed the ICANN President and CEO to initiate a public comment period on framework principles of a potential review mechanism to address perceived inconsistent SCO Expert Determinations. The NGPC stated that the review mechanism would be "limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM".[38]

5.26 On 11 February 2014, ICANN published its "Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections: Framework Principles" (the "**Proposed Framework Principles**").[39] The Proposed Framework Principles addressed two cases where SCOs were raised by the same objector against different applications for the same string, where the outcomes of the SCOs differed, namely .CAR/.CARS and .CAM/.COM.

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[35] ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2.
[36] NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.
[37] As set out in summary in NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 3.
[38] NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.
[39] ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**.

5.27 The Proposed Framework Principles set out the proposed standard of review as being whether the Expert Panel could "have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and procedural rules".[40] The proposed review process would be conducted by a new three member panel constituted by the ICDR as a "Panel of Last Resort" (the "**Inconsistent Determinations Review Procedure**").[41]

5.28 ICANN specifically noted in the Proposed Framework Principles that the proposed review procedure mechanism must be limited and that:

"[t]he use of a strict definition for Inconsistent SCO Expert Determinations conversely means that all other SCO Expert Determinations are *not inconsistent*. As a result, the review mechanism, or Panel of Last Resort, shall not be applicable to those other determinations."[42]

5.29 ICANN defined the "strict definition" as "objections raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ."[43]

5.30 On 14 March 2014, as part of the public consultation process, the Claimant's parent company, Donuts Inc., submitted that SCO Expert Determinations relating to .SHOP should also be included, as follows:

"… this limited review should be extended to include a third contention set where there is an incongruent outcome. In the .SHOP vs. SHOPPING objection, the same panelist who found .SHOP to be confusing to a Japanese .IDN found in favor of the objector with regard to the Donuts' .SHOPPING application."[44]

5.31 Donuts concluded: "Finally, we urge ICANN to undergo a similar review mechanism in cases of inconsistent outcomes with the Limited Public Interest and Community objections."

5.32 On 12 October 2014, the NGPC issued Approved Resolutions "to address perceived inconsistent and unreasonable Expert Determinations resulting from the New gTLD Program

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[40] ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2

[41] ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, pages 2 to 3.

[42] ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**.

[43] ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2.

[44] http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/pdfJC5UktBBxf.pdf

String Confusion Objections process."[45] The NGPC directed ICANN's President and CEO to establish a three-member panel to re-evaluate the materials presented in the two identified SCO Expert Determinations for .COM/.CAM and .SHOP/通販.[46]

5.33 The 12 October 2014 Approved Resolutions set out in detail the scope of the New Inconsistent Determinations Review Procedure:

(a) the NGPC took "action to address certain perceived inconsistent or otherwise unreasonable SCO Expert Determinations by sending back to the ICDR for a three-member panel evaluation of certain Expert Determinations";[47]

(b) the NGPC identified these Expert Determinations as "not in the best interest of the New gTLD Program and the Internet community";[48]

(c) "the identified SCO Expert Determinations present exceptional circumstances warranting action by the NGPC because each of the Expert Determinations falls outside normal standards of what is perceived to be reasonable and just";[49] and

(d) the "record on review shall be limited to the transcript of the proceeding giving rise to the original Expert Determination, if any, expert reports, documentary evidence admitted into evidence during the original proceeding, or other evidence relevant to the review that was presented at the original proceeding", and the "standard of review to be applied by the Review Panel is: whether the original Expert Panel could have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR Supplementary Procedures for ICANN's New gTLD Program".[50]

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[45] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, pages 5 to 6.

[46] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, page 5. The NGPC noted in relation to the SCO Expert Determinations for .CAR/.CARS that the parties "recently have resolved their contending applications" so "the NGPC is *not* taking action to send these SCO Expert Determinations back to the ICDR for re-evaluation to render a Final Expert Determination." NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, page 10.

[47] The dispute with respect to .CAR/.CARS was resolved and the new Inconsistent Determinations Review Procedure went forward with respect to the .SHOP/.通販 and .CAM/.COM disputes. NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, pages 5-6.

[48] NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.

[49] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

[50] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 7.

5.34 The NGPC also set out in detail its reasons for limiting application of the new process to the identified SCO Expert Determinations and "particularly why the identified Expert Determinations should be sent back to the ICDR while other Expert Determinations should not":[51]

(a) the Applicant Guidebook (Section 5.1) provides that the "Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application";[52]

(b) "[a]ddressing the perceived inconsistent and unreasonable String Confusion Objection Expert Determinations is part of the discretionary authority granted to the NGPC in its Charter regarding 'approval of applications' and 'delegation of gTLDs,' in addition to the authority reserved to the Board in the Guidebook to consider individual gTLD applications under exceptional circumstances";[53]

(c) "[w]hile some community members may identify other Expert Determinations as inconsistent or unreasonable, the SCO Expert Determinations identified are the only ones that the NGPC has deemed appropriate for further review";[54]

(d) "while on their face some of the Expert Determinations may appear inconsistent, including other SCO Expert Determinations, and Expert Determinations of the Limited Public Interest and Community Objection processes, there are reasonable explanations for these seeming discrepancies, both procedurally and substantively";[55]

(e) "on a procedural level, each expert panel generally rests its Expert Determination on materials presented to it by the parties to that particular objection, and the objector bears the burden of proof" and "[t]wo panels confronting identical issues could –

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[51] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 10 to 11.
[52] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 9 to 10. (*See also:* Applicant Guidebook, **ICANN Appendix C**, page 5-1, para. 5.1.)
[53] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.
[54] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.
[55] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

and if appropriate should – reach different determinations, based on the strength of the materials presented";[56]

(f) "on a substantive level, certain Expert Determinations highlighted by the community that purportedly resulted in 'inconsistent' or 'unreasonable' results, presented nuanced distinctions relevant to the particular objection" which "should not be ignored simply because a party to the dispute disagrees with the end result";[57]

(g) "the standard guiding the expert panels involves some degree of subjectivity, and thus independent expert panels would not be expected to reach the same conclusions on every occasion";[58]

(h) "for the identified Expert Determinations, a reasonable explanation for the seeming discrepancies is not as apparent, even taking into account all of the previous explanations about why reasonable 'discrepancies' may exist" and "[t]o allow these Expert Determinations to stand would not be in the best interests of the Internet community";[59]

(i) the NGPC "considered whether it was appropriate, as suggested by some commenters, to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections";[60]

(j) the comments presented by various stakeholders "highlight the difficulty of the issue and the tension that exists between balancing concerns about perceived inconsistent Expert Determinations, and the processes set forth in the Guidebook that were the subject of multiple rounds of public comment over several years";[61]

(k) "[a]s highlighted in many of the public comments, adopting a review mechanism this far along in the process could potentially be unfair because applicants agreed to the

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[56] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.
[57] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.
[58] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.
[59] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.
[60] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 11-12.
[61] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 9.

processes included in the Guidebook, which did not include this review mechanism, and applicants relied on these processes";[62]

(l) "Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds";[63]

(m) "[a]llowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook";[64] and

(n) the NGPC "determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program".[65]

5.35 The NGPC summarized its conclusion by noting that, "while on balance, a review mechanism is not appropriate for the current round of the New gTLD Program, it is recommended that the development of rules and processes for future rounds of the New gTLD Program (to be developed through the multi-stakeholder process) should explore whether a there is a need for a formal review process with respect to Expert Determinations".[66]

5.36 As a result of this analysis, the New Inconsistent Determinations Review Procedure was therefore introduced to provide an additional layer of review in the New gTLD Program Application Process for a very limited category of applications – i.e. two SCOs. The .CHARITY applications were not included.

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[62] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.
[63] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.
[64] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.
[65] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.
[66] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 9.

6. FACTUAL BACKGROUND TO THE .CHARITY EXPERT DETERMINATIONS

6.1 A brief summary of the specific facts relating to the .CHARITY applications is below. The Panel has considered the Parties' written and oral submissions in full, even where not included in the below summary and subsequent analysis.

(i) Claimant's .CHARITY Application

6.2 On 13 June 2012, the Claimant filed application no. 1-1384-49318 to operate the new gTLD .CHARITY (the "**Application**").[67] The Claimant purports to have invested $185,000 for the application fee along with other significant resources in making the Application.[68]

6.3 The Claimant's .CHARITY Application was one of the 1,930 applications made in the New gTLD Application Process in 2015.

6.4 The Claimant applied for .CHARITY to "allow consumers to make use of the gTLD in accordance with the meanings they ascribe to that dictionary word."[69] It described the "mission/purpose" of its proposed gTLD as follows:

"The CHARITY TLD will be of interest to the millions of persons and organizations worldwide involved in philanthropy, humanitarian outreach, and the benevolent care of those in need. This broad and diverse set includes organizations that collect and distribute funds and materials for charities, provide for individuals and groups with medical or other special needs, and raise awareness for issues and conditions that would benefit from additional resources. In addition, the term CHARITY, which connotes kindness toward others, is a means for expression for those devoted to compassion and good will. We would operate the .CHARITY TLD in the best interest of registrants who use the TLD in varied ways, and in a legitimate and secure manner."[70]

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[67] Corn Lake, LLC June 2012 Application for .CHARITY, App. ID 1-1384-49318, **Claimant Exhibit 1**.

[68] Claimant Request, para. 9.

[69] Claimant Request, para. 9. See also ICANN Response, para. 2.

[70] Corn Lake, LLC June 2012 application for .CHARITY, App. ID 1-1384-49318, **Claimant Exhibit 1**, para. 18(a), 3. See also Claimant Request, para. 16.

(ii) SRL and Excellent First's .CHARITY Applications

6.5 Also on 13 June 2012, Spring Registry Limited ("SRL") filed a separate application, no. 1-1241-87032, also to operate the new gTLD called .CHARITY (the "SRL Application").[71] In the SRL Application, SRL described the "mission/purpose" of its proposed gTLD as follows:

"… the aim of 'charity' is to create a blank canvas for online charity services set within a secure environment. The Applicant will achieve this by creating a consolidated, versatile and dedicated space to access charity information and donation services. … [T]here will be a ready marketplace specifically for charity-based enterprises to provide their goods and services."

6.6 Further, Excellent First Limited submitted an application for the Chinese character translation of .CHARITY.[72]

6.7 By 5 March 2013, each applicant was required to submit a TLD-specific Public Interest Commitments Specification ("**PIC**").[73] Both the Claimant and SRL submitted PICs prior to 5 March 2013.[74] Neither the Claimant nor SRL, (nor, as far as the IPP Panel is aware Excellent First), addressed eligibility requirements in their original PICs.

(iii) The .CHARITY Applications Independent Objections

6.8 On 12 March 2013, Professor Alain Pellet, acting as IO, submitted a Community Objection to the ICC Centre for Expertise in relation to the Application by the Claimant.[75] The IO's objection was submitted on the basis that .CHARITY should be limited to "charities and charitable organizations".[76] In particular, the Claimant's IO stated that a "community objection" is warranted when "there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly targeted."[77]

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[71] Spring Registry Ltd. June 2012 application for .CHARITY, **Claimant Exhibit 10**.
[72] ICANN Response, para. 6, http://newgtlds.icann.org/en/program-status/odr/determination
[73] https://www.icann.org/resources/pages/base-agreement-2013-02-05-en
[74] Donuts Public Interest Commitment (PIC), **Claimant Exhibit 9**. SRL's original PIC is not in evidence in the proceedings.
[75] IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**.
[76] As per Claimant Request, para. 17. The Respondent explains the process in its Response, para. 2.
[77] IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 6.

6.9 The IO worked through the four tests of a community objection and found these to be met, including the community test, substantial opposition, targeting and detriment. In relation to the detriment test in particular, the IO contended that the Claimant "has not addressed the specific needs of the charity community in its proposed management of the gTLD .Charity, and there are three key factors that demonstrate the likelihood of detriment to the charity community."[78]

6.10 The three key factors were that the Claimant's Application: (i) "has not been framed by [the Claimant] and its subsidiary as a community based gTLD",[79] (ii) "does not propose any eligibility criteria for the string";[80] and (iii) proposes security mechanisms "aimed at reacting to abuse [that] are unlikely to meet the specific requirements and needs of the charity community" as well as making "no commitment concerning the specific content of the "Anti-Abuse Policy".[81]

6.11 The IO also brought separate Community Objections against SRL and Excellent First Limited, the two other applicants for the .CHARITY gTLD in English and Chinese respectively, on similar grounds.[82]

6.12 On 7 May 2013, the ICC Centre for Expertise notified the Claimant that it had decided to consolidate the IO's objection to Claimant's application with the two other proceedings relating to the applications by SRL and Excellent First Limited.

(iv) The .CHARITY Independent Expert Panels

6.13 On 6 June 2013, the Claimant submitted to the ICC Centre for Expertise a response to the IO's objection (the "**Response to IO Objection**").[83] The Claimant submitted that the IO lacked standing to make the objection and that the objection failed on its merits. It further submitted that the IO's Community Objection constituted a restriction on "rights of free

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[78] IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 41.
[79] IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 42.
[80] IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 43.
[81] IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 45.
[82] As per Claimant Request, para. 18. The Respondent provides further descriptions in its Response, para. 3. http://newgtlds.icann.org/en/program-status/odr/determination
[83] Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**.

expression"[84] which was contrary to the New gTLD program objective "to enhance choice, competition and expression in the namespace."[85]

6.14 On the merits, the Claimant submitted that the IO invoked no clearly delineated community, demonstrated no substantial opposition within the community he claims to represent, demonstrates no strong association between the community and applied for string and does not prove material detriment.[86]

6.15 Specifically in response to the IO's objection based on material detriment, the Claimant reiterated that it had:

"clearly stated its opposition to such constraints on access, expression and innovation: 'attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD.'"[87]

6.16 On 4 July 2013, the ICC Centre for Expertise appointed Mr. Tim Portwood of Bredin Prat as the Independent Expert Panel in the consolidated proceedings.

6.17 On 22 August 2013, the IO submitted to the ICC Centre for Expertise a reply (the "**IO Reply**").[88] Among other things, the IO observed that the detriment test standard pursuant to the Applicant Guidebook is the "likelihood of detriment."[89] The IO considered that he had "developed many elements establishing that there exists a likelihood of detriment, in particular because of the Applicant's unwillingness to propose preventative security measures assuring the charitable nature, the integrity and the trustworthiness of the entities represented and the information provided under the gTLD."[90]

6.18 Specifically in relation to the GAC Beijing Communiqué, the IO noted that the Claimant:

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[84] As per Claimant Request, para. 19.
[85] Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**, page 1.
[86] Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**.
[87] Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**, page 13.
[88] IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**.
[89] IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 22.
[90] IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 24.

"continues to ignore the specificity of this string despite the fact that the GAC Beijing Communiqué of 11 April 2013 listed the .Charity gTLD within the 'sensitive strings that merits particular safeguards' because this string is 'likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm'."[91]

6.19 On 6 September 2013, the Claimant submitted to the ICC Centre for Expertise a further response (the "**Expert Panel Sur-Reply**").[92] In its Expert Panel Sur-Reply, the Claimant argued that the word charity does not clearly delineate any community, the separate targeting test was not satisfied, the IO demonstrates no substantial opposition and that the IO mischaracterizes the material detriment standard "in a misplaced effort to justify having failed to satisfy it."[93] The Claimant further objected to the IO's reliance on the GAC's Beijing Communiqué,[94] submitting that it "has little (if any) bearing on the material detriment analysis" and that,

"[w]hatever measures ICANN enacts will require implementation by Applicant in the form of a PIC [Public Interest Commitment], then embodied in a formal registry agreement by which Applicant must bind itself to undertake those measures under penalty of losing the registry."[95]

6.20 On 6 September 2013, SRL also submitted to the ICC Centre for Expertise its further response (the "**SRL Sur-Reply**").[96] In the SRL Sur-Reply, it specifically offered to amend its PIC to take into account the IO's concerns. According to the Claimant, SRL's amendment to its PIC:

"would impose eligibility criteria in a .CHARITY domain that would limit registration of second-level names to those who could 'establish that they are a charity of a 'not-for-profit' enterprise with charitable purposes.'"[97]

6.21 SRL's amended PIC stated that SRL "appreciates the opportunity to restate and once again commit to the following operational measures, where those matters are within its control,

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[91] IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 24. See footnote 11: http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf, Annex 1, Category 1, p. 8 (annex 1).
[92] Corn Lake 6 September 2013 sur-reply in further support of opposition to objection, **Claimant Exhibit 5**.
[93] Corn Lake Sur-Reply, p.5.
[94] Corn Lake Sur-Reply, p.7.
[95] Corn Lake Sur-Reply, pp.8-9.
[96] September 6, 2013 email from SRL to ICC w/attachments, **Claimant Exhibit 23**.
[97] Claimant Request, para. 22.

as outlined in our application."[98] SRL further noted that "[w]e reserve the right to amend or change this PIC Spec once the details of the Program are finalized."[99] Specifically in relation to eligibility, SRL stated in its amended PIC that:[100]

"[o]nly incorporated associations or entities, foundations or trusts which can establish that they are a charity or 'not for profit' enterprise with charitable purposes will qualify to be a registrant of a .CHARITY domain name."

6.22 On 25 October 2013, SRL notified the Expert Panel by email of its "amended PIC SPEC" and sent a link to the document on the ICANN website.[101] In its cover email, SRL noted that it was making its unsolicited submission:

"merely to make you aware of independent evidence that our eligibility policy is progressing through the new gTLD application process, and in the interests of justice I hope you can consider this evidence. It merely confirms what was stated in our Rejoinder, and should only take a moment to consider.

Articles 17 and 18 of the Dispute Rules do provide the Panel with the power to admit additional material, and making this submission is the only way to draw it to your attention."

6.23 There is no record of any objection to the 25 October 2013 communication by the IO or the Expert Panel and no record that it was rejected by the Expert Panel.

6.24 On 3 December 2013, the Claimant notified the Expert Panel and the IO by email of further information "to update the Panel regarding matters raised in the Objection and further submissions made by the Objector."[102]

6.25 Specifically, the Claimant notified the Expert Panel that "ICANN has formally announced its intention to adopt the "GAC's Beijing Communiqué advice concerning Category 1 and Category 2 Safeguards"". The Claimant further explained that as a result, the:

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[98] SRL PIC, **Claimant Exhibit 12**, page 1.
[99] SRL PIC, **Claimant Exhibit 12**, page 1.
[100] SRL PIC, Claimant Exhibit 12.
[101] October 25, 2014 email from SRL to ICC, **Claimant Exhibit 24**.
[102] Corn Lake 3 December 2013 further requested submission, **Claimant Exhibit 6**.

"… Applicant must implement the safeguards, if awarded the subject string, as a term of its registry agreement with ICANN for the string. Applicant therefore respectfully submits that, to the extent Objector claims material detriment based on Applicant's alleged lack of GAC-recommended safeguards, ICANN's recent action has rendered that portion of the Objection moot, and eliminates it as a basis for denying Applicant its presumptive right to compete for and, if awarded, operate the string."

6.26 On 5 December 2013, the IO objected to the Claimant's further submission on procedural and substantive grounds.

6.27 On 11 December 2013, the ICC Centre for Expertise wrote to the parties and Expert Panel reserving to the Expert Panel the decision as to whether to admit the Parties' further submissions.

6.28 On 13 December 2013, the Expert Panel rejected the Claimant's further submission on the grounds that (a) further submissions "were not contemplated by the procedural timetable" of 9 August 2013 and (b) "the Expert Determination in each of the consolidated cases was submitted in draft to the Centre within the 45 day time period provided for in Article 21(a) of the ICANN New gTLD Dispute Resolution Procedure (the "**Procedure**") for scrutiny by the Centre pursuant to Article 21(b) of the Procedure and Article 12(6) of the ICC Rules for Expertise (the "**Rules**").[103]

6.29 There was no further correspondence between the Parties, the IO and/or the Expert Panel prior to the issuance of the Expert Determinations.

(v) The .CHARITY Applications Expert Determinations

6.30 On 9 January 2014, the Expert Panel issued its three separate Expert Determinations in respect of the applications by the Claimant and SRL, respectively, despite the proceedings having been consolidated.[104] The Expert Determination in relation to the IO in the Claimant's Application had a different outcome to the SRL and Excellent First Expert

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[103] Letter from Expert Panel to Parties, 13 December 2013, **Claimant Exhibit 7**, page 1. Article 21(a) provides that: "*(a) The DRSP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel. In specific circumstances such as consolidated cases and in consultation with the DRSP, if significant additional documentation is requested by the Panel, a brief extension may be allowed*", Applicant Guidebook, **ICANN Appendix C**, Module 3, page P-10.

[104] Expert Determination Corn Lake, 9 January 2014, **Claimant Exhibit 8** and Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**. Expert Determination Excellent First is at: https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf.

Determinations. The reasoning sections in the Expert Panel Determinations for the Claimant and SRL community objections are virtually identical, and very similar for the Expert Determination for the Excellent First community objection, up to the determination concerning the detriment test.

6.31 The Expert Panel upheld the community objection against the Claimant, as set out by the IO on the basis that "there is a likelihood of material detriment to the charity sector community were the Application to proceed" and that:[105]

"the targeted community … would be harmed if access to the '.CHARITY' string were not restricted to persons … which can establish that they are a charity or a not-for-profit enterprise with charitable purposes".[106]

6.32 However, the Expert Panel rejected the IO's identical community objections against both SRL and Excellent First.[107]

6.33 In relation to SRL, the Expert Panel concluded that eligibility policy contained in its amended PIC "will be included in any registry agreement which Applicant would sign with ICANN if its Application is successful and which Applicant will therefore be contractually obliged to implement at the risk of legal action under the PIC Dispute Resolution Procedure in the event of breach."[108] On that basis:

"the SRL Expert Panel found that SRL's commitment set out its .CHARITY application to restrict registration 'to members of the charity sector' was sufficient to negate any concern of material detriment to the targeted community."[109]

6.34 In relation to Excellent First, the Expert concluded that its commitment in its application to limit registrations to: "charitable organizations or institutions which must represent and warrant that they are authorized to conduct charitable activities" was sufficient to negate concerns of material detriment.[110]

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[105] Expert Determination Corn Lake, 9 January 2014, **Claimant Exhibit 8**. *See* As per ICANN Response, para. 4.
[106] As per Claimant Request, para. 24.
[107] Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**. ICANN Response, para. 6.
[108] Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**, para. 90.
[109] ICANN Response, para. 5.
[110] ICANN Response, para. 6. *See*: http://newgtlds.icann.org/en/program-status/odr/determination

6.35 In both the SRL and Excellent First Expert Determinations, the Expert Panel included the following paragraph:

> "Provided that Applicant's undertaking [in respect of eligibility requirements] is honored, the Expert Panel considers therefore, that there would be no material detriment as identified by IO to the charity sector – registrants being limited to the members of that sector."[111]

6.36 In the preceding paragraph in the Excellent First Expert Determination (but not the SRL Expert Determination), the Expert Panel further noted that:

> "… according to the Applicant the eligibility policy has been developed following and in response to the GAC Advice and will be further developed with ICANN."[112]

6.37 The Expert Panel thus clearly relied on the differing PIC Specs as between SRL and Excellent First, on the one hand, and the Claimant on the other, in reaching differing results with respect to the identical community objections addressed to each application. The Expert Panel did not take into account ICANN's 29 October 2013 announcement that it intended to adopt the Beijing Communiqué's recommendation and the effect this would have on the three applications.

(vi) Claimant's Board Governance Committee Reconsideration Request

6.38 On 24 January 2014, the Claimant filed a Reconsideration Request to the ICANN Board Governance Committee (the "**BGC**") regarding action by ICANN that the Claimant alleged was contrary to established ICANN policies pertaining to Community Objections to New gTLD Applications.[113] The Claimant requested that the BGC reconsider the action by the ICC Centre for Expertise as DRSP for community objections and, in particular, the 9 January 2014 Expert Determination.

6.39 The Claimant submitted in relation to jurisdiction in respect of the Reconsideration Request that:

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[111] Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**, para. 132 and Expert Determination Excellent First is at: https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf, para. 131.

[112] https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf, para. 130.

[113] https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf.

> "The [Expert Determination] Ruling fails to follow ICANN processes and policies concerning community objections as expressed in Sections 3.5 and 3.5.4 of the gTLD Applicant Guidebook… . ICANN has determined that the reconsideration process can properly be invoked for challenges of the third party DRSP's decisions as challenges of the staff action where it can be stated that … the DRSP failed to follow the established policies or processes in reaching the decision … ."[114]

6.40 The Claimant submitted in relation to the merits of the Reconsideration Request that the Expert Panel contravened ICANN process and policy by reaching the opposite result in relation to two identical applications for the .CHARITY string. It pointed out that:

> "In the SRL case, … the Panel held that the alleged community would not likely incur material detriment because of obligations that SRL had indicated in a supplemental filing it would assume in its registry agreement with ICANN. The Panel in that case accepted SRL's additional evidence negating the IO's claim of material detriment, and denied the objection. Here, by contrast, the Panel refused to consider a proffered further submission showing that, by its proposed adoption of Government Advisory Council ("GAC") advice regarding the String, ICANN would require Corn Lake to employ stringent protection mechanisms of the type the Panel found sufficient in SRL."[115]

6.41 The Claimant submitted that reconsideration properly lies to remedy the Expert Determination as inconsistent with ICANN policy and process and with the Panel's own decision in consolidated cases.

(vii) The Board Governance Committee's Reconsideration Decision

6.42 On 27 February 2014, the BGC issued its determination in respect of the Claimant's Reconsideration Request. The BGC determined that the Expert Panel had adhered to the factors in the Applicant Guidebook in determining whether the community invoked by the IO (the charity sector) was a delineated community and properly determined that the charity sector indeed "constitutes a clearly delineated community".[116]

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[114] https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf, para. ii.

[115] https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf, para. iv.

[116] 27 February 2014 Determination, at page 8. https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf.

6.43 The BCG further determined that the Expert Panel did not fail to apply the proper standard for evaluating the likelihood of material detriment. It noted that:

> "[t]he lack of an eligibility policy in the Requestor's application ensuring that registration will be limited to members of the charity sector is precisely what distinguishes the Panel's determination in the instant proceeding from that in the SRL proceeding. In the SRL proceeding, the Panel articulated the same concerns present here, namely the need to clearly distinguish charitable organizations from for-profit enterprises in particular in public giving and fund-raising activities. … In the SRL proceeding, however, the Panel found that SRL's proposed eligibility policy adequately assuaged the Panel's concerns:
> 'The eligibility criteria policy defined by Applicant and inspired by the criteria of the UK Charities Act 2011 which will be included in any registration agreement entered into by the Applicant with ICANN together with appropriate safeguards for registry operators respond in the Expert Panel's view to the Detriment test concerns raised by IO.'
>
> Specifically, SRL committed to an eligibility policy that defined the subset of the community to which registration will be limited as 'incorporated entities, unincorporated associations or entities, foundations or trusts which can establish that they are a charity or 'not for profit' enterprise with charitable purposes'."[117]

6.44 The BGC concluded that "[b]ecause the Requester presented no evidence that it intended to or was otherwise willing to adopt a similar eligibility policy, there is no support for the Requestor's claim that "nothing distinguishes the application of SRL from that of Corn Lake.""[118]

6.45 As to the allegation of different treatment of the Claimant and SRL's respective additional submissions dealing with eligibility, the BGC noted that SRL's additional submission was "expressly requested and approved by the Expert Panel in the SRL proceeding before the close of evidence. Indeed, in the Panel's determination in the SRL proceeding, the Panel stated that 'on 9 August 2013, … the Expert Panel wrote to the Parties informing them of its view that it would be assisted by a second round of written submissions and inviting the

[117] 27 February 2014 Determination, at page 11. https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf.

[118] 27 February 2014 Determination, at page 12. https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf.

Parties each to submit an Additional Witness Statement … .'"[119] SRL did so on 6 September 2014.

6.46 The BGC noted that by contrast, the evidence closed on 6 September 2014 and only on 4 December did the Claimant proffer new information regarding the proposed implementation of the GAC's Beijing Communiqué. The Expert Panel had rejected that additional submission. Based on all of those grounds, the BGC concluded that the Claimant had not stated proper grounds for reconsideration and denied the Reconsideration Request. The BGC noted that "[i]f the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter."[120]

(viii) Office of the Ombudsman Review

6.47 On 8 July 2014, the Office of the Ombudsman issued a report relating to the dispute resolution process used for competing applicants to new gTLDs, initiated by the Claimant or a related entity.[121] The Ombudsman determined that he did not have jurisdiction to look at any of the issues raised. He stated in his report that:

"In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determination. Accordingly, the BGC is not required to evaluate the Panel's substantive conclusion that there is substantial opposition from a significant portion of the community to which the string may be targeted. Rather, the BGC's review is limited to whether the Panel violated any established policy or process.

"My jurisdiction is very similar, although I have a different approach, based on whether the way in which the expert processed the decisions was unfair, but like the BGC, I cannot review the substance of the determination. It is useful to refer to my bylaw which refers to unfairness and delay, but underlying this is the issue that there must be a failure of process. The comments from Donuts have looked to interpret the differences in the panel decisions as a failure of process, but that is not the correct interpretation of my jurisdiction. Procedural fairness is very different from making an error of law in the decision itself. It is

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[119] 27 February 2014 Determination, at page 12. https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf.

[120] 27 February 2014 Determination, at pages 14 to 15. https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf.

[121] Report from Ombudsman Case 14-00122 In a matter of a Complaint by Donuts, **Claimant Exhibit 25**.

not appropriate for me to enter into any discussion or evaluation of the decisions themselves however. If I were to undertake the exercise urged upon me by Donuts, then I would step well outside my jurisdiction, and have not done so accordingly."[122]

(ix) Claimant's Cooperative Engagement Process Request

6.48 On 18 July 2014, the Claimant filed a Cooperative Engagement Process ("CEP") Request pursuant to Article 5.1 of the Bylaws. Article 5.1 provides that:

"[b]efore either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator, following initiation of communications by either party, must attempt to resolve the dispute by engaging in good faith discussion over a period of at least fifteen (15) calendar days."

6.49 The Cooperative Engagement Process description further provides that:

"prior to initiating an independent review process, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. It is contemplated that this cooperative engagement process will be initiated prior to the requesting party incurring any costs in the preparation of a request for independent review."[123]

6.50 On 20 March 2015, in accordance with that Cooperative Engagement Process, the Independent Review Process filing date for the Claimant was extended to 24 March 2015.[124]

6.51 On 24 March 2015, the Claimant submitted the current Notice and Request for IRP. The procedural history thereafter is summarized at Section 4 above.

6.52 In its Notice and Request for IRP, the Claimant seeks, or potentially seeks, review of the following:

(a) the ICANN Board's 27 February 2014 decision to permit inconsistent Expert Determinations from the Corn Lake and SRL applications for .CHARITY to continue by denying the Claimant's Reconsideration Request;

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[122] July 8, 2014 Ombudsman letter, **Claimant Exhibit 25**, page 2.
[123] ICANN Cooperative Engagement Process description, **ICANN Appendix H**.
[124] Cooperative Engagement and IRP Status Update 20 March 2014, **Claimant Exhibit 17**.

(b) the ICANN Board's 12 October 2014 decision to treat the Expert Determinations for .CHARITY differently to those for .COM/.CAM and/or .CAR/.CARS and/or .SHOP/ .通販 in respect of the new Inconsistent Determinations Review Procedure recorded in its Approved Resolutions;[125] and/or

(c) "somewhat alternatively" (as characterized by ICANN),[126] the ICANN Board's action to establish a new standard for review of all "inconsistent and unreasonable" decisions and decision not to apply that standard to .CHARITY, even though, in Claimant's view, "the decisions on the .CHARITY objections, and no others [that were excluded], come within the realm of review established by the NGPC".[127]

7. IRP PANEL'S ANALYSIS OF ADMISSIBILITY

7.1 This IRP is the final stage in the ICANN New gTLD Application dispute resolution procedure. The process is governed by the ICANN Bylaws, Articles and "Core Values".

7.2 In the course of its written and oral submissions, the Claimant invites the IRP Panel to review certain ICANN Board "actions or decisions" arising out of or relating to the Expert Determination upholding the community objection in the Claimant's .CHARITY Application. The IRP Panel appears to be invited to review some or all of the following alleged "actions or decisions":

(a) the Claimant's Expert Determination dated 9 January 2014;

(b) the Board's Denial of the Claimant's Reconsideration Request dated 27 February 2014 and published in the Board Minutes of 27 February 2014, which were posted to the ICANN website on 13 March 2014, arising out of the Claimant's Expert Determination;

(c) the NGPC Approved Resolutions, 5 February 2014, proposing the new Inconsistent Determinations Review Procedure and the ensuing consultation (the "**5 February 2014 Decision and Action**"); and

[125] Claimant Request at para. 47.
[126] ICANN Response at para 52.
[127] Claimant Request at para. 42.

(d) the NGPC Approved Resolutions, 12 October 2014, adopting the new Inconsistent Determinations Review Procedure and omitting .CHARITY from its purview (the "**12 October 2014 Decision and Action**").

7.3 The requirements for an IRP are that: (a) the Claimant was materially affected by a decision or action of the Board; (b) the decision or action is inconsistent with the Articles of Incorporation or Bylaws; and (c) the request for the IRP was made within 30 days of the posting of the Board minutes recording that decision or action.[128] The issues of material effect and inconsistency with the Articles of Incorporation or Bylaws are integral to the exercise of substantive review, and are dealt with in Section 8 below. The question of timeliness, by contrast, may be disposed of as a threshold admissibility issue.

7.4 As to the threshold issue of timeliness of the request to review the 12 October 2014 Decision (and to the extent that the subsequent decision was based on it, the 5 February 2014 Decision or Action), there is no dispute between the Parties. ICANN has not asserted any timeliness objection in relation to the IRP Panel's review of these decisions and actions and proceeds on the basis that review is not precluded on timing grounds.[129] On that basis, this IRP Panel accepts that it has jurisdiction in respect of the 12 October 2014 Decision and Action (and to the extent that the subsequent decision was based on it, the 5 February 2014 Decision or Action). The IRP Panel's review of those "decisions and actions" is set out below, including in relation to material effect and inconsistency.

7.5 As to the threshold issue of timeliness of the request to review the Expert Determination and/or Denial of the Reconsideration Request, there is a dispute between the Parties as to admissibility.

7.6 The Claimant's primary position is that its request that the IRP Panel review the Expert Determination and the BCG's Denial of the Reconsideration Request is timely despite its failure to file its IRP request within the time period specified in Article IV, Section 3.3 of the

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[128] The Claimant's Request for IRP was submitted on 24 March 2015, the filing deadline previously agreed by the parties. Cooperative Engagement and IRP Status Update 20 March 2014, **Claimant Exhibit 17**.

[129] Claimant Request, para. 31 and fn 26. ICANN and Claimant agreed to toll until 24 March 2015 the deadline for Claimant to file an IRP in relation to the 12 October 2014 action while Claimant pursued the CEP.

Bylaws. In particular, the Claimant contended at the hearing that the filing deadline provided in the Bylaws is "not a statute of limitations" and "lacks the rationale."[130]

7.7 ICANN, in response, denies that the Claimant's request for IRP in relation to the Denial of the Reconsideration Request is timely. It refers to the posting on 13 March 2014 of the 27 February 2014 minutes of the meeting at which the BCG denied Claimant's Reconsideration Request. According to ICANN, the Claimant's right to file an IRP Request in relation to that decision expired on 28 March 2014.[131] In support of that position, ICANN specifically relies on the Bylaws, which provide that:

> "[a] request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws of Articles of Incorporation."[132]

7.8 There is no suggestion by either party that the deadline for an IPR application concerning the Reconsideration Request (or Expert Determination) has been tolled.

7.9 Having carefully considered the submissions of both Parties in relation to admissibility, the IRP Panel has determined that the Claimant's application for review of the Expert Determination Denial of the Reconsideration Request is out of time. The Panel considers that ICANN is entitled and indeed required to establish reasonable procedural rules in its Bylaws, including in respect of filing deadlines, in order to provide for orderly management of its review processes.

7.10 Article IV, Section 3.3 of ICANN's Bylaws clearly states that:

> "[a] request for independent review must be filed ***within thirty days of the posting of the minutes*** of the Board meeting (and the accompanying Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws of Articles of Incorporation."[133]

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[130] Claimant's Hearing Slides at 5.2

[131] ICANN Sur-Reply, para. 40; The Panel notes that the date 30 days after the 13 March 2014 posting of the 27 February minutes was 12 April 2014, a Saturday.

[132] ICANN Sur-Reply, para. 40 and Bylaws, Article IV, Section 3.3.

[133] ICANN Sur-Reply, para. 40 and Bylaws, Article IV, Section 3.3. (Emphasis added.)

7.11 The Claimant failed to file its request for independent review within 30 days of the posting of the 27 February 2014 Minutes of the Board meeting in respect of the 27 February 2014 Denial of Request for Reconsideration concerning the .CHARITY Expert Determination of 9 January 2014. Claimant did not file the IRP request at issue here until 24 March 2015 and, arguably, did not raise the 27 February 2014 denial of its Reconsideration Request until its Reply Memorandum in this IRP, filed on 10 December 2015. [134]

7.12 Moreover, the Claimant did not file its CEP request, which would have extended the independent review filing period, until 18 July 2014.[135] By that time, the 30 day period following publication of the Denial of the Reconsideration Request had already expired, i.e., on 28 March 2014, or, at latest, in mid-April 2014.

7.13 Although the CEP rules contemplate a process that will take place prior to initiating an IRP, the record before this Panel is insufficient to conclude that Claimant's CEP request operated to revive the already-expired time to file an IRP as to the denial of Claimant's Reconsideration Request or that ICANN waived that deadline.[136] Accordingly, the Panel has not considered the Denial of the Reconsideration Request (or indeed the underlying Expert Determination) in this IRP proceeding, except as background.

7.14 In summary, the Panel has determined that Claimant's only timely claim in this IRP is its application for relief from the Board's specific action to omit .CHARITY from the purview of its Resolution of 12 October 2014, and, to the extent related thereto, the 5 February 2014 Decision or Action.[137] Therefore, the Panel proceeds on the basis that the other "actions or decisions" discussed at length in the parties' submissions are background to the specific "action or decision" recorded in the 12 October 2014 Approved Resolutions.

7.15 The Parties further addressed the threshold question whether or not an Expert Determination was a "board decision" capable of review within the IRP process. As the Panel has already rejected any invitation to review the Expert Determination on the basis of timeliness, it is not required to address this further threshold issue.

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[134] See ICANN Sur-Reply at para. 38-40; Corn Lake Reply at fn. 60.
[135] Witness Statement of Jonathon Nevett at para. 15
[136] Claimant Request, **Appendix H**.
[137] Claimant Request, para. 31.

8. IRP PANEL REVIEW OF THE BOARD'S "ACTION OR DECISION"

8.1 The IRP of ICANN Board's 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action) to adopt the Inconsistent Determination Review Process and omit .CHARITY from its purview is set out below.

(i) Summary of Alleged Grounds for Review

8.2 The Claimant has raised four separate grounds for review. ***First***, the Claimant relies on Article II of the Bylaws, which sets out the powers of ICANN, including restrictions at Section 2 and non-discriminatory treatment standards at Section 3. Specifically, Article II, Section 3, provides that:[138]

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

8.3 The Claimant stated in its submissions to the Panel and at the hearing that "discrimination is the primary basis for Corn Lake's IRP… ."[139]

8.4 ***Second***, the Claimant relies on ICANN's "Core Values" set out in the ICANN Bylaws, Article I, Section 2, together with ICANN's mission statement. Specifically, the 11 core values that the ICANN Bylaws, Article I, Section 2 states "should guide the decisions and actions of ICANN" when it is "performing its mission" include to:

(a) preserve and enhance the operational stability, reliability, security, and global interoperability of the Internet;[140]

(a) respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters within ICANN's mission;[141]

(b) to the extent feasible and appropriate, delegate coordination functions;[142]

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[138] ICANN Bylaws, **ICANN Appendix A**, Article II, Section 3. *See* Claimant Request para. 4(a).

[139] Claimant's hearing slides at 1.1 ("Framing the Issues").

[140] ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.1.

[141] ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.2.

[142] ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.3.

(c) seek and support broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet;[143]

(d) *where feasible and appropriate, to promote and sustain a competitive environment*;[144]

(e) *introduce and promote competition in the registration of domain names*;[145]

(f) employ open and transparent policy development mechanisms;[146]

(g) make decisions by applying documented policies neutrally and objectively, with integrity and fairness;[147]

(h) act with a speed that is responsive to the needs of the Internet;[148]

(i) *remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness*;[149] and

(j) recognize that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.[150]

8.5 The Claimant relies in particular on core values at Article I, Sections 2.5, 2.6 and 2.10, as italicized above.[151]

8.6 Article I of the Bylaws further provides that the core values are "deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances." The Bylaws state that:

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[143] ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.4.

[144] ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.5.

[145] ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.6.

[146] ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.7.

[147] ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.8.

[148] ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.9.

[149] ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.10.

[150] ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.11.

[151] ICANN Bylaws, **ICANN Appendix A**, Article I, Sections 2.5 and 2.6. *See* Claimant Request para. 4(b). ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.10. *See* Claimant Request para. 4(d).

"[a]ny ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."[152]

8.7 ***Third***, the Claimant relies on the ICANN Articles of Incorporation, Article 4, which requires that ICANN operate for the benefit of the Internet community as a whole:[153]

"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. …"

8.8 ***Fourth***, and anticipating the IRP Standard of Review provided in Article IV, Section 3.4, the Claimant asserts that the:

"Board simply failed to 'exercise due diligence and care in having a reasonable amount of facts in front of them' regarding the .CHARITY objection decisions when it refused to provide for their review as similarly 'inconsistent and unreasonable' as the determinations for which it did order review."[154]

8.9 As to procedure, Article IV, Section 3 of the ICANN Bylaws – as part of the accountability and review provisions – deals with the IRP. The process is confined to review of ICANN Board actions asserted by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.[155] In particular, Article IV, Section 3.2 provides that:

"Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's

[152] ICANN Bylaws, **ICANN Appendix A**, Article I.

[153] ICANN Articles of Incorporation, **ICANN Appendix B**, Article 4. *See* Claimant Request para. 4(c).

[154] Claimant Request, para. 47.

[155] ICANN Bylaws, **ICANN Appendix A**, Article IV (3) (1).

alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action."

8.10 For the sake of completeness, the Panel further notes that the Applicant Guidebook is described in its preamble as being "the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period." It is described in the IRP Final Declaration in *Booking.com v ICANN* as "the crystalization of Board-approved consensus policy concerning the introduction of new gTLDs."[156]

(ii) Standard of Review

8.11 Both Parties accept that the standard of review is set out at Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplemental Procedures.

8.12 Article IV, Section 3.4 of the Bylaws provides that:

"Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), 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 IRP Panel must apply a defined standard of review to the IRP request, focusing on:

(a) did the Board act without conflict of interest in taking its decision?;

(b) did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

(c) did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?"

8.13 Article 8 of the Supplementary Rules reiterates those three questions and further provides as follows:

"8. Standard of Review

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[156] *Booking.com v ICANN* IRP Final Declaration, 3 March 2015, **ICANN Appendix I**, at para. 54.

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

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

8.14 The IRP Panels in *Booking.com v ICANN* and *ICM Registry v ICANN* confirmed that the defined standard quoted above does not constitute the exclusive basis for an IRP of ICANN's Board action or inaction. Rather, they described this business judgement rule standard as "the default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN … that bear on the propriety of its conduct."[157] Where, as here, the Board's action or inaction may be compared against relevant provisions of ICANN's governing documents, the IRP Panel's task is to *compare* the Board's action or inaction to the governing documents and to *declare* whether they are consistent.[158]

8.15 The IRP in *Booking.com v ICANN* further elaborated the standard at paragraphs 108 to 110 and 115 of its Final Declaration:

108. "The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed "[a]ny ICANN body making a recommendation or decision") shall itself "determine which core values are most relevant and how they apply to the specific circumstances of the case at hand."

[157] *ICM Registry v ICANN* Final Declaration, 19 February 2010, **ICANN Appendix K**, para. 123.
[158] *Vistaprint v ICANN*, Final Declaration, 9 July 2015, **ICANN Appendix E**, para. 123 to 124.

109. "In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN's best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, with the policies and procedures established in the Guidebook."

110. "There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. …"

…

115. "[I]t is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board's action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook … but merely to apply them to the facts."[159]

8.16 Taking into account the Board's broad authority as described above, IRP Panels nonetheless consistently have declined to adopt a deferential review standard. As the IRP Panel in *Vistaprint v ICANN* stated:

"the IRP is the only accountability mechanism by which ICANN holds itself accountable through *independent third-party review* of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability… ."[160]

8.17 The IRP Panel in *Booking.com v ICANN* concurred, noting:

"Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, … the IRP Panel is charged with 'objectively' determining whether or not the Board's

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[159] *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 108 to 110 and 115.
[160] *Vistaprint v ICANN*, Final Declaration, 9 July 2015, **ICANN Appendix E**, para. 124.

actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness."[161]

8.18 Having reviewed the IRP Final Declarations in the *Vistaprint v ICANN*, *ICM Registry v ICANN* and *Booking.com v ICANN*, this Panel concludes that it is now well established that:

"... the IRP Panel is charged with 'objectively' determining whether or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness."[162]

8.19 While it is in no way bound by these earlier decisions, this IRP Panel agrees with those conclusions and sees no reason to depart from the standard of review set out in *Booking.com v ICANN*, which in turn relied on the Final Declaration in *ICM Registry LLC v ICANN*, dated 19 February 2010. That the Panel is not called upon to revisit or vary the substance of the Articles, Bylaws or Guidebook generally does not lessen its charge to analyse the specific Board action or inaction at issue here objectively against the standards contained in those instruments.

8.20 The current IRP Request raises a direct and concededly timely challenge to an ICANN "action or decision", namely the Board's 12 October 2014 establishment of the new Inconsistent Determinations Process and specifically, the Board's determination to limit that process to String Confusion Objections and not to extend it to inconsistent Community and Limited Public Interest Objections, such as .CHARITY.

(iii) Analysis

8.21 In accordance with the standard adopted by the IRP Panels in the *Booking.com v ICANN* and *ICM Registry v ICANN*, this Panel considers below whether the Board acted consistently with ICANN's Articles of Incorporation, Bylaws and the procedures established in the Applicant Guidebook. We initially compare the Board's action to Article II, Section 3 of the Bylaws. In addition, we compare the Board's action to the standard set out in Article IV, Section 3.4 of

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[161] *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 111.

[162] *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 111.

the Bylaws and Article 8 of the Supplementary Rules and consider other relevant Bylaws and ICANN governing documents, including the Guidebook and ICANN's Core Values.

8.22 The issues addressed in turn are:

(a) Did the Board Apply Its Standards, Policies, Procedures or Practices Inequitably or Single Out Any Particular Party for Disparate Treatment Without Substantial and Reasonable Justification? (Bylaws Article II, Section 3)

(b) As to the Defined Review Standard (Bylaws Article IV, Section 3.4):

i. Did the Board act without conflict of interest in taking its decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure?

ii. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them in taking its decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure?

iii. Did the Board members exercise independent judgment in taking the decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure, believed to be in the best interests of the community?

(c) Did the Board Act in the Best Interests of the Internet Community? (Articles of Incorporation, Article 4)

(d) Did the Board Abdicate Its Accountability Responsibility? (Bylaws, Article I, Section 2.10)

8.23 Each of these issues is considered in relation to the 12 October 2014 Decision and Action (and the preceding 5 February 2014 Decision and Action) to adopt the Inconsistent Determination Review Procedure which omitted .CHARITY from its purview of the new Inconsistent Determinations Review Procedure.

ISSUE 1: Did the Board Apply Its Standards, Policies, Procedures or Practices Inequitably or Single Out Any Particular Party for Disparate Treatment Without Substantial and Reasonable Justification?

8.24 The first ground for review is whether or not the Board applied its standards, policies, procedures or practices inequitably or singled out any particular party for disparate treatment. The applicable Bylaw is Article II, Section 3, set out above.[163]

8.25 This IRP Panel is required to determine whether or not the ICANN Board, in its 12 October 2014 Approved Resolutions "action or decision" not to extend the new Inconsistent Determination Review Procedure to the Claimant's .CHARITY Expert Determination, accorded the Claimant unfair or disparate treatment without substantial and reasonable cause as compared to other unsuccessful applicants who had received perceived inconsistent Expert Determinations, i.e., the unsuccessful applicants for the gTLDs for .CAM and .通販 (and originally .CARS).

(i) The Claimant's Position

8.26 First, the Claimant contends that the Board's decision to establish a review process for "inconsistent and unreasonable" determinations whilst at the same time excluding .CHARITY from that review process materially affected the Claimant. In this regard, the Claimant refers, among other things, to:

(a) the NGPC's 5 February 2014 proposed review mechanism "for addressing perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process", established for public comment;[164]

(b) community criticism at the time that the review proposal was not sufficiently expansive and that the review process should be widened;

(c) the Board decision to encompass the .CAM and .COM decisions as "inconsistent or otherwise unreasonable" and "not in the best interest of the Internet community" in relation to "objections raised by the same objector against different applications for the same string, where the outcomes of the [objections] differ",[165] in circumstances where the description of the problem arising out of inconsistent decisions on .CAM

[163] ICANN Bylaws, **ICANN Appendix A**, Article II, Section 3. *See* Claimant Request para. 4(a).
[164] Claimant Request, para. 28.
[165] Claimant Request, para. 30.

and .COM applies to the .CHARITY situation, according to the Claimant, "*exactly*";[166] and

(d) ICANN's characterization of the "strict definition" of "inconsistency" contained in the NGPC 12 October 2014 Resolution as extending to "objections raised by the same objector against different applications for the same string, where the outcome of the [objections] differ".[167]

8.27 Based on those factors, the Claimant submits that the Board's decision to not include .CHARITY (as a Community Objection determination) has resulted in the Claimant being "materially affected by a decision or action by the Board".[168] According to the Claimant, it was materially affected because it was deprived of an opportunity for review of an objection where another party subject to the identical circumstances was granted an opportunity for review.

8.28 The Claimant further submits that those same factors render that decision "inconsistent with the Articles of Incorporation or Bylaws".[169] In the Claimant's submission, the Board established a process for handling inconsistent and unreasonable objection decisions and then consciously disregarded that process in the case of .CHARITY.[170]

8.29 The Claimant submits that it "does not challenge the Board's decision not to extend review beyond only 'inconsistent and unreasonable' objection determinations."[171] Rather, it submits that its complaint arises out of "the Board's stated rationale for limiting its review only to one type of objection, SCO", which the Claimant submitted "raises at least three critical issues that the Board appears to have overlooked."[172] Essentially addressing the question of whether there was "substantial and reasonable cause" for the limitation, the Claimant notes, in particular:

(a) the Board did not identify any action taken by anyone in reliance on an inconsistent objection determination of any type and, in particular, in relation to .CHARITY,

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[166] Claimant Request, para. 31 (emphasis in original); see also Claimant Request, para. 42.
[167] Claimant Request, para. 31; 11 February 2014 Proposed Review Mechanism, **Claimants Exhibit 15**, at page 2.
[168] Claimant Request, para. 32.
[169] Claimant Request, para. 32.
[170] Claimant Request, para. 37.
[171] Claimant Request, para. 39.
[172] Claimant Request, para. 39.

nothing indicates that SRL has done anything to pursue its application further after the objection ruling in its favor;[173]

(b) the Board's concern about actions taken in reliance on the Applicant Guidebook ignores those applications for new gTLDs made in reliance upon the Applicant Guidebook's strict criteria and made in the expectation that experts would apply those criteria properly;[174] and

(c) the Board's conclusion that to expand the review would unfairly impact a number of participants without reasonably considering the available facts ignores the fact that "*only* the decisions on the .CHARITY community objections, and *no others*, come within the realm of review established by the NGPC."[175]

8.30 The Claimant further relies on recent decisions in which Final Review Panels established pursuant to the October 2014 Resolution have overturned "inconsistent and unreasonable" new gTLD objection determinations.[176] In particular, the Claimant relies on Final Review Determinations issued by both of the three member Final Review Panels convened as a result of the Board's October 2014 Resolution to re-review two specifically identified string confusion objection expert determinations.

8.31 The Claimant argues that each of these Final Expert Determinations reversed the SCO challenged determinations and provide evidence that the Panel "cannot reasonably uphold the disparate treatment that Corn Lake has suffered." The Panel is asked to correct this situation.[177]

8.32 The Claimant submits that:

"[*a*]*t minimum*, it [ICANN] can and should defer to the same review mechanism provided for in the Resolution: a 3-member review panel, examining only the materials offered in the original proceedings, asking solely 'whether the original Expert Panel could have reasonably

[173] Claimant Request, para. 40.
[174] Claimant Request, para. 41.
[175] Claimant Request, para. 42.
[176] Reply, paras. 21 to 28.
[177] Reply, para. 23.

come to the decision reached … through an *appropriate* application of the standard review *as set forth in the Applicant Guidebook*.'"[178]

8.33 In the course of its written and oral submissions in this IRP, the Claimant put forward its substantive concerns as to the content of the original Expert Determination and Denial of the Reconsideration Request in support of its position for further review.[179] In particular, it submitted that:

(a) "a single ICC panelist upheld a community objection against Corn Lake's application for the .CHARITY gTLD and, at the same time, that same panelist denied an identical objection against a similarly situated applicant for the same string"[180] and such differing determinations are "inconsistent and unreasonable" in the same sense the Board applied those terms to the SCO determinations to which it extended the new review mechanism;

(b) in "[r]eviewing the decision against Corn Lake and the ruling in favor [of] SRL together, it becomes clear that the PIC offered by SRL formed the sole basis for the differing outcomes. The analyses on the other three community objection criteria track closely, and often verbatim, in the two rulings";[181]

(c) "[n]o legitimate basis exists … to distinguish the two applications" because "[b]oth the IO's objection and the panel's ruling against Corn Lake turn entirely on its perceived lack of the type of protections to which the panel found SRL had acceded in its PIC";[182]

(d) "[b]ecause Corn Lake must in fact implement such protections as a contractual condition to an award of the TLD, and because SRL has the unilateral right to change its PIC language, the applicants should not be subject to disparate treatment";[183]

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[178] Claimant Request, para. 45 (emphasis in original). See also, Reply, para. 15 ("Corn Lake does not, as ICANN contends, seek substantive review of the Ruling. Rather, it claims that the Ruling improperly discriminates against Corn Lake. The Board acted by failing to rectify the Ruling despite the requirement that the Board ensure the integrity of its processes, which include consistency, fairness and non-discriminatory treatment of similarly situated applicants.")

[179] Claimant Request, para. 27.

[180] Claimant Request, Introduction. See also, Reply, para. 12.

[181] Claimant Request, para. 26.

[182] Claimant Request, para. 27.

[183] Claimant Request, para. 27.

(e) the Claimant "made clear to the IO that it would fully comply with more stringent safeguard requirements (or PICs) should they be adopted by ICANN"[184] and, as a result, the disparate treatment between the Claimant's and SRL's eligibility criteria, which it alleges was effectively the same, was inconsistent and unreasonable;

(f) the procedure by which SRL was permitted to make additional submissions was inconsistent with the procedure afforded to the Claimant and unreasonable. In particular, despite ICANN's publicly stated commitment to transparency and accountability, it failed to make public the substance of SRL's proposed amendment for almost two months – during a critical phase in the application process. Moreover, ICANN published the new mandatory PICs applicable to .CHARITY only for comment. According to the Claimant, this effectively left it in the dark;[185]

(g) "even though the panel had accepted SRL's late submission, it rejected Corn Lake's identical attempt to support its own application" to alert the Expert Panel that ICANN had accepted the GAC's Beijing Communiqué recommendations, thereby mooting the IO's objection;[186]

(h) the Expert Panel based the decision to deny the IO's objection against SRL's .CHARITY application entirely on the amended PIC that was the subject of SRL's late submission and "[t]he panel's decision to deny the objection against SRL's application allowed SRL's .CHARITY application to move forward in the process," whereas Claimant's application was disqualified and removed from contention altogether;[187] and

(i) as a result, the Board's actions have materially affected the Claimant in that it has now seemingly lost the right to the .CHARITY domain, by refusing to allow Corn Lake to provide evidence of the PIC it would have to adopt.[188]

8.34 In relation to this position, as set out in Section 7 above, the IRP Panel has determined that, irrespective of whether or not the Expert Determination and/or Denial of the Reconsideration Request were subject to review, the current IRP application as applied to those actions is out of time. Therefore, in its analysis below the IRP Panel takes the

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[184] Reply, para. 5.
[185] Reply, para. 7.
[186] Reply, para. 8.
[187] Reply, para. 9-10.
[188] Reply, para. 10.

aforementioned factors into account by way of background only, and does not review the merits of the Expert Determination or the Denial of the Reconsideration Request. Irrespective of what might have happened in the expert proceeding or the reconsideration process, this Panel addresses the Board's independent obligation, at the time it acted to adopt the new review mechanism, to act in accordance with the requirements of its Bylaws, other governing documents and ICANN's Core Values on the facts and the record then before it.

8.35 The Claimant made further post-hearing submissions regarding the ICANN Board's 3 February 2016 Resolution[189] to address the "perceived inconsistency and unreasonableness" of the .HOSPITAL Limited Public Interest objection Expert Determination by referring the objection proceeding to the Inconsistent Determinations Review Procedure. The .HOSPITAL Expert Determination was found to have been the only Limited Public Interest objection out of nine "health-related" Limited Public Interest objections that resulted in a determination in favor of the objector rather than the applicant. As a consequence, the Board invoked the Inconsistent Determinations Review Procedure for the third time – this time beyond the original string confusion objections scope referred to in the 12 October 2014 Approved Resolutions. In the .HOSPITAL: case, identical objections were lodged by the same objector, not to the same string, but to strings related by subject matter.

8.36 The Claimant contended that the Board's action with respect to .HOSPITAL provides additional evidence of the disparate treatment of .CHARITY in that the .CHARITY situation is "*more* similarly situated to .CAM and .SHOP than is .HOSPITAL."[190]

8.37 The Claimant relies on the Final Declaration in *Dot Registry v. ICANN* to urge that ICANN must establish that it complied with its Bylaw obligations regarding accountability, diligence and independent judgment based on affirmative proof of the record on which the Board relied in denying Claimant's Reconsideration Request and in excluding the .CHARITY expert determinations from the new review mechanism.

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[189] Claimant Post-Hearing Submission dated 16 February 2016.

[190] Claimant Post-Hearing Submission dated 16 February 2016.

(ii) The Respondent's Position

8.38 ICANN rejects the Claimant's arguments: (a) that the .CHARITY Expert Determinations should have been included in the 12 October 2014 Approved Resolutions relating to the limited review mechanism for expert determinations from specifically identified sets of String Confusion Objections; and (b) that the Board should have expanded the limited review process and implemented a similar review to cover the .CHARITY Expert Determinations.[191]

8.39 ICANN denies that the Claimant was materially affected by the Board establishing a review process for "inconsistent and unreasonable" determinations whilst excluding .CHARITY from that review process. It submits that the NGPC identified several bases to distinguish inconsistent Expert Determinations between specifically identified sets of objections to string confusion and other Expert Determinations which were not included in the new process. In particular:

> "the NGPC identified several bases to distinguish the seemingly inconsistent determinations resulting from specifically identified sets of String Confusion Objections on the one hand, and the expert determinations resulting from Community Objections, such as those relating to .CHARITY or . 慈善, on the other. Based upon these differences, the NGPC concluded that permitting the specifically identified sets of String Confusion Objections to stand 'would not be in the best interests of the Internet community,' but that 'reasonable explanations' existed for the seeming discrepancies concerning determinations on Community Objections, such as for .CHARITY."[192]

8.40 ICANN further submits that the 12 October 2014 Approved Resolutions were deliberately narrow and consciously limited to only the String Confusion Objection Expert Determinations relating to .COM/.CAM and .SHOP/通販.[193] The Respondent submits therefore that the NGPC did not establish a new standard for review of all "inconsistent and unreasonable" Expert Determinations and was under no obligation to provide such a review mechanism.[194]

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[191] ICANN Response, para. 52. See also ICANN Sur-Reply, para. 9.
[192] ICANN Response, para. 11.
[193] ICANN Response, para. 53.
[194] ICANN Response, para. 62.

8.41 ICANN argues that in limiting the review to two specifically identified sets of String Confusion Objection Expert Determinations, the NGPC did not breach its obligations under the Bylaws or Articles of Incorporation.[195] It cites two recent IRP Final Declarations (claiming that such decisions have "precedential value"[196]) that it submits contradict the Claimant's arguments, and rejects the Claimant's reliance on the third case.[197]

(a) *Vistaprint v ICANN*: ICANN relies on the following findings:

(i) "the Panel is not tasked with reviewing the actions or decisions of ICANN staff or other third parties who may be involved in ICANN activities or provide services to ICANN";[198] and

(ii) "the ICANN Board has no affirmative duty to review the result in any particular SCO [string confusion objection] case";[199] and has no duty to establish an appeals process to challenge Expert Determinations in objection proceedings[200] and "had properly limited its consideration to whether the contested actions comported with established policies and procedures."[201]

(b) *Merck v ICANN*: ICANN relies on the IRP Final Declaration findings that:

(i) "the claimant's disagreement with the outcome of the Merck Expert Determination cannot form the basis for an IRP";[202] and

(ii) "the Guidebook does not include any appeals process for determinations on objection proceedings."[203]

(c) *DCA v ICANN*: ICANN argues that this determination is not applicable because "[t]he DCA Panel premised its declaration on the GAC's status as an ICANN constituent

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[195] ICANN Response, para. 11.
[196] ICANN Sur-Reply, para. 7. See also, ICANN Bylaws, as amended 30 Jul 2014, **ICANN Appendix A**, Art. IV, para. 3.21.
[197] ICANN Sur-Reply, paras. 3-6.
[198] ICANN Sur-Reply, para. 15, as per Final Declaration, *Vistaprint Ltd v. ICANN*, ICDR No. 01-14-0000-6505,**ICANN Appendix K**, para. 127.
[199] ICANN Sur-Reply, para. 16, as per Final Declaration, *Vistaprint Ltd v. ICANN*, ICDR No. 01-14-0000-6505, **ICANN Appendix K**, para. 157.
[200] ICANN Sur-Reply, para. 17.
[201] ICANN Sur-Reply, para. 18.
[202] ICANN Sur-Reply, para. 20.
[203] ICANN Sur-Reply, para. 20.

body, but here neither the ICC nor the expert panels it established to preside over the two objection proceedings at issue are constituent bodies of ICANN."[204]

8.42 In addition, ICANN argues that the review mechanism which was approved was "a very narrow review mechanism to be applied only to specifically identified Expert Determinations arising out of the String Confusion Objection process. The NGPC explicitly decided not extend the review to any Community Objection expert determinations. Moreover, the NGPC was not obligated to create or implement a broader review mechanism."[205] There is no appellate mechanism in the Bylaws, the Articles or the Guidebook "for objection proceedings that are conducted as part of the New gTLD Programme."[206]

8.43 ICANN rejects the Claimant's reliance on the Final Determinations (as exhibited to the Reply) by IRP Panels convened as a result of the Board's October 2014 Resolution to re-review two specific SCO Expert Determinations. ICANN submits that the Claimant's reliance on these is inapplicable because: (i) the NGPC was explicit that the New Inconsistent Determination Review Process would encompass only the SCOs addressed in the October 2014 Approved Resolutions; (ii) these findings have no bearing on community objection Expert Determinations; (iii) the New Inconsistent Determination Review Process involved different Expert Panels; and (iv) the Claimant is incorrect to presuppose that the Board has an affirmative duty to intervene with respect to the Corn Lake Expert Determination.[207]

8.44 Finally in response to the Claimant's submissions regarding the content of the Expert Determination and Denial of the Reconsideration Request, ICANN noted that:[208]

(a) "[e]valuation of a Community Objection necessarily goes far beyond a review of the string, and instead requires careful consideration of the application materials and an applicant's proposed commitments, which (and likely do, as here) vary among applicants. As a result, one could reasonably expect that Community Objections

[204] ICANN Sur-Reply, para. 24.
[205] ICANN Response, para. 12.
[206] ICANN Response, para. 12.
[207] ICANN Sur-Reply, para. 10.
[208] ICANN Response, para. 24. See also Applicant Guidebook, **ICANN Appendix C**, para. 3.5.4.

filed against different applications, even applications for the same string, may be resolved differently";[209]

(b) the IO found that the "various comments in opposition" to Claimant's .CHARITY Application had "mainly focused on the views that the string should be administered by a not for profit organization and/or that there are insufficient protection mechanisms in place such that non-bona fide organizations may adopt the .CHARITY gTLD, and create confusion in the mind of the public over what is in fact a charity"[210] and, as such, the IO concluded that in the absence of preventative security measures assuring the charitable nature of the applicant i.e. Corn Lake, adopting .CHARITY as a gTLD would create "likelihood of detriment to the rights or legitimate interests of the charity community, to users and to the general public";[211]

(c) the Expert Determination further found that the public opposition statements "point out the absence of any limitation in the Application of the '.CHARITY' string to not-for-profit or charitable organizations … and emphasize the need for strict registration eligibility criteria limited to persons regulated as charitable bodies or their equivalent depending upon domestic law";[212]

(d) the IO and the Expert Panel clearly considered that harm would occur if .CHARITY gTLD was not limited to persons or entities who could clearly establish that they were charities or not-for-profit organizations and that the IO had established the likelihood of material detriment;[213]

(e) the IO had raised the same concerns in respect of the Claimant's and SRL's applications but the SRL Expert Panel considered that: "[t]he eligibility policy defined by the Applicant [SRL] and inspired by the criteria of the UK Charities Act 2011 which will be included in any registration agreement entered into by Applicant

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[209] ICANN Response, para. 25.
[210] As per ICANN Response, para. 28. See also IO 12 March 2013 Community Objection to Corn Lake's Application, **Claimant Exhibit** 2, para. 4.
[211] ICANN Response, para. 28.
[212] ICANN Response, para. 32. See also Panel 9 January 2014 objection determination against Corn Lake, **Claimant Exhibit 8**, paras. 150-151.
[213] ICANN Response, para. 33.

with ICANN together with appropriate safeguards for registry operators respond in the Expert Panel's view to the Detriment test concerns raised by IO";[214]

(f) unlike the Claimant, SRL had committed to an eligibility policy that indicated registration would be limited to entities that could establish that they were a charity or a not-for-profit entity with charitable purposes;[215]

(g) "it is not the role of the Board (or, for that matter, this IRP Panel) to second-guess the substantive determination of independent, third-party experts"[216] or inject itself into the objection process and it was not for the Board to reverse the Corn Lake Expert Determination;[217] and

(h) the Applicant Guidebook contains no suggestion – and certainly no requirement – that the Board should conduct substantive reviews of expert panel determinations.[218]

8.45 As to ICANN's post-hearing submission concerning .HOSPITAL, ICANN relied primarily on the argument that different panels assessed the nine health-related applications and only the .HOSPITAL panel sustained an objection. It also argued that the .HOSPITAL situation confirms that the Board has, and may exercise, discretion to act where it believes there has been an unjust result.

8.46 In its .HOSPITAL post-hearing submission, ICANN confirmed that it did not dispute Claimant's position that ".CHARITY was the only other TLD … where the same objector brought the same objection to different applications for the same strings and reached different results to the detriment of the losing applicant."[219] Nonetheless, ICANN argued that other applicants also have complained that the results in their Expert Determinations were "unreasonable" and to give credence to Claimant's arguments here "would risk opening a floodgate of "appeals" for other objection determinations.

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[214] ICANN Response, para. 34, as per Panel 9 January 2014 objection determination in favor of SRL; **Claimant Exhibit 11**, para. 129.
[215] ICANN Response, para. 35.
[216] ICANN Response, para. 48.
[217] ICANN Response, para. 49.
[218] ICANN Sur-Reply, para. 2.
[219] ICANN letter 2 February 2016 at fn 5.

8.47 ICANN contends that the facts at issue in the *Dot Registry v. ICANN* IRP are not remotely similar to those present here and the *Dot Registry* Final Declaration has little relevance to the instant IRP.

(iii) The Panel's Decision

8.48 As stated above, this IRP Panel is not reviewing the Expert Determination or the Denial of the Reconsideration Request, as any application in respect of either is out of time. The Panel's analysis does not end there, however. Irrespective of what might have happened in the expert proceeding or the reconsideration process, this Panel has before it a separate and timely challenge to the Board's Decisions and Actions of 12 October 2014 and 5 February 2014. The Panel therefore analyses the Board's independent obligation, at the time it acted to adopt the new review mechanism, to act in accordance with the requirements of its Bylaws, other governing documents and ICANN's Core Values on the facts and the record then before it.

8.49 In its consideration as to whether or not the Board applied its standards, policies, procedures or practices inequitably or singled out any particular party for disparate treatment, this IRP Panel specifically examines the Board's "decision or action" in determining "whether it was appropriate … to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections".[220]

8.50 In that specific context, the IRP Panel considers whether or not the Board "singled out" the Claimant for "disparate treatment" without substantial and reasonable cause, in contravention of Article II, Section 3 of the Bylaws, by excluding the .CHARITY Expert Determination, being the only community objection where the same objection from the same objector led to a different determination, from its consideration. The Panel further considers whether or not the Board's decision was based on an exercise of due diligence and care in having a reasonable amount of facts in front of it.

8.51 The IRP Panel accepts that, subject to its duty to act in the best interests of the community as discussed below at Issue 3, ICANN was under no obligation to create the new Inconsistent Determinations Review Procedure. However, once it had done so, this IRP

[220] NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 11-12.

Panel considers that the Bylaws required ICANN to ensure that it did not single out a similarly situated applicant for disparate treatment in relation to the application of the new Inconsistent Determinations Review Procedure without “substantial and reasonable cause”.

8.52 It is central to this Panel’s analysis that ICANN has admitted that “.CHARITY was the only other TLD … where the same objector brought the same objection to different applications for the same strings and reached different results to the detriment of the losing applicant.”[221] In other words, ICANN has accepted that the Expert Determination at issue here fits within the “strict definition” of inconsistent Expert Determinations that the ICANN Board used to determine the scope of the new review procedure.

8.53 Ultimately, the 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action) was not to extend the scope of the new review mechanism to apparently inconsistent Expert Determinations made as to objections other than certain designated Expert Determinations based on string confusion objections. Rather, the Board’s decision was to limit the new Inconsistent Determinations Review Procedure to a hand-picked subset of inconsistent SCO Expert Determinations.[222] ICANN accepted that “to promote the goals of predictability and fairness” a broader review mechanism “may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program,” but declined to extend the new review mechanism at the time it acted because:

(a) “Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds”;

(b) “[a]llowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook”;

[221] ICANN letter 2 February 2016 at fn 5.

[222] Notably, the Board did not refer the full suite of inconsistent SCO determinations to the new review process to reconcile the differing outcomes. Rather, the Board selected only one determination from each set for review in the new process. Reply, fn. 10. The basis on which the Board made this selection was not disclosed, other than to state that each “falls outside normal standards of what is perceived to be reasonable and just.” Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**. This Panel’s review of whether the Board had a reasonable basis to distinguish the selected string contention objection Expert Determinations, which were subjected to the new process, from the community objections to .CHARITY, which were excluded, is limited by this non-disclosure.

(c) while on their face other SCO Expert Determinations and Expert Determinations of the Limited Public Interest and Community Objections might appear inconsistent, there were "reasonable explanations for these seeming discrepancies, both procedurally and substantively";[223] and

(d) those "reasonable explanations" lay in the "materials presented," i.e. the applications and the parties' responses to the IO's objection and in "nuanced distinctions" between the Expert Determinations relevant to the particular objection."[224]

8.54 These factors may have explained the different treatment in respect of other perceived inconsistent Expert Determinations, but in relation to the .CHARITY Expert Determinations they are problematic for the reasons explained below.

8.55 ***First***, as acknowledged by ICANN, pending the outcome of this IRP Final Determination, the .CHARITY applicant SRL has taken no action in reliance on the Expert Determination overruling the IO's Community Objection to its application, including but not limited to signing Registry Agreements, transitioning to delegation, withdrawing its application or requesting refunds.

8.56 ***Second***, as a consequence, there are no actions in respect of the .CHARITY applications to be undone such as to delay consideration of all applications, were the new review mechanism to apply. As to issues of unfairness for those that have already acted in reliance on the Applicant Guidebook, there is no evidence in the carefully documented record that the Board considered the fact that ICANN Board's October 2013 decision that it would adopt the Beijing Communiqué recommendations – some three months prior to the .CHARITY Expert Determinations – materially changed the Applicant Guidebook requirements in respect of the .CHARITY registration eligibility requirements, equally affecting *all* applicants and potentially eliminating any meaningful distinction between the pending applications.

8.57 ***Third***, given ICANN's admission that on their face the .CHARITY Expert Determinations appear "inconsistent" within the same "strict definition" the Board relied upon in considering the new review mechanism, and in light of the Board's October 2013

[223] Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**.
[224] Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**.

announcement that it would adopt the Beijing Communiqué recommendations, there do not appear to be "reasonable explanations for these seeming discrepancies, both procedurally and substantively".

8.58 ***Fourth***, as to the existence of "reasonable explanations" that the perceived inconsistency in the .CHARITY Expert Determinations could be explained by the "materials presented" or "nuanced distinctions" between the different applications, the carefully documented record of the Board's 5 February 2014 and 12 October 2014 consideration of the new process contains no consideration of the potentially levelling impact of the October 2013 announcement that the Board intended to adopt of the GAC Beijing Communiqué recommendations – three months before the Expert Determinations were issued.[225]

8.59 The IRP Panel recognizes and has carefully considered the fact that the Expert Panel had rejected as untimely the Claimant's attempt to introduce evidence of the October 2013 announcement in the Expert Determination proceeding. The IRP Panel takes no position as to the correctness of that procedural decision, as the IRP Panel has concluded that the Claimant's IRP claims as to the Expert Determination itself are untimely. In any event, it is doubtful that such a procedural decision would in any case have been subject to an IRP, even if timely.

8.60 Nevertheless, situating this IRP Panel's review at the time that the Board took its decision not to extend the new review procedure to the inconsistent .CHARITY determinations, nothing in the record indicates that the Board took into account the following:

(a) that the decision that ICANN would adopt the GAC Beijing Communiqué recommendations was a major policy development for ICANN, announced in October 2013, that would lead to the establishment of new undertakings in its registry agreements, which would be mandatory and applicable across-the-board to all Category I and Category II gTLD's, including but not limited to .CHARITY, providing an important change to the Applicant Guidebook;

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[225] This is despite the fact that the Claimant's Reconsideration Request was pending at the time the NGPC first published framework principles of a potential review mechanism that would be limited only to "perceived Inconsistent String Confusion Expert Determinations." The Claimant filed its Reconsideration Request on 24 January 2014 and the NGPC published Approved Resolutions formally adopting the recommendations of the Bejing Communiqué and describing the new review mechanism, which would be limited to identified SCO Expert Determinations, on 5 February 2014. Approved Resolutions, 5 February 2014 resolutions, **Claimant Exhibit 14**, page 3.

(b) that the Board indicated publicly that it planned to adopt the GAC Beijing Communiqué recommendations relating to .CHARITY three months prior to the issuance of the inconsistent .CHARITY Expert Determinations;

(c) that the effect of that decision was to render the eligibility requirements in respect of all applicants for the .CHARITY gTLD identical, including those proposed by the Claimant;

(d) that all .CHARITY gTLD applicants originally elected to protect their positions in respect to any future action relating to the Beijing Communiqué by clearly stating in their application materials that they would comply with any ICANN registration requirements, including in the submission of their final PICs for approval;

(e) that the IO had lodged identical objections in March 2013 to the .CHARITY applications based on the initial lack of a commitment to operate a limited registry, but the Expert Panel nevertheless overruled the IO community objection for the SRL and Excellent First applications based on their amended commitment to limit the eligibility requirements in a manner that was consistent with the GAC Beijing Communiqué recommendations and, in the case of Excellent First's amended commitment, explicitly referred to the recommendation; and

(f) that the Expert Panel upheld the IO community objection to the Claimant's application despite the practical effect of ICANN's announcement in October 2013 that it intended to adopt the GAC Beijing Communiqué's recommendations concerning Category I and Category II safeguards, coupled with the Claimant's (and SRL and Excellent First's) advance undertakings to comply with such safeguards being to level all applications for the .CHARITY gTLD, to put all three applications on a level playing field and rendering them functionally indistinguishable in respect of eligibility requirements.

8.61 Given the procedural and substantive effect of the announcement that the Board would adopt the GAC Beijing Communiqué recommendations, at the time the Board determined the scope of the new Inconsistent Determination Review Process, any practical differences in the "materials presented", as well as any "nuanced distinctions" perceived to have existed between the .CHARITY applications in relation to eligibility requirements prior to October 2013, had ceased to have any material effect prior to the .CHARITY Expert Determinations.

8.62 For the same reasons, any "reasonable explanations" for perceived inconsistencies between the .CHARITY Expert Determinations based on the different eligibility requirement undertakings prior to October 2013 were eliminated by the ICANN Board's announcement that it would adopt the GAC Beijing Communiqué recommendations. The effect of that decision, coupled with *all* applicants' undertakings to follow any GAC Beijing Communiqué recommendations adopted by ICANN, was to render the applicants' eligibility requirements criteria identical across all three applications.

8.63 The Panel concludes that the Board's decision not to expand the scope of the proposed mechanism to include other Expert Determinations, and in particular the .CHARITY Expert Determinations, failed to take into account the following factors:

(a) the .CHARITY Expert Determinations were the only other set of inconsistent Expert Determinations dealing with the same objection by same objector to identical strings that was outstanding at the time that the ICANN Board determined the scope of the process, making them the only other non-SCO Expert Determinations to fit the "strict definition" of "inconsistent" the NGPC set forth in the 5 February 2014 Approved Resolution;[226]

(b) the Claimant, SRL and Excellent First were the only applicants for the .CHARITY gTLD and at the time of the Expert Determinations and the Claimant's application was distinguished only by the absence of a separately proffered amended public interest commitment to operate a limited registry in response to the IO's objection;

(c) as at 12 October 2014, SRL had not taken any action in reliance on the Expert Determination, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds; and

(d) the effect of ICANN's action in determining it would implement new mandatory registration requirements applicable to all Category I and Category II gTLDs was to eliminate any practical distinction between the competing .CHARITY applications, including the basis on which the Expert Panel had distinguished the Claimant's applications by upholding the community objection in relation to it.

[226] As far as the IRP Panel is aware, any other inconsistent Expert Determinations did not involve identical objections to identical strings, including .Vistaprint and .HOSPITAL. In the circumstances, there is no support in the record for ICANN's contention that extending review to Claimant risks opening floodgates.

8.64 As a result of these factors, the impact on "predictability and fairness" in the application process of including this additional set of similarly situated Expert Determinations in the new Inconsistent Determination Review would be limited.

8.65 The fact that the inconsistent Expert Determinations in the .CHARITY applications were the only other inconsistent determinations of identical objections by the same objector to the same gTLD string that existed at the time the Board determined the scope of the new review process, and the fact that the Claimant was the only party prejudiced by such an inconsistent Expert Determination that was not entitled to participate in the new review process, strongly suggests that it was an inequitable action and did single out the Claimant. The requirement for discrimination is not that it was malicious or even intentional, and this Panel has not been presented with any evidence that ICANN acted maliciously or intentionally to single out the Claimant. Rather, the requirement for discrimination is that a party was treated differently from others in its situation without "substantial and reasonable" justification. The IRP Panel does find that this standard was met.

8.66 For the reasons discussed above, the Panel finds the reasons ICANN advanced for limiting the scope of the new process to the designated SCO determinations insufficient to constitute "substantial and reasonable cause" to subject Claimant to the disparate treatment of being denied access to the new process.

8.67 Although the Panel believes that it is appropriate to determine whether the Board acted in conformance with the Articles, Bylaws and Guidebook primarily based on the record of the Board's contemporaneously stated rationale for its actions, the Panel also has considered two further arguments that ICANN advanced in the IRP proceeding as follows.

(a) ICANN submitted that community and limited public interest objections differ from string contention objections in that the latter can be judged on the face of competing strings, while the two former categories of objection require recourse to the underlying applications for determination. The Panel finds this argument inconsistent, however, with the Board's contemporaneously stated rationale in its 12 October 2014 Decision and Action to exclude apparently inconsistent Expert Determinations other than the ones referred to the new process, *including other SCO Expert Determinations*, on the basis that "reasonable explanations" of the

apparent inconsistencies in differing Expert Determinations were found in the "materials presented" and the existence of other "nuanced distinctions."[227]

(b) ICANN submitted that there was less need for an additional process to review the apparently inconsistent Expert Determinations of the competing .CHARITY applications because they were determined by a single expert panelist "who therefore had all of the evidence for both objection proceedings in hand." ICANN contrasts this situation to the SCO determinations the Board designated for review, which were determined by different panels.[228] Although ICANN at the hearing characterized the new process as a "re-evaluation" in which "a single expert panel was tasked with re-evaluating the determinations,"[229] the Inconsistent Determination Review Process ICANN actually adopted did not involve reconciliation of the differing results of "both [SCO] objection proceedings", but rather independent review of a single SCO expert determination from each of the two sets which the NGPC designated, for reasons it chose not to state. The Panel finds ICANN's distinction on the basis that different panels issued the inconsistent SCO determinations insufficient to constitute "substantial and reasonable cause" for disparate treatment of the .CHARITY inconsistent determinations as compared to the SCO determinations that were accorded access to the new process.

8.68 The Panel therefore determines that the Board's action in excluding the Claimant from the new Inconsistent Determinations Review Procedure was inconsistent with the non-discrimination provision of Article II, Section 3 of ICANN's Bylaws.

ISSUE 2: Defined Review Standard (Article IV, Section 3.4)

8.69 The IRP Panel's findings as to the Defined Review Standard (Bylaws Article IV, Section 3.4) are set out below.

i. Did the Board act without conflict of interest in taking its decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure?

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[227] The distinction between open and limited registries may also be relevant to the resolution of string contention objections where the objection alleges a likelihood of confusion in relevant markets. The commitment to a limited registry, or lack thereof, appears in application materials and is not apparent from the face of the gTLD string. Report of Final Review Panel, *Verisign, Inc. v. United TLD Holdco Ltd.,* ICDR No. 01-15-0003-3822, **ICANN Appendix L**.

[228] ICANN Sur-Reply at para. 49; ICANN's hearing slides at 21.

[229] ICANN hearing slides at 21.

8.70 There is no suggestion that the Board had a conflict of interest, and the IRP Panel finds that the Board acted without conflict.

ii. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them in taking its decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure?

8.71 As to the 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action), the research, analysis, investigation and consultation process undertaken by the ICANN Board in establishing its new Inconsistent Determination Review Process is carefully documented. The Approved Resolutions of 12 October 2014 appear comprehensively to summarize the matter on which the Board relied in determining to limit the scope of application of the new process to selected inconsistent SCO Expert Determinations.

8.72 The carefully documented record does not reflect, however, that the Board considered the effect of its then-recent adoption of the GAC Beijing Communiqué recommendations in determining the scope of application of the new review mechanism. In particular, the Board does not appear to have considered the levelling effect on the pending .CHARITY applications of its decision to adopt the new PIC requirement.

8.73 The Board's announcement that it would adopt the GAC's Beijing Communiqué recommendations was a fact known to ICANN. ICANN, in exercising due diligence and care in deciding whether or not to include the perceived inconsistent .CHARITY Expert Determinations in the new Inconsistent Determinations Review Procedure at minimum should have taken that into account. Absent such consideration, in light of the circumstances outlined above, the IRP Panel must conclude that Bylaw standard of due diligence and care was not met on this occasion. Again, we make no finding that the Board's failure to consider the impact of its adoption of the Beijing Communiqué recommendations was malicious or intentional. We find simply that the levelling effect on the eligibility requirements in the pending applications of the new PIC requirement was a material fact that should have been considered, and apparently it was not.

iii. Did the Board members exercise independent judgment in taking the decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure, believed to be in the best interests of the community?

8.74 There is no indication that the Board members were acting in any way other than in good faith and exercising independent judgment, with the subjective belief that they were acting in the best interests of the community. The IRP Panel finds that the Board members exercised independent judgment, believed to be in the best interests of the community.

ISSUE 3: Did the Board Act For the Benefit of the Internet Community as a Whole? (ICANN Articles of Incorporation, Section 4)

(i) The Claimant's Position

8.75 The Claimant further submits that ICANN's Articles state that the Board must act "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."[230] The Claimant considers that the Board has failed to do so in relation to its .CHARITY Application. By failing to reconcile differing outcomes for the same objection, at least in respect to the differing .CHARITY Expert Determinations, which Claimant contends fit the same definition of "inconsistent determinations" the Board applied to .COM and .CAM, the Board has failed to act in the best interests of the Internet community.

8.76 ICANN adopted its new gTLD programme "to enhance choice and competition in domain names and promote free expression online."[231] The Claimant argues that the Board must remain "faithful to 'the public interest' and 'accountable to the Internet community'."[232] Furthermore, the Claimant considers that the Board has not acted in the best interests of the Internet community in its decision in relation to the Claimant and should have granted a review for "inconsistent and unreasonable" objection rulings.[233]

8.77 The Claimant also argues that the Bylaws and Articles compel the Board to remain accountable to the Internet community, as well as acting in the best interests of the Internet community. The Claimant further argues that the Board has conceded that it has not acted in the best interests of the Internet community: "[t]he Board fails the Bylaw directive of 'remaining accountable to the Internet community' by refusing to employ the

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[230] Claimant Request, para. 48.
[231] Claimant Request, para. 9.
[232] Claimant Request, para. 7
[233] Claimant Request, para. 8.

very 'mechanism' it created to right the wrong perpetrated by the types of conflicting objection rulings that include those made regarding. CHARITY".[234]

8.78 The Claimant relies on *Booking.com v ICANN* to show that "even where the Board acts reasonably and in what it believes to be the best interests of ICANN, a panel must still independently determine whether the Board acted or chose not to act in a manner 'consistent with the Articles, Bylaws, and … the policies and procedures of the Guidebook.'"[235]

(ii) The Respondent's Position

8.79 ICANN takes the position that the 12 October 2014 Decision and Action (and the preceding 5 February 2014 Decision and Action) are purposefully narrow and limited specifically to SCOs.[236] It expressly distinguished the objection decisions rendered in the context of other objection proceedings, such as those relating to Community Objections. The NGPC's procedural rationale was that "[t]wo panels confronting identical issues could – and if appropriate should – reach different determinations based on the strength of the material presented."

8.80 ICANN goes on to conclude that the materials presented to the two Expert Panels in .CHARITY were not the same and, in particular:

"SRL presented evidence demonstrating its commitment to limit registration in .CHARITY to members of the charity sector, while Corn Lake did not and instead maintained that .CHARITY would be 'open to all consumers.'"[237]

8.81 According to ICANN, SRL's proposed registration eligibility requirements for the .CHARITY gTLD were in the best interests of the community and the Claimant's open registration was not.

(iii) The Panel's Decision

8.82 The ICANN Articles of Incorporation, Article 4, require that ICANN act:

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[234] Claimant Request, Introduction.
[235] Reply, para. 37.
[236] ICANN Response, at para. 53.
[237] ICANN Response, at para. 56.

"for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and … local law."

8.83 It is plainly in the best interests of the Internet community as a whole that ICANN maintains a procedurally fair system with the highest levels of consistency and integrity. The Panel is of the view that well-reasoned, non-discriminatory application of the new Inconsistent Review Procedure would be in the best interests of the Internet community.

8.84 Prior to the issuance of the .CHARITY Expert Determinations, ICANN had announced that it would adopt the GAC Beijing Communiqué. As a consequence, *all* applicants were committed to the same registration limitations, both because the recommendations became mandatory and, importantly, because all had indicated in their applications a commitment to comply with any adopted recommendations. The impact of the decision to adopt the GAC Beijing Communiqué recommendations was a material factor in determining whether or not there were reasonable explanations for the perceived inconsistences in the .CHARITY Expert Determinations.

8.85 ICANN's failure to take the impact of its decision to adopt the GAC Beijing Communiqué recommendations into account was not in conformity with its own Bylaws or generally accepted standards of natural justice and due process reflected in its Core Values and other governing documents. Accordingly, the Panel finds that in this instance, ICANN cannot be found to have acted for the benefit of the Internet community as a whole.

8.86 It is not suggested by the Claimant that ICANN was motivated by anything other than the best interests of the Internet community. However, assessing its actions from an objective standard, failure to take into account material factors in its decision-making results in a procedural unfairness and disparate treatment that is not in the interests of that community as a whole.

8.87 For the reasons discussed above, we find the reasons the Board advanced at the time of its action to exclude .CHARITY insufficient to meet this standard. We likewise, for the reasons discussed, find ICANN's *post hoc* justification based on the fact that the .CHARITY applications were decided by a single Expert Panelist also insufficient.

ISSUE 4: Did the Board Action Abdicate Its Accountability Obligation?

(i) The Claimant's Position

8.88 The Claimant submits that one of ICANN's core values is for the Board to remain accountable to the Internet community through mechanisms that can enhance ICANN's effectiveness.[238] It submits that:

> "[t]he Board had an opportunity to bring such accountability to all of the inconsistent objection results reached on common TLDs, but excluded the sole community objection situation that fell within the ambit of what it did."[239]

8.89 The Claimant appears to argue that by deciding not to review all inconsistent Expert Determinations, the Board somehow abdicated its accountability obligation to uphold a certain standard in all Expert Determinations rendered pursuant to its procedures.[240]

(ii) The Respondent's Position

8.90 The Respondent submits that the Reconsideration Request is the only way for it to be involved in review of the Expert Determination of the objection to Claimant's Application because:

> "[r]econsideration is an accountability mechanism available under ICANN's Bylaws and involves a review by ICANN's Board Governance Committee ("BGC"). The BGC's consideration of reconsideration requests is limited to assessing whether the challenged action (or inaction) violated established policies or procedures."[241]

8.91 The Respondent also argues that the Claimant's challenge of the BGC's denial of Request 14-3 is time-barred because the Claimant did not assert any such claim in its IRP Request and waited until its Reply to raise the argument.[242] The Bylaws provide that such a claim should be submitted within thirty days of the posting of the Board meeting contested by the

[238] Claimant Request, para. 54.
[239] Claimant Request, para. 55.
[240] Claimant Request, para. 57.
[241] ICANN Sur-Reply, para. 8.
[242] ICANN Sur-Reply, para. 39.

prospective applicant.[243] On 27 February 2014, the BGC denied the Claimant's Request 14-3. The Claimant's right to file an IRP Request on this issue expired on 28 March 2014.[244]

8.92 The Respondent argues in favor of dismissal of the Claimant's claims in this respective on time-barred grounds alone.

8.93 The Respondent also argues that the Claimant's claims fail substantively too because the Claimant has been unable to identify any Bylaws or Articles which have been allegedly breached by the BGC.[245]

(iii) The Panel's Decision

8.94 The Panel has carefully considered the parties' respective positions concerning the allegation of ICANN's abdication of its accountability responsibilities and finds there to be no basis for those claims. We do not fault ICANN for its attempt to enhance its accountability through the creation of the new process. Rather, we have found that having created the process, ICANN's Core Values and Bylaws required that it be extended on a non-discriminatory basis to similarly situated applicants and that such distinctions as were to made regarding the scope of the process were required to be determined based on a reasonable factual record.

8.95 As to any suggestion that ICANN abdicated obligations by its Denial of the Reconsideration Request, as set out above in Section 7, any application to review to Reconsideration Request is out of time.

IPR PANEL REVIEW CONCLUSION

8.96 In conclusion, the IRP Panel determines that the ICANN Board's 12 October 2014 Decision and Action (as preceded by its February 2014 Decision and Action) is a "decision or action by the Board" that is "inconsistent with the Articles of Incorporation of Bylaws" of ICANN and "materially affected" the Claimant.

8.97 This Panel stresses that this is a unique situation and peculiar to its own unique and unprecedented facts. The facts were rendered particularly complicated and unusual by a

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[243] ICANN Sur-Reply, para. 40.
[244] ICANN Sur-Reply, para. 40.
[245] ICANN Sur-Reply, para. 41.

combination of (i) the Claimant's insistence throughout the Expert Determination proceeding that it would operate .CHARITY as an open registry – up to and until it became apparent that ICANN had decided not to permit that to occur, and (ii) the exceedingly unlikely and difficult timing of the Board's announcement that it would adopt the GAC's Beijing Communiqué recommendations – coming after the Expert Panel had closed the record but before the Expert Determination was made.[246] This unique set of circumstances created what was doubtless a difficult situation for ICANN to consider in establishing the scope of the new review process, but it does not relieve ICANN from its ultimate responsibility to act in accordance with its Bylaws and Articles of Incorporation.

8.98 This IRP Panel does not suggest that ICANN lacks discretion to make decisions regarding its review processes as set out in the Applicant Guidebook, which may well require it to draw nuanced distinctions between different applications or categories of applications. Its ability to do so must be preserved as being in the best interests of the Internet community as a whole.

8.99 In reaching this conclusion, the Panel carefully considered other relevant IRP Final Determinations and considers its approach to be consistent with these. In particular, the IRP Panels in *Booking.com v ICANN*, *Vistaprint v ICANN* and *ICM Registry v ICANN* were asked to review underlying Expert Determinations, which had been, or might have been, subject to Reconsideration Requests. Each considered that Reconsideration Review provides for procedural review and is not a substantive appeal (and that ICANN's Board was under no obligation to create a different appeal mechanism). For example:

(a) *Booking.com v ICANN* found it "crucial" to its decision that the Claimant there was not challenging the validity or fairness of the process and that no such challenge would have been timely;

[246] These circumstances, in which ICANN agreed to adopt the Beijing Communiqué recommendations while the .CHARITY Expert Determinations were still underway but after the record was closed led to a circumstance in which the Expert upheld a community objection that the Claimant could legitimately have considered moot. As noted already, however, it is outside the scope of this Panel's mission to determine whether the Expert rightly or wrongly excluded the Claimant's late submission regarding the Beijing Communiqué. It is also beyond this Panel's mission to express a view as to whether review of that Expert Determination under the Inconsistent Determinations Review Procedure, applying the standard of review determined by ICANN, should or will lead to a reversal of that Expert Determination. The sole issue before this Panel is whether the Board properly or improperly excluded the .CHARITY Expert Determinations from the Inconsistent Determinations Review Procedure in the first place.

(b) *ICM Registry v ICANN* found the "fundamental obstacle" to the Claimant's assertions to be that the established process had been followed in all respects and the time "long had passed" to challenge the processes themselves;[247]

(c) *Donuts v ICANN*[248] considered whether the Board should have extended the Inconsistent Determinations Review Procedure "to correct and prevent community objection rulings exceeding or failing to apply documented Guidebook standards"[249] and found that "the only differences in treatment that implicate Bylaws Article II, Section 3 are those which occur in like circumstances" and thus held that the record did not allow it to conclude that the "considerable consistency issues" raised in connection with string similarity cases were present in "community objection cases as a whole…"; and

(d) *VistaPrint v ICANN* characterized the claim as arising from "similarly situated" strings, as compared to the "inconsistent determinations" the NGPC addressed in the 12 October 2014 Resolution, (i.e. .WEB./WEBS being similar to .CAR/.CARS) and the claim of disparate treatment "a close question",[250] recommending that the Board conduct the Reconsideration Request step in the process that was, at the time of the IRP Panel, not yet engaged.

8.100 The Panel considers the Final Determination in *Dot Registry v ICANN*, which addressed primarily issues of adequacy and burden of proof in respect to the BCG's denial of a Reconsideration Request, to be of little relevance here. The Panel has found the instant IRP request untimely in respect to the denial of Claimant's Reconsideration Request. In reaching its findings in respect of the basis on which the NGPC acted in determining the scope of the new review mechanism, the Panel here has relied on a record it considered carefully documented and apparently comprehensive.

8.101 The current IRP is not a review of a Reconsideration Request or Expert Determination but, rather, of a decision not to extend the scope of the new Inconsistent Determinations Review Procedure to the .CHARITY Expert Determinations, despite those Determinations meeting the strict criteria for inclusion. This is further supported by the ICANN Board's

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[247] ICM Registry v ICANN, para. 129.
[248] As addressed in post hearing submissions.
[249] Final Declaration of the Independent Review Panel in Donuts, Inc. and ICANN at para. 73.
[250] Final Declaration, *VistaPrint Ltd. v. ICANN*, ICDR No. 01-14-0000-6505, **ICANN Appendix K**, at para. 176

subsequent decision to include the .HOSPTIAL Expert Determinations, despite those Determinations appearing to have been less clearly within the criteria that the .CHARITY Determinations.

9. COSTS

9.1 The Supplementary Rules provide, at Article 11 that:

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

9.2 The ICDR Rules, Article 34, define costs to include the fees and expenses of the arbitrators and Administrator as well as the reasonable legal and other costs incurred by the parties.

9.3 The IRP Panel considers that these IRP proceedings involve extraordinary circumstances. The relevant factors, which go to the reasonableness of the parties' positions and their contribution to the public interest, include as follows:

(a) the exceedingly unlikely and difficult timing of the Board's announcement that it would adopt the GAC's Beijing Communiqué recommendations – coming after the Expert Panel had closed the record but before the Expert Determination was made;

(b) the unique impact of the Beijing Communiqué recommendations on the .CHARITY applications and the nuances thereof;

(c) the Claimant's insistence throughout the Expert Determination proceeding that it would operate .CHARITY as an open registry – up to and until it became apparent that ICANN had agreed not to permit that to occur;

(d) the lack of any deliberate disparate treatment of the Claimant by ICANN;

(e) the Panel's 20 January 2016 determination that the Claimant's Reply exceeded the scope of PO1; and

(f) the fact that the new Inconsistent Determination Review Process is to be funded by ICANN.

9.4 These factors created what was doubtless a difficult situation for ICANN to consider in establishing the scope of the new review process. Although they do not relieve ICANN from its ultimate responsibility to do so in accordance with its Bylaws and Articles of Incorporation, they do influence the IRP Panel's costs determination.

9.5 The IRP Panel accordingly determines that, although ICANN is not the prevailing party in the IRP, due to the extraordinary circumstances described above, ICANN shall not be responsible for bearing all costs of the proceedings. Instead, pursuant to Article 11 of the Supplementary Rules, the IRP Panel determines that no costs shall be allocated to the Claimant as the prevailing party. Consequently, each Party shall bear its own costs in respect of this IRP Panel proceeding.

10. RELIEF REQUESTED

10.1 The Claimant seeks:

(a) a direction from the Panel to ICANN's Board of Directors to reverse the .CHARITY objection ruling against CORN LAKE, LLC;

(b) a direction from the Panel to ICANN's Board of Directors to subject that ruling to the same review as provided in the Resolution for the .COM and .CAM decisional conflicts; or

(c) a direction from the Panel to ICANN's Board of Directors to reinstate CORN LAKE, LLC's application conditioned upon its acceptance of the PIC, agreed to by SRL; and

(d) an order from the Panel [to ICANN's Board of Directors] to place all .CHARITY applications on hold during the course of these proceedings and for ICANN to refrain from engaging in any contracting or delegation processes related to the same.

11. DISPOSITIVE

11.1 In Accordance with Article IV, Section 3.11 of the Bylaws, the Panel:

(a) Declares that the Claimant, Corn Lake, is the prevailing party;

(b) Declares that the action of the Board in omitting .CHARITY from the new Inconsistent Determinations Review Procedure was inconsistent with the Articles of Incorporation and Bylaws;

(c) Recommends that the Board extend the new Inconsistent Determinations Review Procedure to include a review of Corn Lake's .CHARITY Expert Determination;

(d) Recommends that the Board continue to stay any action or decision in relation to SRL's .CHARITY application until such time as the Board reviews and acts upon the opinion of the IRP Panel; and

(e) Determines that no costs shall be allocated to the prevailing party.

Signed:

Mark Morril

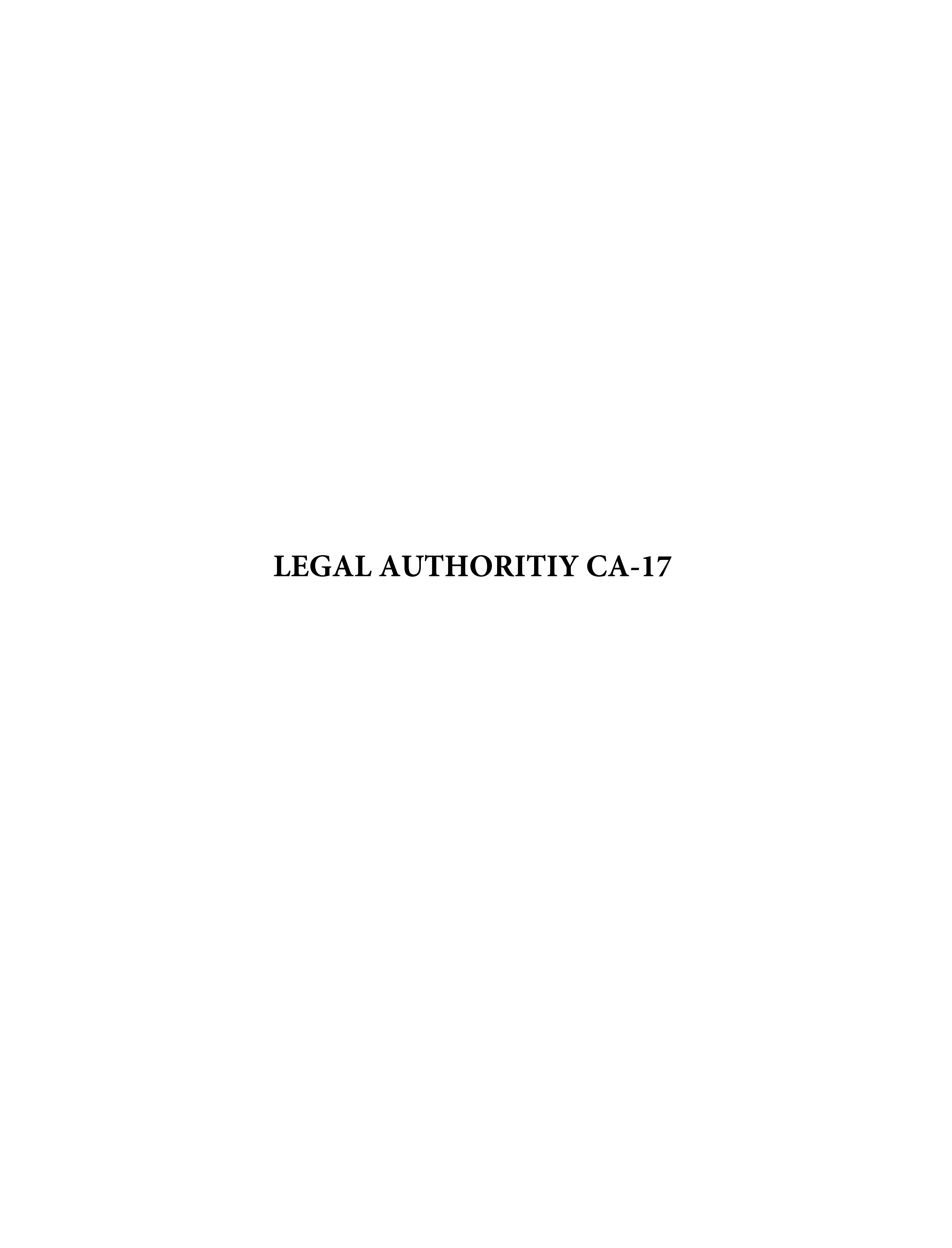
Date: 17 October 2016

Michael Ostrove

Date: 17 October 2016

Wendy Miles QC

Date: 17 October 2016



LEGAL AUTHORITIY CA-17

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Independent Review Panel

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
Pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the *International Arbitration Rules of the ICDR*, and the *ICDR Supplementary Procedures for ICANN Independent Review Process*

Gulf Cooperation Council (GCC)	
Claimant	
and	**ICDR Case No. 01-14-0002-1065**
Internet Corporation for Assigned Names and Numbers (ICANN)	
Respondent	

PARTIAL FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL

Independent Review Panel

Lucy Reed, Chair
Anibal Sabater
Albert Jan van den Berg

I. INTRODUCTION

1. This case concerns the dispute between the Gulf Cooperation Council ("**GCC**"), and the Internet Corporation for Assigned Names and Numbers ("**ICANN**") over the generic Top-Level-Domain name ("**gTLD**") ".persiangulf".

2. The underlying dispute is a broader one, concerning the name for the body of water separating the Arabian Peninsula from the Islamic Republic of Iran ("**Iran**"), which is a non-Arab nation historically called Persia. The Arab states, including members of the GCC, use the name "Arabian Gulf", while Iran uses the name "Persian Gulf". The sensitivity of this geographical name dispute, which has gone on for over 50 years, is well-known. It is representative of deeper disputes between GCC members and Iran over matters of religion, culture and sovereignty, prompting sanctions such as the banning of maps and censorship of publications that use either "Arabian Gulf" or "Persian Gulf". (For purposes of neutrality, we will use the simple term "Gulf" in this Declaration.)

3. The particular dispute has its origins in the July 2012 application by a Turkish company founded by Iranian nationals, Asia Green IT System Bilgisayar San. Ve Tic. Ltd Sti ("**Asia Green**"), for registration of the ".persiangulf" gTLD as an international forum for people of Persian descent and heritage. The GCC has contested this application at every step of the ICANN gTLD review process, primarily on grounds that ".persiangulf" targets the Arabian Gulf Arab community, which was not consulted and opposes this use of the disputed geographical name.

4. The GCC initiated this Independent Review Process ("**IRP**") in December 2015 to challenge the ICANN Board's taking any further steps to approve registration of ".persiangulf" gTLD to Asia Green, alleged to violate the ICANN Articles and Bylaws.

5. Based on the IRP Panel's review and assessment of the Parties' submissions and evidence, our Partial Declaration is in the GCC's favor. At the Parties' joint request, the IRP Panel will allocate costs in a Final Declaration at a later stage.

II. THE PARTIES AND COUNSEL

6. The Claimant GCC is a political and economic alliance established in 1981 among six countries: the United Arab Emirates ("**UAE**"), Saudi Arabia, Kuwait, Qatar, Bahrain and Oman. The GCC is based in Saudi Arabia. Its address is Contact Information Redacted

7. The GCC is represented by Natasha Kohne and Kamran Salour of Akin Gump Strauss Hauer & Feld LLP, Sawwah Square, Al Sila Tower, 21st Floor, P.O. Box 55069, Abu Dhabi, UAE.

8. The Respondent ICANN is a non-profit public benefit corporation established under the laws of the State of California, USA. ICANN's mission is "*to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems*", including the domain name system.[1] ICANN's address is 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536, USA.

9. ICANN is represented by Jeffrey A. LeVee, Eric P. Enson, Charlotte Wasserstein and Rachel Zernik of Jones Day, 555 South Flower Street, 50th Floor, Los Angeles, CA 90071, USA.

III. BACKGROUND FACTS

10. We set out below the basic background facts, which are undisputed except where otherwise noted. More detailed background facts are included in the separate sections below on the jurisdiction and merits issues in dispute.

A. ICANN's New gTLD Program

11. As set out in Article 3 of its Articles of Incorporation, ICANN is mandated to develop procedures to expand the number of top level domains and increase the number of companies approved to act as registry operators and sell domain name registrations. In

[1] ICANN's Response to Gulf Cooperation Council's Request for Emergency Relief ("**Response to Emergency Request**"), ¶ 6.

June 2011, ICANN launched a significant expansion with the "New gTLD Program". According to ICANN, this Program is its "most ambitious expansion of the Internet's naming system". To illustrate, ICANN approved only seven gTLDs in 2000 and another small number in 2004-2005[2] and then received almost 2000 applications in response to the New gTLD Program.[3]

12. ICANN developed an Applicant Guidebook through several iterations, with Version 4 of the New gTLD Application Guidebook dated 4 June 2012 ("**Guidebook**") being relevant here.[4] The Guidebook, running to almost 350 pages, sets out comprehensive procedures for the gTLD application and review process. It includes instructions for applicants, procedures for ICANN's evaluation of applications, and procedures for objections to applications. In line with ICANN's policies of transparency and accountability, applications for new gTLDs are posted on the ICANN website for community review and comment. ICANN may take such community comments into account in deciding whether an application meets the criteria for approval of a new gTLD registry operator.

13. Decisions on applications for new gTLDs are made by the New gTLD Program Committee of the ICANN Board ("**NGPC**").

B. The ".persiangulf" New gTLD Application

14. On 8 July 2012, Asia Green applied for the ".persiangulf" gTLD. In its application form, Asia Green identified the mission/purpose of the proposed gTLD in relevant part as follows:

> *There are in excess of a hundred million of Persians worldwide. They are a disparate group, yet they are united through their core beliefs. They are a group whose origins are found several millennia in the past, their ethnicity often inextricably linked with their heritage. Hitherto, however, there has been no way to easily unify them and their common cultural, linguistic and historical heritage. The .PERSIANGULF gTLD will help change this.*[5]

[2] Response to Emergency Request, ¶¶ 12-13.
[3] https://newgtlds.icann.org/en/about/program.
[4] Response to Emergency Request, Exh. R-ER-3/R-2 ("**Guidebook**").
[5] Request for Independent Review Process ("**Request for IRP**"), ¶¶ 31 and 66.

15. Asia Green has also applied for a number of other gTLDs. Its application for ".pars" (referring to the ancient Persian homeland of Pars), which was based on essentially the same mission/purpose as ".persiangulf" to unite the Persian community, was successful and led to a registry agreement in 2014.[6] Its applications for ".islam" and ".halal", however, were not accepted by ICANN.[7]

C. The GCC's Objections to Asia Green's ".persiangulf" gTLD Application

16. The GCC objected to Asia Green's application within the mechanisms provided by ICANN.

1. Concerns Raised with the Governmental Advisory Committee to ICANN

17. ICANN, which is a complex global organization, relies on committees to provide advice from different constituencies. As relevant here, the Governmental Advisory Committee to ICANN ("**GAC**") consists of members appointed by and representing governments. The GAC was created to:

> *consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements, or where they may affect public policy issues.*[8]

18. Module 3.1 of the Guidebook, which is entitled "GAC Advice on New gTLDs", allows GAC members to raise governmental concerns about a gTLD application. Such concerns are considered by the GAC as a whole, which may agree on advice to forward to the ICANN Board. Such GAC advice to the ICANN Board is one of two methods of governmental recourse against an application for a gTLD. (The second method, an "Early Warning Notice", is discussed below.)

19. As set out in Module 3.1 of the Guidebook, the advice from the GAC to the ICANN Board may take one of the following three forms:

    a. A "Consensus GAC Advice", in which the GAC, on consensus, provides public policy advice to the ICANN Board that an application **should not** proceed, creating a strong

[6] Request for IRP, ¶ 65.
[7] Ibid., ¶ 61.
[8] Guidebook, Module 3.1, p. 1.

presumption of non-approval of the application by the ICANN Board; there is no equivalent form of consensus GAC advice that an application **should** proceed;

b. The expression of **concerns** in the GAC about an application, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those concerns, and to give reasons for its ultimate decision; or

c. Advice that the application should not proceed unless remediated, creating a strong presumption that the ICANN Board should not allow the application to proceed unless the applicant implements a remediation method available in the Guidebook.

20. On 14 October 2012, the UAE wrote to the GAC and ICANN expressing its disapproval and non-endorsement of Asia Green's ".persiangulf" application.[9] Similar letters from Oman, Qatar and Bahrain followed.[10] As members of the GCC and GAC, these governments objected to registration of ".persiangulf" as a new gTLD on grounds that the proposed domain refers to a geographical place subject to a long historical naming dispute and targets countries bordering the Gulf that were not consulted and did not support the domain, confirming that there was not community consensus in favor of the new gTLD. (The subsequent GAC consideration of these concerns is described below.)

2. Early Warning Process

21. During the public comment period for gTLD applications, the Guidebook (Module 1.1.2.4) also allows the GAC to issue an "Early Warning Notice" to the ICANN Board flagging that one or more governments consider the application to be sensitive or problematic. The Board in turn notifies the applicant for the gTLD. As the Early Warning is merely a notice, and not a formal objection, it alone cannot lead to ICANN's rejection of the application.

22. On 20 November 2012, the governments of Bahrain, Oman, Qatar and the UAE raised their concerns about Asia Green's ".persiangulf" application through the GAC Early Warning process. The reasons mirrored those of their GAC objections: "*The applied for*

[9] Request for IRP, Annex 6.
[10] Ibid., Annexes 7-9.

new gTLD is problematic and refers to a geographical place with disputed name"; and "*Lack of community involvement and support*".[11]

3. Independent Objector Review

23. The Guidebook (Module 3, Articles 3.2.1–3.2.5) also provides an "Independent Objector" process, when there has been negative public comment before any formal objection. ICANN appoints an Independent Objector whose role, as the name indicates, is to exercise independent judgement in the public interest to determine whether to file and pursue a "Limited Public Interest Objection" or a "Community Objection" to the application.

24. In December 2012, the Independent Objector for the ".persiangulf" gTLD application, Professor Alain Pellet, issued his comments aimed at "*informing the public of the reasons why the* [Independent Objector] *does not consider filing an objection*" in relation to the ".persiangulf" application.[12] Professor Pellet concluded that a Limited Public Interest Objection was not warranted, because there were no binding international legal norms to settle the naming dispute. Likewise, he found a Community Objection to be "*unadvisable*".[13] Although Professor Pellet found that there was a clearly delineated Gulf community at least implicitly targeted by Asia Green's application and that a significant portion of that community opposed delegation of ".persiangulf", he considered it "*most debateable*" that the gTLD would "*create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the targeted community*" (meaning the Arab portion), which is a necessary criterion in the Guidebook for a Community Objection.[14] He stated in this regard that:

> *it is a matter of fact that there is a long-term dispute over the name of the Gulf and that both designation*[s] [i.e. Persian Gulf and Arabian Gulf] *are in use. It is indeed not the mission of the gTLD strings to solve nor to exacerbate such a dispute; but they probably should adapt to the status quo and the* [Independent Objector] *deems it unsuitable to take any position on the question. He notes that it is open to the Arabian Gulf community to file an objection as well as the same community could have applied for a ".Arabiangulf" gTLD.*[15]

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[11] Ibid., Annex 10.
[12] Independent Objector's Comments on Controversial Applications, Response to Emergency Request, Exh. R-ER-5.
[13] Ibid., p. 6.
[14] Ibid., p. 5.
[15] Ibid., pp. 5-6.

4. Formal Community Objection by the GCC

25. Module 3 of the Guidebook also provides for formal objection by third parties to challenge a gTLD application. There are four types of formal objections, of which a "Community Objection" is one.

26. A Community Objection is made on the basis that "[t]*here is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted*" (Module 3.2). Pursuant to Paragraph 3.2.3 of the Guidebook, the International Centre of Expertise of the International Chamber of Commerce ("**ICC**") administers disputes brought by Community Objection. One expert hears a Community Objection (Paragraph 3.4.4).

27. On 13 March 2013, the GCC filed a Community Objection to the ".persiangulf" application. The ICC appointed Judge Stephen M. Schwebel as the Expert Panelist to hear the Objection (Case No. EXP/423/ICANN/40). (Judge Schwebel's determination, which he issued on 30 October 2013, is discussed below.)

D. GAC Advice to the ICANN Board

28. Concurrent with the various opposition avenues described above, the GAC was considering the GCC's concerns in the course of its regular meetings.

29. In its 11 April 2013 meeting in Beijing, China, the GAC issued advice to the ICANN Board concerning a number of gTLD applications, using the typical format of a post-meeting Communiqué. Certain of the advice in the Beijing Communiqué was Consensus GAC Advice against gTLD applications, creating a presumption that the ICANN Board should **not** approve the relevant applications. In the case of certain geographically-based strings, including ".persiangulf", the Beijing Communiqué reflected that the GAC required time for further consideration. On that basis, the GAC advised the ICANN Board not to proceed beyond initial evaluation of Asia Green's application.[16]

[16] Request for IRP, Annex 23, p. 3.

30. The NGPC of the ICANN Board accepted this advice. The NGPC documented its decision in a Resolution with an annexed "Scorecard" setting out its response to each item in the GAC's Beijing Communiqué.[17]

31. In its 13-18 July 2013 meeting in Durban, South Africa, the GAC gave further consideration to the Asia Green application for ".persiangulf". Mr Abdulrahman Al Marzouqi, who represented the UAE and the GCC at the Beijing and Durban GAC meetings, testified that no consensus was reached to oppose or support the application. In his words:

> *5. I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC's opposition to the .PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because "Persian Gulf" is a disputed name. A substantial amount of GAC members in attendance shared these concerns.*
>
> *6. Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the "Persian Gulf" name, and Iran's GAC representative obviously does not share the other GAC members' concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson... pulled me to the side to express her frustration that GAC could not reach a consensus.*[18]

32. The Minutes of the Durban meeting ("**Durban Minutes**"), on which the GCC relies in these IRP proceedings, reported:

> *The GAC finalized its consideration of .persiangulf after hearing opposing views, the GAC determined that it was **clear that there would not be consensus of an objection regarding this string** and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name.*[19] (Emphasis added.)

33. The 18 July 2013 Durban Communiqué, on which ICANN relies as the document formally providing GAC advice to the ICANN Board, reported:

[17] Response to Emergency Request, Exhs. R-ER-6 and R-ER-7.
[18] Claimant's Request for Emergency Arbitrator and Interim Measures of Protection, Witness Statement of Abdulrahman Al Marzouqi (22 December 2014) ("**Al Marzouqi Statement**"), paras. 5-6.
[19] Request for IRP, Annex 34.

The GAC has finalised its consideration of the following strings, and ***does not object*** *to them proceeding:*

. . .

ii. .persiangulf (application number 1-2128-55439).[20] (Emphasis added.)

34. On 10 September 2013, relying on the Durban Communiqué, the NGPC of the ICANN Board passed a resolution to continue to process the ".persiangulf" gTLD application, with a notation that there was a Community Objection:

> ***ICANN will continue to process the application*** *in accordance with the established procedures in the* [Guidebook]. *The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF.*[21] (Emphasis added.)

35. The NGPC resolution and related Scorecard were posted on the ICANN website on 12 September 2013. The Board Minutes and related materials were posted more than two weeks later, on 30 September 2013.

36. It is the ICANN Board's decision on 10 September 2013 to continue to process Asia Green's ".persiangulf" gTLD application that the Claimant GCC challenges in these IRP proceedings.

E. Expert Determination of the Community Objection

37. On 30 October 2013, one month after ICANN's posting of the Durban Minutes, Judge Schwebel issued his Expert Determination dismissing the GCC's Community Objection.[22]

38. Judge Schwebel first found that the GCC had standing to object to the ".persiangulf" application, as an institution created by treaty and having an ongoing relationship with a clearly delineated community, namely the Arab inhabitants of the six GCC states on the Gulf. He then proceeded to find in the GCC's favor on the first three of the four elements required by the Guidebook for a successful Community Objection (which, it bears noting, are not the same as the elements applicable to these IRP proceedings). Judge Schwebel found that: (a) the community invoked is a clearly delineated community; (b) the relevant

[20] Ibid., Annex 24.
[21] Response to Emergency Request, Exhs. R-ER-9 and R-ER-10.
[22] Case No. EXP/423/ICANN/40, Expert Determination of Judge Stephen M. Schwebel, Request for IRP, Annex 2.

community was substantially opposed to the ".persiangulf" application, and (c) the relevant community was closely associated with and implicitly targeted by the gTLD string.

39. Judge Schwebel, however, then found against the GCC on the fourth element, on grounds that the GCC had failed to prove that the targeted community would "*suffer the likelihood of material detriment to their rights or legitimate interests*". In his assessment, even though geographical name disputes such as the Arabian Gulf-Persian Gulf dispute can have significant impacts on international relations, "*it was far from clear that the registration would resolve or exacerbate or significantly affect the dispute*".[23] Like the Independent Objector before him, Judge Schwebel noted that the GCC could apply for its own ".arabiangulf" string.

40. This Independent Review Process followed.

IV. THE INDEPENDENT REVIEW PROCESS: THE ARCHITECTURE

41. Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), of the ICANN Bylaws sets out the procedure for independent review of actions taken by the ICANN Board.

42. Paragraph 2 of Article IV, Section 3, 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. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws of the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.*

43. Paragraph 7 of Article IV, Section 3, provides that "[a]*ll IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN*". As stated in the Supplementary Procedures for ICANN Independent Review Process ("**Supplementary Procedures**"), the ICANN Board has designated and approved

[23] Ibid., p. 11.

the International Centre for Dispute Resolution (**"ICDR"**) as the Independent Review Panel Provider.[24]

44. The Supplementary Procedures apply to these proceedings, in addition to the ICDR International Arbitration Rules (**"ICDR Rules"**). Pursuant to Article 2 of the Supplementary Procedures, in the event of any inconsistency between the Supplementary Procedures and the ICDR Rules, the former prevail.

45. The Parties dispute whether the ICANN Bylaws are also applicable to this procedure, in particular in relation to the determination of costs. (This is discussed in Section IX below.)

46. The ICANN Bylaws provide a three-question standard of review for the Independent Review Process. As set out in Paragraph 4 of Article IV, Section 3:

> *Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), 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 IRP Panel must apply a defined standard of review to the IRP request, focusing on:*
>
> *a. did the Board act without conflict of interest in taking its decision?*
>
> *b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
>
> *c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

47. Article 8 of the Supplementary Procedures replicates this standard of review in similar terms.

V. THE INDEPENDENT REVIEW PROCESS: PROCEDURAL HISTORY

48. On 5 December 2014, the GCC filed its Request for Independent Review Process with the ICDR (**"Request for IRP"**). The Claimant attached a number of Annexes, and the Expert Report of Mr. Steven Tepp.

[24] The standing panel of reviewers contemplated in Article, IV, Section 3, Paragraph 6, of the ICANN Bylaws has not been established. Claimant's Supplementary Request for Independent Review Process (**"Supplementary IRP Request"**), Annex S-8.

49. The Request for IRP invokes ICANN's accountability mechanisms for the independent review of ICANN Board action, as set out in Article IV, Section 3, of the ICANN Bylaws.

50. Also on 5 December 2014, the Claimant filed a Request for Emergency Arbitrator and Interim Measures of Protection ("**Emergency Request**"). In the Emergency Request, the GCC sought:

    a. Timely appointment of an Emergency Arbitrator to hear its request for emergency relief to preserve its right to a meaningful independent review; and

    b. An order enjoining ICANN from executing the ".persiangulf" registry agreement with Asia Green while the Request for IRP was pending.

51. On 9 December 2014, ICANN consented to the appointment of an Emergency Panelist. Mr. John A.M. Judge was appointed on the same day to fulfil that role.

52. On 17 December 2014, the Respondent submitted its Response to Gulf Cooperation Council's Request for Emergency Relief, asking that the Emergency Request be denied.

53. On 22 December 2014, the Claimant filed its Reply in Support of its Request for Emergency Arbitrator and Interim Measures of Protection. This submission included the Witness Statement of Mr. Al Marzouqi ("**Al Marzouqi Statement**").

54. On 23 December 2014, the Emergency Panelist conducted a hearing by telephone conference call.

55. On 20 January 2015, ICANN submitted its Response to Claimant's Request for Independent Review Process.

56. On 12 February 2015, Mr. Judge issued his Interim Declaration on Emergency Request for Interim Measures of Protection ("**Emergency Declaration**"). The Conclusion of the Emergency Declaration provided as follows:

    > *96. Based on the foregoing analysis, this Emergency Panel makes the following order by way of an interim declaration and recommendation to the ICANN Board that:*

a. *ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted;*

b. *This order is without prejudice to the IRP panel reconsidering, modifying or vacating this order and interim declaration upon a further request;*

c. *This order is without prejudice to any later request to the IRP panel to make an order for the provision of appropriate security by the Claimant; and*

d. *The costs of this Request for Interim Measures shall be reserved to the IRP panel.*[25]

57. Following the Emergency Declaration, the present IRP Panel was constituted. The chair was appointed on 4 December 2015.

58. On 6 January 2016, the IRP Panel held a preparatory conference call with the Parties. The Panel issued Procedural Order No. 1 on 8 January 2016 (corrected 13 January 2016), establishing the submissions and setting the timetable for the proceedings. The merits hearing by telephone conference call was scheduled for 17 May 2016.

59. Pursuant to Procedural Order No. 1, the GCC filed its Supplementary Request for Independent Review Process ("**Supplementary IRP Request**") on 12 February 2016. This submission included the Supplementary Witness Statement of Mr. Al Marzouqi ("**Supplementary Marzouqi Statement**"), which described the GCC's unsuccessful attempts to conduct a conciliation process with both ICANN and Asia Green after the GCC filed its Request for IRP.

60. On 14 March 2016, ICANN filed its Response to Claimant's Supplementary IRP Request ("**Response to Supplementary IRP Request**"). As was the case in the emergency proceedings, ICANN did not file any witness statements.

61. On 29 March 2016, the GCC submitted its Reply in Support of its Supplementary Request for IRP, with no additional witness statements. ICANN's Response followed on 12 April 2016, ("**Rejoinder to IRP Request**"), again with no witness statements.

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[25] Interim Declaration on Emergency Request for Interim Measures of Protection ("**Emergency Declaration**"), ¶ 96.

62. On 7 May 2016, the Claimant requested that the hearing be postponed until July 2016. ICANN did not oppose. The IRP Panel rescheduled the hearing for 7 July 2016.

63. The hearing took place by telephone conference call on 7 July 2016, lasting approximately two hours. The IRP Panel heard submissions from counsel for both Parties. As agreed by the Parties, there was no fact or expert witness testimony.

64. Having determined that there was no need for further submissions, the Panel declared the hearing officially closed on 19 October 2016, except as to costs.

VI. THE RELIEF SOUGHT

65. The Claimant GCC seeks a Declaration:

a. stating that the ICANN Board violated ICANN's Articles, Bylaws and the New gTLD Application Guidebook of 4 June 2012;

b. recommending to the Board that ICANN take no further action on the ".persiangulf" gTLD, including by enjoining ICANN from signing the registry agreement with Asia Green, or any other entity;

c. awarding the GCC its costs in this proceeding; and

d. awarding such other relief as the Panel may find appropriate or that the GCC may request.[26]

66. The Respondent ICANN seeks a Declaration:

a. denying the GCC's IRP Request;

b. awarding ICANN its reasonable fees and costs incurred, including legal fees, if it is the prevailing party.[27]

[26] Supplementary IRP Request, ¶ 63.
[27] Response to Supplementary IRP Request, ¶¶ 30 and 32.

VII. JURISDICTION: TIMELINESS OF THE REQUEST FOR IRP

A. The Issue and Legal Framework

67. A preliminary jurisdictional issue for decision is whether the GCC's Request for IRP is time-barred. ICANN argues that the Request is time-barred; the GCC disagrees.

68. As a starting point, the 30-day deadline for challenging an ICANN Board action appears in Article IV, Section 3, Paragraph 3 of the ICANN Bylaws ("**IRP Deadline**"), which provides in relevant part:

> *A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.*

69. Article IV, Section 3, of the ICANN Bylaws, together with the ICANN document entitled "Cooperative Engagement Process – Requests for Independent Review" dated 11 April 2013 ("**CEP-IRP Document**"),[28] codify two exceptions to the IRP Deadline.

a. The IRP Deadline is tolled if the parties are engaged in a Cooperative Engagement Process ("**CEP**"), referred to in Paragraph 14 of Article IV, Section 3, of the ICANN Bylaws:

> *Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.*

Pursuant to the CEP-IRP Document (pp. 1-2):

> *If ICANN and the requestor have not agreed to a resolution of issues upon the conclusion of the cooperative engagement process, or if issues remain for a request for independent review, the requestor's time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.*

[28] Response to Claimant's Request for Independent Review Process ("**Response to IRP Request**"), Exh. R-5; Supplementary IRP Request, Exh. S-10.

b. Pursuant to the CEP-IRP Document (para. 6), ICANN and an IRP requestor may agree, in writing, to extend the IRP Deadline.

70. To recall, certain relevant facts are undisputed. Following the Durban GAC meeting and Communiqué, ICANN posted the Durban Minutes and related materials on 30 September 2013. The GCC filed its Request for IRP on 5 December 2014. Obviously, 5 December 2014 is more than 30 days after the 30 September 2013 posting of the Durban Minutes and related materials.

71. It is also undisputed that the Parties neither initiated a formal CEP nor agreed in writing to extend the IRP Deadline.

72. Accordingly, the issue before the IRP Panel is whether the 30-day IRP Deadline was tolled or otherwise extended despite the absence of a CEP or written extension of the IRP Deadline.

B. The Respondent's Position

73. ICANN takes the firm legal position, as advocated in both its written submissions and during the 7 July 2016 hearing, that the IRP Deadline is mandatory and cannot be tolled or extended for non-codified reasons. To allow equitable tolling in general would be to create unacceptable uncertainty for gTLD applicants and IRP applicants. To allow tolling in the instant circumstances for the GCC, which waited over a year to file its IRP Request, would be to provide impermissible special treatment.

74. As for the specific circumstances alleged by the GCC (described below), ICANN denies that any dealings and communications between its officials and GCC representatives effectively substituted for the CEP process or excused the GCC's failure to initiate the CEP process. To recall, as in the Emergency Request proceedings, ICANN presented no witness statements from named or unnamed representatives or any other factual evidence.

C. The Claimant's Position

75. The GCC presents an equitable reliance defense to its delayed initiation of the IRP process. The GCC argues, as a general matter, that ICANN should acknowledge non-written tolling

circumstances and, in the specific circumstances here, that the IRP Deadline must be deemed tolled by reason of the explicit and/or implicit representations made by ICANN officials to Mr. Al Marzouqi between October 2013 and November 2014.

76. The GCC asserts that "*following the Board's September 2013 Board Action, ICANN represented repeatedly – through its words and actions – to the GCC that the deadline to file the IRP had not yet passed*".[29]

77. The GCC relies primarily on the Al Marzouqi Statement, and a 9 July 2014 letter from Mr. Mohammed Al Ghanim, Director General of the UAE Telecommunications Regulatory Authority, to ICANN CEO Mr. Fadi Chehade, to support this assertion. According to Mr. Al Marzouqi:

   a. He and other GAC members expected that ICANN would treat the ".persiangulf" gTLD application in the same way it had treated the ".islam" and ".halal" applications, because all three applications "*lack community support, and the .PERSIANGULF gTLD application, unlike the .ISLAM and .HALAL gTLD applications, also is strongly opposed by the Arab community because 'Persian Gulf' is a disputed name*".[30]

   b. After the posting of the ICANN Board decision to proceed with the ".persiangulf" application on 30 September 2013, he "*reached out to* [his] *ICANN counterparts to initiate an attempt at resolution*" and they "*instructed* [him] *to wait until the Independent Expert issued a declaration on the GCC's Community Objection*", which he did.[31]

   c. After Judge Schwebel dismissed the Community Objection on 30 October 2013, Mr. Al Marzouqi again reached out and his "*ICANN counterparts advised they would get back to* [him]".[32]

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[29] Supplementary IRP Request, ¶ 35.
[30] Al Marzouqi Statement, ¶ 7.
[31] Ibid., ¶¶ 8-10.
[32] Ibid., ¶ 11.

d. "*After several months of dialogue with* [his] *ICANN counterparts proved unsuccessful*", he arranged for "*high-level*" meetings "*in hopes of facilitating a resolution*", which arrangements took substantial time due to schedules.[33]

e. In June 2014, Mr. Al Marzouqi and other GCC representatives met with the ICANN CEO, Mr. Chehade, during the GCC Telecom Council Ministers Meeting in Kuwait City.[34] According to Mr. Al Marzouqi, GCC representatives reiterated their objections to the ".persiangulf" application in that meeting.

f. Mr. Al Marzouqi's testimony about the meeting is corroborated by a 9 July 2014 letter from Mr. Al Ghanim to Mr. Chehade.[35] Mr. Al Ghanim reiterated the GCC's concerns about lack of community involvement and support for the gTLD, which is "*problematic and refers to a geographical place with disputed name*", and added:

> *While the GAC did not issue an advice objecting against the Application (due to lack of consensus because one particular country did not agree to the objection), this does not mean those countries which are port* [sic] *of the community targeted by the Application are agreeing to the Application to proceed and this certainly does not mean that ICANN should ignore this fact and continue to allow the Application to proceed.*
>
> *.... The security, functionality and stability of Internet rely greatly on a successful operation of the DNS system. It is worrying to see how a TLD being opposed by majority of the community targeted would be able to operate and sustain. We believe the motive behind this Application has nothing to do with Internet community interest, nor commercial interest. We request ICANN to analyze the Application from financial and sustainability angle given that the community continues to oppose the Application.*[36]

g. Thereafter, Mr. Al Marzouqi's "*ICANN counterparts again advised* [him] *that they had taken the GCC's position under advisement and would get back to the GCC with an answer*".[37] That answer, testified Mr Al Marzouqi, came in September 2014, when Mr. Al Marzouqi's "*ICANN counterparts ... suggested to*

[33] Ibid., ¶¶ 12-13.
[34] Ibid., ¶ 14.
[35] Ibid., attached Letter from Mr. Mohammed Al Ghanim to Mr. Fadi Chehade, 9 July 2014 ("**Al Ghanim Letter**").
[36] Al Ghanim Letter, p. 2.
[37] Al Marzouqi Statement, ¶ 15.

[him] *that the GCC's only recourse toward resolution* ***may*** *be to file a request for independent review of ICANN's Board action*" (emphasis in original).[38]

h. Mr. Al Marzouqi spoke again with his "*ICANN counterparts*" in October 2014 at ICANN meetings in Los Angeles. As "*ICANN's handling of geographic gTLD applications was a topic of discussion at those meetings*", he "*remained hopeful that the GCC and ICANN could finally resolve the dispute*".[39]

i. In November 2014, there having been no resolution at the October meetings, Mr. Al Marzouqi advised the GCC to proceed with the IRP process.[40] He learned only in December 2014 that ICANN intended to sign the registry agreement for ".persiangulf", after which he advised the GCC to file the Emergency Request "*to ensure that the independent review process would not be rendered meaningless*".[41]

j. According to Mr. Al Marzouqi: "*At no time from September 2013 to November 2014 did ICANN state, let alone suggest, that if the GCC engaged in resolution efforts it would be time-barred from seeking an independent review of the September 2013 Board action*".[42]

78. Mr. Marzouqi, in his Supplementary Witness Statement, describes further attempts at conciliation with both ICANN and Asia Green after the GCC filed its IRP Request.[43] These attempts proved unsuccessful.

79. The GCC also relies, in support of its equitable reliance defense, on an email dated 19 December 2014 from Mr. Eric Enson, outside counsel to ICANN, to Mr. Kamran Salour, outside counsel to the GCC ("**ICANN Counsel Email**").[44] The relevant language is as follows:

[38] Ibid., ¶16.
[39] Ibid., ¶ 17.
[40] Ibid., ¶ 18.
[41] Ibid., ¶ 22.
[42] Ibid., ¶ 19.
[43] Supplementary Marzouqi Statement, Exh. S-9, ¶¶ 2-16.
[44] Supplementary Request for IRP, Exh. S-11.

> *Fourth, during the call yesterday, you mentioned the possibility of entering a Cooperative Engagement Process ("CEP"), as set forth in ICANN's Bylaws. A CEP is supposed to take place before the filing of an IRP in the hope of avoiding, or at least minimizing, the costs associated with an IRP. That, obviously, did not happen in this matter. In addition, a CEP is supposed to be a dialogue between the parties, rather than counsel for the parties. ICANN is always willing to discuss amicable resolutions of issues, but I think we need additional information from the GCC before agreeing to engage in a CEP, at this point. First, ICANN would like to know whether the GCC believes that there is a realistic possibility that the GCC would dismiss its IRP based on CEP discussions. The reason this is important to ICANN is because ICANN representatives informed GCC representative*[s]*, on several occasions, that the CEP was available to the GCC and should be invoked before the filing of an IRP.*

80. The GCC considers this email to evidence ICANN's earlier tolling of the 30-day IRP Deadline, because ICANN expressed willingness to enter into a CEP despite the GCC's initiation of the IRP process on 5 December 2014.[45]

D. The IRP Panel's Analysis and Decision

81. Turning first to the Parties' general arguments on whether and how the IRP Deadline can be tolled or extended other than by the two codified exceptions, we do not consider it our role as an IRP Panel to issue general directives. It suffices to record that, under an equitable reliance theory, a requesting party should be allowed to request an IRP after expiry of the 30-day IRP Deadline if that party can show reliance on a representation or representations by ICANN inviting or allowing extension of the IRP Deadline. Otherwise, ICANN would be allowed "to blow hot and cold" and ultimately undermine its own mandate. Such contradictory actions would be inconsistent with, for example, the core value set out in Article 1, Section 2, of the ICANN Bylaws, of ICANN's "[m]*aking decisions by applying documented policies neutrally and objectively, with integrity and fairness*".

82. Beyond that general proposition, our Declaration must be focused on the facts and circumstances of the case before us. The issue is whether ICANN did make such a representation or representations here, either explicitly or implicitly by conduct.

[45] Claimant's Reply in Support of its Supplementary Request for IRP, ¶ 26.

83. We have carefully examined the GCC's evidence of contacts and communications between GCC and ICANN representatives between September 2013 and November 2014. Although the Marzouqi Statement was conclusory and short on detail, for example, in not providing names for his "*ICANN counterparts*" who participated in discussions after September 2013, he did provide a credible account of a series of communications with ICANN, commensurate with the credible level of serious GCC concerns about registry of ".persiangulf" as a new gTLD.

84. We have not been helped by any contradictory or confirming witness statements, or other evidence, from ICANN, about that alleged series of contacts and communications. It is striking that ICANN does not dispute the fact that the meeting with its most senior representative, CEO Chehade, occurred in June 2014. ICANN does dispute other points of Mr. Al Marzouqi's testimony, for example, his description of the instruction by unnamed ICANN officials that the GCC wait until after the Expert Panelist's decision on the Community Objection to commence an IRP process, and his testimony that unnamed ICANN officials suggested an IRP process in September 2014 and participated actively in negotiations thereafter. However, ICANN provided no witness statements from ICANN representatives who did participate in the June 2014 meeting, no copy of any written response from ICANN to the Al Ghanim letter about the content of the discussions in that meeting, or any other factual evidence whatsoever countering Mr. Al Marzouqi's account.

85. Having weighed such evidence as there is in the record, we find as follows, on the balance of probabilities:

    a. In October 2013, ICANN requested the GCC, through Mr. Al Marzouqi, not to commence dispute resolution proceedings – which by definition encompass an IRP process – until the Expert Panelist had resolved the GCC's Community Objection to the ".persiangulf" gTLD application. This request was in effect a representation that the IRP Deadline was tolled until Judge Schwebel issued his expert decision, regardless of when that might be.

    b. The GCC relied on that representation from ICANN, to the effect that the 30-day IRP Deadline was not yet running, in not filing an IRP request within 30 days

after the posting of the GAC's Durban Minutes and related materials on 30 September 2013.

c. After Expert Panelist Schwebel dismissed the GCC's Community Objection on 30 October 2013, which happened to be the expiry of the IRP Deadline, ICANN continued to welcome – if not actively encourage – a series of communications and meetings to discuss the GCC's objections to registration of ".persiangulf". Having previously tolled the IRP Deadline, if ICANN at that point believed that the 30-day deadline was running or had expired, it is reasonable to assume that ICANN would have told the GCC. It is thus reasonable – indeed, necessary – to conclude that, while those communications and meetings were taking place, the IRP Deadline remained tolled.

d. By far the most compelling evidence is that the ICANN CEO himself, Mr. Chehade, met with Mr. Al Marzouqi and other GCC representatives in June 2014 to discuss the GCC's objections to the ".persiangulf" gTLD application, a meeting testified to by Mr. Al Marzouqi and corroborated by the 9 July 2014 Al Ghanim Letter. Regardless of whether ICANN officials thereafter expressly advised the GCC that ICANN had taken the GCC's objections under advisement, as Mr. Al Marzouqi testified, CEO Chehade's personal involvement made it reasonable for the GCC to consider that their opposition to ".persiangulf" remained under active consideration by the ICANN Board through July 2014.

e. Not long thereafter, in September 2014, an ICANN representative or representatives suggested to Mr. Al Marzouqi that an IRP request might be the GCC's only recourse toward resolution. Considering that the 30-day IRP Deadline had passed over a year before, and assuming good faith on the part of ICANN throughout, it is reasonable that the GCC considered the IRP Deadline to remain tolled at this time.

f. The GCC pursued a further settlement attempt with ICANN at meetings in Los Angeles in October 2014, which reflects that the GCC continued to rely on ICANN's holding the IRP Deadline open in hopes of settlement. Those hopes

dissipated by November 2014 when the GCC received nothing positive from the Los Angeles meetings.

g. At this point, absent any further representations from ICANN about further negotiations, the limitations period reasonably ceased to be tolled and the IRP Deadline started to run.

h. On 5 December 2014, within the 30-day IRP Deadline, the GCC filed its Request for IRP.

86. Exchanges thereafter – in specific, the ICANN Counsel Email confirming that ICANN had entertained a CEP process – support the conclusion that ICANN itself considered the deadline for the submission of an IRP to have been tolled. Those exchanges show that ICANN could and did continue discussions with the GCC aimed at resolving the ".persiangulf" gTLD dispute by way of a formal or informal CEP process even after the 30-day IRP Deadline had passed and before the GCC filed a Request for IRP. As confirmed in the ICANN Counsel Email, the CEP is a dispute resolution mechanism that typically precedes, and is aimed at avoiding, an IRP filing. We need not interpret Mr. Enson's email as confirmation that a CEP took place before the IRP was filed, to find that ICANN reasonably appeared to the GCC to remain open to a CEP, with certain conditions, well after 30 October 2013.

87. While there was no formal CEP, we conclude from the evidentiary record overall that ICANN explicitly and implicitly cooperated in a shadow conciliation process with the GCC. It was reasonable for the GCC to continue to participate in that process, without concern that ICANN would retroactively impose a strict 30 October 2013 time-bar for an IRP request should the shadow conciliation process fail.

88. In coming to this conclusion, we have not been swayed by the GCC's umbrella argument that ICANN should have formally notified the GCC, at very least in the December 2014 ICANN Counsel Email, that the IRP Deadline was mandatory and had expired by 30 October 2014. Nor have we been swayed by ICANN's mirror argument that the GCC should have formally reserved and documented its position that the IRP Deadline was tolled by ICANN's conduct. It is because neither Party took such formal action that this

dispute comes before this Panel, and we are tasked with evaluating the legal import of the actions the Parties did take.

89. Nor have we been swayed by the political context. While the well-known sensitivities around the disputed names "Persian Gulf" and "Arabian Gulf" cannot **excuse** ICANN's ignoring its own IRP Deadline for over a year, which implicitly encouraged the GCC to postpone filing its IRP Request, those sensitivities perhaps **explain** ICANN's reluctance to apply the IRP Deadline strictly in this case. It would seem that both Parties hoped that such a political dispute would somehow resolve itself.

90. Although neither Party asked the IRP Panel to take any formal action in relation to the status of the Emergency Declaration, it should be clear from our conclusion that we agree with the assessment of Mr. Judge that "*the evidence of the ongoing contact between representatives of ICANN and the GCC from October 2013 to November 2014 supports a reasonable possibility that the time period for the filing of the IRP has been extended by the conduct of ICANN representatives and that the delay, as explained, is reasonable*".[46] The Emergency Panelist cautioned that "*the evidentiary record is far from complete and additional evidence can be expected on this issue on the IRP itself*",[47] but, as it transpired, ICANN did not provide any such additional evidence concerning the conduct of its officials.

91. To conclude, the Panel finds that: (a) at no point did the GCC cease its objections to ICANN's registration of the ".persiangulf" gTLD; (b) through its conduct, ICANN made representations that the IRP Deadline, measured against the 30 September 2013 Board action, was tolled; (c) the GCC relied on those representations, in hopes of a resolution, in postponing a formal IRP process; and (d) the GCC timely submitted its IRP Request on 5 December 2014.

[46] Emergency Declaration, ¶ 83.
[47] Ibid., ¶¶ 83 and 86.

VIII. THE MERITS

A. The Standard of Review

92. As a preliminary matter, the Panel considers the standard of review to be clear. Pursuant to Article IV, Section 3, Paragraph 4, of the ICANN Bylaws (echoed in Article 8 of the Supplementary Procedures), we are:

> *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.* . . . [and] ***must apply a defined standard of review*** *to the IRP request,* ***focusing on:***
>
> *a. did the Board act without conflict of interest in taking its decision?*
>
> *b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
>
> *c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*
>
> (Emphasis added.)

93. The IRP Panel agrees with the GCC that this is a *de novo* standard of review, without a component of deference to the ICANN Board with regard to the consistency of the contested action with the Articles and Bylaws.[48] This is consistent with the very name of the IRP process – an **independent** review of the contested Board action. Other IRP Panels have recognized and applied this *de novo* standard of review.[49]

94. We also agree with ICANN that an IRP Panel cannot abuse this independence to substitute its own view of the underlying merits of the contested action for the view of the Board, which has substantive discretion.[50] This proposition is reflected in the language of Article IV, Section 3, Paragraph 4, of the Bylaws: an IRP Panel is not entrusted with second-

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[48] Supplementary IRP Request, ¶¶ 9-11.

[49] Relying upon Annex S-3, 19 February 2010, Final Declaration in *ICM Registry LLC v. ICANN*; Annex S-4, 3 March 2015, Final Declaration in *Booking.com v. ICANN*; Annex S-5, 9 July 2015 Final Declaration in *DotConnectAfrica Trust v. ICANN*.

[50] Response to Claimant's Supplementary IRP Request ("**Response to Supplementary IRP Request**"), ¶ 5; Annex S-2, 9 October 2015, Final Declaration in *Vistaprint v. ICANN*, ¶ 124; Exh. R-24, Final Declaration in *Merck v. ICANN*, ¶ 21; Annex S-4, Final Declaration in *Booking.com v. ICANN*, ¶ 108.

guessing the Board, but rather "*with declaring whether the Board has acted consistently with the provisions of* [the ICANN] *Articles of Incorporation and Bylaws*".

95. To recall, the contested ICANN Board action here is the Board's decision on 10 September 2013 to proceed with the ".persiangulf" gTLD application. It is irrelevant whether the IRP Panel considers this decision to be right or wrong on the merits, much less to be politically wise or unwise. Our role is to examine the **process** of the Board's decision-making, in specific to answer the questions in Article IV, Section 3, Paragraph 4, of the Bylaws: (a) did the Board act without conflict of interest? (b) did the Board exercise due diligence and care in having a reasonable amount of facts? and (c) did the Board members exercise independent judgment, believed to be in the best interests of ICANN?

96. If the answer to any of those questions is "no", the GCC will prevail in this Request.

B. The Claimant's Standing to Pursue the IRP

97. A second preliminary question goes, as we find below, to the GCC's standing to pursue this IRP proceeding.

98. The Parties devoted substantial attention in their written and oral submissions to the question of the type and level of harm that the GCC must establish it has suffered or will suffer as a result of the contested ICANN Board action. This question arises from the IRP-related test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws:

> *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. In order* **to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation**, *and not as a result of third parties acting in line with the Board's action.* (Emphasis added.)

99. The Parties agree that the term "*materially affected*" must be distinguished from the term "*material detriment*", which is relevant in assessing the merits of a Community Objection to a gTLD application. One of the four elements to be proven for a successful Community Objection is that the application "*creates a likelihood of* ***material detriment*** *to the rights or legitimate interests of a significant portion of the community to which the string may be*

explicitly or implicitly targeted" (emphasis added). Factors evidencing material detriment go to actual operation of the gTLD by the applicant, including the likelihood that operation will cause reputational, security, and/or economic harm to the community represented.

100. ICANN, however, effectively equates the two terms "*materially affected*" and "*material detriment*" by using them interchangeably. The basic inquiry for both tests, according to ICANN, is whether an IRP requestor will be materially injured or harmed by the actual operation of the relevant string.[51] In ICANN's view, the GCC, however, has failed to identify any legally recognizable harm it will suffer if ".persiangulf is registered; the contention that a ".persiangulf" gTLD will create the false impression that the Gulf Arab nations accept the disputed name "Persian Gulf" is not a cognisable harm.[52] To support its position, ICANN puts substantial weight on the findings of the Independent Objector and the Expert Panelist that the GCC fell short of proving that it would suffer harm reaching the level of "*material detriment*".[53]

101. In comparison, the GCC in its Supplementary IRP Request argues that the only relevant inquiry is whether it suffered injury or harm connected to ICANN's alleged action inconsistent with the ICANN Articles or Bylaws.[54] The IRP Panel, according to the GCC, is to examine only whether that action – here, the Board's 10 September 2013 decision to allow processing of the ".persiangulf" application – did cause harm "*materially affect*[ing]" the GCC and its members.[55] The GCC identifies that harm to be the denial of its due process rights to an ICANN decision on the contested ".persiangulf" gTLD application in which its objections were fully considered by the Board, and apparent discrimination against its Arab members in favor of Iran.[56]

102. The IRP Panel agrees with ICANN that the question of whether the GCC was "*materially affected*" for purposes of Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is one

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[51] Rejoinder to ICANN's Response to Gulf Cooperation Council's Reply in Support of Supplementary Request for Independent Panel Review (**"Rejoinder to IRP Request"**, ¶ 15.
[52] Ibid., ¶¶ 13-15; Response to Supplementary IRP Request, ¶ 25.
[53] Rejoinder to IRP, ¶ 14.
[54] Supplementary IRP Request, ¶ 41. The GCC took a position closer to ICANN's in this respect in its original Request for IRP; see, e.g., ¶¶ 70-74.
[55] Supplementary IRP Request, ¶ 49.
[56] Ibid., ¶ 42.

of standing.[57] This is the logical meaning of the language in Paragraph 2 that a "*person materially affected*" by an ICANN Board action perceived to be inconsistent with the Bylaws or Articles "*may submit a request for independent review*"; this cannot and does not presuppose a successful request for IRP. As a standing question, this question precedes the core IRP question of whether the ICANN Board acted inconsistently with its Articles or Bylaws.[58]

103. However, we cannot agree with ICANN's effective conflation of the two tests of "*materially affected*" and "*material detriment*". Only the former test appears in, and is relevant to, the IRP-related standing test in Article VI, Section 3, Paragraph 2, of the ICANN Bylaws. To apply the "*material detriment*" test, which is a critical component of the Community Objection evaluation process under the Guidebook, would be to put the IRP Panel into a role it does not have – to examine and offer its views on the merits of the ".persiangulf" gTLD application under the relevant ICANN criteria. The determinations of the Independent Objector and the Expert Panelist, which were made in the Community Objection context and hence necessarily focused on the likelihood of "*material detriment*" to the interests of the Gulf community, are therefore irrelevant.[59]

104. In this connection, we do not need to address the submissions of the Parties as to whether the GCC could have minimized or avoided injury or harm by applying for an ".arabiangulf" gTLD, and whether such an application is or is not foreclosed in the future. This may have been a factor for the Independent Objector and the Expert Panelist to consider in the Community Objection context, but it is not a proper issue of standing in an IRP case.

105. We recognize that the "*materially affected*" test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is defined in relation to "*injury or harm that is directly or causally connected to the Board's alleged violation of the Bylaws or the Articles*". As Paragraph 2 goes to standing, however, it cannot reasonably be interpreted as requiring an IRP panel to find proof of concrete and measurable injury or harm at the time an IRP request is filed. It

[57] Rejoinder to IRP Request, ¶ 16.
[58] Ibid., ¶ 16.
[59] Supplementary IRP Request, ¶¶ 43-49; The Gulf Cooperation Council's Reply in Support of its Supplementary Request for Independent Review Process ("**Reply to IRP Request**"), ¶ 21.

must suffice for the IRP requestor, to meet the standing test, to allege reasonably credible injury or harm connected to the contested ICANN Board action. We are satisfied that the GCC has done so here by describing the harm caused to its Gulf members' due process rights, by definition, if the processing of the ".persiangulf" gTLD application were to continue on the basis of a Board decision made without regard to the GCC's objections. We now turn to the core merits question of whether the GCC has proven such inconsistent action by ICANN.

C. The Claimant's Position

106. The GCC's main submission is that ICANN failed to follow the GAC's advice from the Durban meeting, as well as the Guidebook procedures, in deciding in September 2013 to allow further processing of the ".persiangulf" gTLD.

107. The GCC relies on Module 3.1 of the Guidebook, which sets out three possible forms for GAC advice to the ICANN Board. These are set out at paragraph 19 above. Given that the GAC did not issue Consensus GAC Advice that the ".persiangulf" gTLD application should **not** proceed or advice that the application should not proceed unless remediated, by elimination the only available form of advice was an "*expression of concerns in the GAC*" about Asia Green's application, meant to prompt a dialogue between the GAC and the Board.[60] The GAC did identify such concerns, in the Durban Minutes, which explicitly: (i) referred to the opinions of GAC members from the UAE, Oman, Bahrain and Qatar that the application should not proceed; (ii) noted that the GAC had heard "*opposing views*" on the application; and (iii) concluded that "*it was clear that there would not be consensus on an objection*".[61] In the GCC's view, these vigorous comments were a fully recognizable expression of its members' concerns.

108. The GCC disagrees with ICANN that only the Durban Communiqué constituted recognizable GAC advice to the ICANN Board. The GCC relies on Principle 51 of GAC's Operating Principles, which does not limit the GAC's advice to a communiqué.[62] Further, ICANN"s failure to review the Durban Minutes before passing its resolution on the

[60] Supplementary IRP Request, ¶ 20.
[61] Ibid., ¶ 18; Reply to IRP Request, ¶ 6.
[62] Reply to IRP, ¶ 8.

".persiangulf" application was, in itself, a failure to exercise due diligence in making the decision, in violation of Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws.[63]

109. In light of the foregoing, the ICANN Board was obligated to enter into a dialogue with the GAC to understand its members' concerns, and to give reasons for its ultimate decision to allow Asia Green's application to move forward – which ICANN failed to do.

110. The GCC argues in the alternative that, even if ICANN was somehow correct in following the GAC's non-compliant advice to allow the ".persiangulf" application to proceed, ICANN violated several other Articles and Bylaws. Among others, the GCC identifies:

a. Bylaws, Article I, Section 2:

In performing its mission, the following core values should guide the decisions and actions of ICANN:

....

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

....

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

....

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

b. Bylaws, Article II, Section 3:

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

c. Bylaws, Article III, Section 1:

[63] Reply to IRP Request, ¶ 10.

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

d. Articles of Incorporation, Article 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.

111. The GCC puts special emphasis on Paragraph 2.1(b) of the GAC Principles Regarding New gTLDs, which directs that "*New gTLDs should respect: ... the sensitivities regarding terms with national, cultural, geographic and religious significance*".

112. Against this backdrop of ICANN constituent documents, the GCC argues that the ICANN Board failed to collect and independently assess all relevant facts before resolving to allow the ".persiangulf" gTLD application to proceed. The Board failed to review the GAC's Durban Minutes, which flagged that there were serious objections to the application and hence no consensus in favor of its proceeding. Nor did the Board explain, or even give any indication of, the reasons for its decision to allow the vigorously contested application to proceed. The bare Board resolution of 10 September 2013 gives no hint that the Board fulfilled its obligation to assess and balance the competing core values of ICANN. Neither that resolution nor any other document contains any reference to the ICANN core values guiding the Board in its 10 September 2013 decision on the ".persiangulf" application or any statement as to how the Board balanced core values that it found to be competing.

113. The Board also discriminated against the GCC by giving credence only to the Iranian position at the GAC and by ignoring the GCC's Community Objection and strong government opposition. If registered with Asia Green, the ".persiangulf" string will be discriminatory because "it will falsely create the perception that the GCC accepts the disputed 'Persian Gulf' name".[64] This is particularly egregious because the Persian

[64] Request for IRP, ¶ 58.

community already has the benefit of the ".pars" string, already registered with Asia Green for purposes overlapping with the ".persiangulf" application.

114. Further, according to the GCC, the Board handled Asia Green's ".persiangulf" application inconsistently with Asia Green's ".halal" and ".islam" applications. In those cases, although the Independent Expert dismissed the Community Objections because he did not find substantial community opposition, the Board intervened to stop the processing of both strings. Here, where the Community Objection and the Durban Minutes documented substantial community opposition, the Board nonetheless decided to allow continued processing of the ".persiangulf" application.

115. Overall, says the GCC, the Board's NGPC acted unfairly in a non-transparent and discriminatory manner, without sensitivity to the national, cultural and geographic issues in the Gulf.[65] In reviewing the Board's decision to allow Asia Green's ".persiangulf" application to go forward, the Panel should follow the path of the IRP Panel in the *DotConnectAfrica Trust v ICANN* case. There, the IRP Panel held that the Board had breached its transparency obligations by simply adopting the GAC's consensus advice not to proceed with the application for the ".africa" gTLD, stating that it "*would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting* [DotConnectAfrica] *Trust's application*".[66]

D. The Respondent's Position

116. ICANN's defense to the GCC's argument that the Board failed to follow the GAC's advice is straightforward: the ICANN Board followed the GAC's advice to the letter. According to ICANN, the GAC did **not** advise of any member concerns regarding the ".persiangulf" gTLD application, and so the proper course was for the Board's NGPC to allow Asia Green's application to progress. The Durban Communiqué expressly stated that the GAC had "*finalised its consideration ... and does not object to* [the ".persiangulf" application] *proceeding*", without advising of any concerns whatsoever. ICANN emphasizes that the Board did not make a decision to approve the ".persiangulf application" based on the

[65] Supplementary IRP Request, ¶ 23-26; Reply to IRP Request, ¶¶ 16-18.
[66] Ibid., Exh. S-5; Final Declaration, *DotConnectAfrica Trust v ICANN*, 9 July 2015, ¶ 113.

GAC's advice, but simply resolved to allow the ICANN staff to continue to process the application.[67]

117. ICANN relies on GAC Operating Principles 51 to argue that the Durban Minutes, to the extent those Minutes say anything more than the Durban Communiqué, are not an official statement of GAC advice to the ICANN Board.[68] Nor were the Durban Minutes approved or posted until November 2013, and so they were not even before the Board for consideration at its meeting on 10 September 2013 to review and pass resolutions on the Durban Communiqué and Scorecard items. Further, in ICANN's view, the Durban Minutes are consistent with the Dublin Communiqué in reporting that there was no advice against the ".persiangulf" application proceeding. Comments made by individual GAC members at the Durban meeting, recorded in the Minutes, do not constitute GAC advice triggering Board duties under Module 3 of the *Guidebook*.[69]

118. As for the GCC's alternative argument based on ICANN's failure to meet its mission and core value standards, ICANN denies both the theory and the facts. In ICANN's view, the Board independently evaluated the ".persiangulf" gTLD application, in an open and transparent fashion, as evidenced by: the posting of the Durban Communiqué and subsequent public comment period; the Board meetings to determine actions based on the GAC's advice in the Durban Communiqué, with a public record of the discussion on each item in the Durban Scorecard responding to the GAC's advice; and a unanimous vote adopting resolutions based on the Scorecard, again publicly posted. Nor can it be inferred that the Board failed to consider ICANN's core values simply because the Board did not explicitly state how it did so; it would be impossible for the Board to spell this out for the hundreds of resolutions it must manage each year.[70] Further, the Bylaws do not oblige the Board to accept any and all advice from the GAC; Article XI, 2.1.j of the Bylaws only requires the Board to take GAC advice into account and, if the advice is not followed, to provide reasons for not doing so.

[67] Response to IRP Request, ¶ 21.
[68] Ibid., ¶ 10, Exh. R-25.
[69] Reply to IRP Request, ¶ 9.
[70] Response to IRP Request, ¶¶ 13-20.

119. ICANN argues that the IRP Panel's Declaration in the *DotConnectAfrica* case is inapposite, because the GAC provided Consensus Advice against the string proceeding. Similarly, as for the alleged inconsistent treatment of Asia Green's applications for ".halal" and ".islam", ICANN points out that in those cases, unlike the instant case, the GAC did in fact express concerns to the Board base on community concerns about the obvious religious sensitivities.

120. In sum, the ICANN Board's NGPC considered and followed the GAC's advice exactly as it was supposed to, fully consistently with the ICANN Articles and Bylaws.

121. Should the Tribunal find in the GCC's favor, ICANN contests the GCC's request for a declaration ordering ICANN to refrain from signing the registry agreement with Asia Green or any other entity. ICANN argues that, pursuant to Article IV, Section 3, Paragraph 3.11, of the Bylaws, an IRP Panel is limited to stating its opinion by "*declar*[ing] *whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws*" and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel.

E. The IRP Panel's Analysis and Decision

122. We turn first to the GCC's main submission that the ICANN Board failed to follow the GAC's advice from the Durban meeting, as well as the Guidebook, in deciding on 10 September 2013 to allow the ".persiangulf" gTLD to proceed in the application process.

123. This turns on whether the GAC did in fact properly provide post-Durban advice to the Board. We find this to be a difficult question, which overlaps with the GCC's alternative submission concerning ICANN's overall compliance with its mission and core values under the Bylaws and Articles.

124. To recall, Module 3.1 of the Guidebook envisions three forms of GAC advice to the Board: (a) Consensus GAC Advice that an application should **not** proceed, creating a strong presumption of non-approval; (b) the expression of **concerns** within the GAC, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those

concerns and then give reasons for its decision; or (c) advice that the application should not proceed unless **remediated**. It is undisputed, and we agree, that the GAC did not issue Consensus GAC Advice against the ".persiangulf" application or suggest remediation, leaving only the second form of advice – the expression of **concerns**, meant to prompt interaction with the Board.

125. If, as ICANN argues, only the Durban Communiqué could provide GAC advice to the Board, then the GAC clearly did **not** express concerns about the ".persiangulf" gTLD application. That Communiqué stated no more than this: "*The GAC has finalised its consideration of* [the application] *and does not object to* [it] *proceeding*". This underlies ICANN's main defense that the ICANN Board followed the GAC's advice to the letter, by resolving to allow Asia Green's application to proceed.

126. We find ICANN's defense to be unduly formalistic and simplistic.

127. As we see it, the GAC sent a missive to the ICANN Board that fell outside all three permissible forms for its advice. The GAC's statement in the Durban Communiqué that the GAC "*does not object*" to the application reads like consensus GAC advice that the application **should** proceed, or at very least non-consensus advice that the application should proceed. Neither form of advice is consistent with Module 3.1 of the Guidelines. Yet the ICANN Board proceeded to resolve to allow the application to proceed, as a routine matter, based on the Durban Communiqué.

128. Some of the fault for the outcome falls on the GAC, for not following its own principles. In particular, GAC Operating Principle 47 provides that the GAC is to work on the basis of consensus, and "[w]*here consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board*".[71] The GAC chair clearly did not do so. Mr. Al Marzouqi testified to the views he expressed at the Durban meeting and that consensus proved impossible, which testimony stands unrebutted by ICANN here (quoted in paragraph 31 above):

[71] ICANN Response to IRP Request, Exh. R-25.

> *5. I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC's opposition to the .PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because "Persian Gulf" is a disputed name. A substantial number of GAC members in attendance shared these concerns.*
>
> *6. Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the "Persian Gulf" name, and Iran's GAC representative obviously does not share the other GAC members' concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson pulled me to the side to express her frustration that GAC could not reach a consensus.*

129. If the GAC had properly relayed these serious concerns as formal advice to the ICANN Board under the second advice option in Module 3.1 of the Guidebook, there would necessarily have been further inquiry by and dialogue with the Board. The directive of Module 3.1, which is a **procedural** protection for opponents to gTLD applications, bears emphasis:

> *The GAC advises ICANN that there are concerns about a particular application "dot.example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rational for its decision.*

130. It is difficult to accept that ICANN's core values of transparency and fairness are met, where one GAC member can not only block consensus but also the expression of serious concerns of other members in advice to the Board, and thereby cut off further Board inquiry and dialogue.

131. In any event, the IRP Panel is not convinced that just because the GAC failed to express the GCC's concerns (made in their role as GAC members) in the Durban Communiqué that the Board did not need to consider these concerns. The record reveals not only substantial sensitivity with respect to Asia Green's ".persiangulf" application, but also general discord around religious or culturally tinged geographic gTLD names. In addition to the Durban Minutes, the pending Community Objection, and public awareness of the sensitivities of the "Persian Gulf"-"Arabian Gulf" naming dispute, the Durban Communiqué itself – on which ICANN relies so heavily here – contained an express recommendation that "*ICANN collaborate with the GAC in refining, for future rounds, the Applicant Guidebook with*

regard to the protection of terms with national, cultural, geographic and religious significance".[72] These materials and this general knowledge could and should have come into play, if not as a matter of following GAC advice then as part of the Board's responsibility to fulfil ICANN's mission and core values.

132. Although it is not necessary to the outcome of this IRP, the Panel cannot accept ICANN's argument that the GAC may provide official advice to the Board only through a Communiqué. It is Principle 46 of the GAC's Operating Principles that provides that "[a]*dvice from the GAC to the ICANN Board shall be communicated through the Chair*", while Principle 51 speaks only of the Chair's authority to "*issue a communiqué to the Media*" following a meeting.

133. Even if, as a matter of practice, ICANN is correct that the Durban Minutes were not a form of official communication from the GAC, the Minutes do express serious GAC member concerns and confirm that there was, in fact, no consensus in Durban in favor of the ".persiangulf" gTLD application proceeding. As quoted in paragraph 32 above, those Minutes recorded as follows:

> *The GAC finalized its consideration of .persiangulf after* ***hearing opposing views****, the GAC determined that it was* ***clear that there would not be consensus of an objection regarding this string*** *and therefore the GAC does not provide advice against this string proceeding. The GAC noted* ***the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed*** *due to lack of community support and controversy of the name.* (Emphasis added.)

Given this language, we cannot accept ICANN's argument that the Durban Minutes are consistent with the Durban Communiqué, which succinctly stated that the GCC "*does not object to* [the application] *proceeding*", thereby creating the impression that GAC members took the position – whether by consensus or not – that the application **should** proceed.

134. It is difficult to accept that the Board was not obliged to consider the concerns expressed in the Durban Minutes if it had access to the Minutes. If it was not given the Minutes, it is equally difficult to accept that the Board – as part of basic due diligence – would not have

[72] Request for IRP, Annex 24, Durban Communiqué, para. 7.

asked for draft Minutes concerning GAC discussions of such a geo-politically charged application.

135. This failure of due diligence is compounded by the fact that, as noted by the NGPC itself in the Minutes of the critical 10 September 2013 meeting, the GCC's Community Objection was pending. The relevant Board resolution bears quoting again:

> *ICANN will continue to process the application in accordance with the established procedures in the* [Guidebook]. *The* ***NGPC notes that community objections have been filed*** *with the International Centre for Expertise of the ICC against .PERSIANGULF.* (Emphasis added.)

136. Yet there is no evidence or indication in the record that the NGPC bothered to consider the content of the Community Objection, before allowing the processing of the obviously controversial string application to proceed. Certainly, that the Expert Panelist – some three weeks later – dismissed the Community Objection cannot support the procedural propriety of the Board's decision on 10 September 2013 to allow the ".persiangulf" application to proceed.

137. In sum, ICANN may be correct that the Board followed all the routine steps of posting information about the application, meeting to review the application, and acting strictly on the basis of the Durban Communiqué and Scorecard items. The Board did post the Durban Communiqué on 1 August 2013 for public comment – but it contained only the one-line conclusion that the GAC had "*finalised it consideration of the* [".persiangulf"] *string, and does not object to it proceeding*". The Board did meet on 13 August 2013 – but the only discussion was whether to respond to the Durban Communiqué advice by Scorecard. The Board did meet on 10 September 2013 to discuss each of the Durban Scorecard items, and did vote unanimously in favor of continuing to process the ".persiangulf" application – but the relevant entry on the Scorecard merely repeated the one-line Durban Communique reporting that the GAC "*does not object*" to the ".persiangulf" application proceeding. The Minutes of the Board meetings were publicly posted.

138. In the IRP Panel's assessment, these were empty steps. ICANN's insistence in its Response to the Supplementary IRP Request (at paragraph 2) and Rejoinder to IRP Request (at paragraph 10) is equally empty. At the end of the day, there is simply no

evidence – or even the slightest indication – that the Board collected facts and engaged with the GCC's serious concerns before resolving to allow the ".persiangulf" application to proceed. ICANN's willingness to meet GCC representatives after the 10 September 2013 decision to allow the application to proceed was belated and could not cure or validate its failure to conduct due diligence and engage with the GCC before that uninformed decision.

139. If the Board had undertaken a modicum of due diligence and independent investigation, it would readily have learned about the GCC's serious concerns as raised in the GAC meetings in Durban and in Beijing, and how and why the GAC failed to reach consensus in Durban against the ".persiangulf" application. The GCC may be right or wrong in submitting that it was Iran's solitary support for the application in Durban that motivated the message in the Durban Communiqué. The correctness of the GCC's position on this point is irrelevant in this IRP. The relevant issue is whether the Board's decision to allow the ".persiangulf" application to proceed was consistent with the Bylaws and Articles.

140. While not binding upon this Panel, the IRP precedent that we find most helpful is the decision concerning the application by DotConnectAfrica Trust for the ".africa" string, in which the IRP Panel found that the actions and inactions of the ICANN Board were inconsistent with its Articles and Bylaws. In particular, the IRP Panel held that the ICANN Board had breached its transparency obligations by rotely adopting the GAC's Consensus Advice not to proceed with that application. The Panel stated that it "*would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting* [DotConnectAfrica] *Trust's application*".[73] Contrary to ICANN's attempt to distinguish the DotConnectAfrica case, we find that ICANN's transparency obligations arose here despite the absence of Consensus GAC Advice. Indeed, transparency and the related need for further due diligence were more compelling in this case, given the pending Community Objection concerning a sensitive application.

141. Overall, based on the submissions and evidence in the record, we are constrained to find that the Board passed a bare-bones resolution, based on a bare-bones GAC Communiqué

[73] Note 66, *supra*.

and Scorecard, to allow Asia Green's ".persiangulf" application to proceed, to virtually certain registration and operation. We can only regard the Board's routine treatment of the non-routine ".persiangulf" gTLD application to have been non-transparent, unfair and essentially oblivious to the well-known geo-political sensitivities associated with the name "Persian Gulf". This treatment consequently fell far short of the mission and core values enshrined in ICANN's Articles of Incorporation and Bylaws, specifically Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.

142. In this connection, we are sympathetic to ICANN's argument that the Board cannot be expected to spell out considerations going to mission and core values in every resolution passed on every gTLD application. However, our finding is not based on inferences from the lack of discussion about mission and core values in the Board's 10 September 2013 decision to allow the ".persiangulf" application to proceed. As noted, there was **no** discussion of **any** factors whatsoever in that decision. This cannot be reconciled with the requirement in Article 1, Section 2, of the Bylaws that ICANN "*exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values*".

143. In related vein, we are not here second-guessing the Board's assessment of a difficult application against the backdrop of its mission and core values. That is because, if nothing else, we have no evidence or indication of what, if anything, the Board **did** assess in taking its decision. Our role is to review the **decision-making process** of the Board, which here was virtually non-existent. By definition, core ICANN values of transparency and fairness were ignored.

144. Having made findings on the Board's duties to make decisions fairly and transparently, we do not need to make an additional finding on the GCC's allegation that the Board discriminated against the GCC, or failed to provide the GCC with consistent treatment, in failing to intervene to stop the ".persiangulf" application as it did with Asia Green's application for the ".halal" and ".islam" gTLDs, to which the GCC had also objected. We do note that it would seem mechanistic indeed for ICANN to justify the different treatment

of ".halal" and ".islam" on the basis that the GAC expressed member concerns about those strings based on community objections and religious sensitivity, when the GAC failed to relay similar member concerns about ".persiangulf". This is despite the glaring fact that the Independent Expert reviewing the GCC's Community Objections against all three strings dismissed them all on the same grounds.

145. In conclusion, turning to the IRP standard of review in Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws, we conclude that the ICANN Board failed to "*exercise due diligence and care in having a reasonable amount of facts in front of them*" before deciding, on 10 September 2013, to allow the ".persiangulf" application to proceed. We find, on the balance of probabilities on the basis of the Parties' submissions and evidence, that this decision effectively was an unreasoned vote on an unreasoned Scoreboard entry reciting the one-line Durban Communiqué statement that the GAC "*does not object*" to the application proceeding. Under the circumstances, and by definition, the Board members could not have "*exercise*[d] *independent judgment in taking the decision, believed to be in the best interests of the company*", as they did not have the benefit of proper due diligence and all the necessary facts. This reflects Board action inconsistent with the Articles and Bylaws, contrary to Article IV, Section 3, Paragraph 4(c), of the ICANN Bylaws.

146. As a final matter, we do not accept ICANN's position that we lack authority to include affirmative declaratory relief. Like the IRP Panel in the *DotConnectAfrica Trust* case, we consider that Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws does give us "*the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act*" inconsistently with its Articles of Incorporation and Bylaws.[74] That Bylaw bears repeating:

> *The IRP Panel* ***shall*** *have the authority to .... recommend that the Board stay any action or decision or that the Board take any interim action, until such time as the Board reviews and acts upon the* ***opinion*** *of the IRP.* (Emphasis added.)

147. Recalling that, under Article IV, Section 3, Paragraph 2, of the Bylaws, the IRP process is designed to provide a remedy for any person "*materially affected*" by suffering injury or harm causally connected to the relevant Board violation, we agree with the

[74] Ibid, ¶ 126.

DotConnectAfrica Trust IRP Panel that the "*language and spirit*" of Paragraph 11(d) empowers us to recommend redress for such injury or harm.[75] The words "*shall*" and "*opinion*" reflect that, similar to any decision maker, the Panel may and should recommend affirmative steps to be taken by the Board to correct the consequences of actions it took inconsistent with the Bylaws and Articles of Incorporation. Here, given the harm caused to the GCC's due process rights by the Board's decision – taken without even basic due diligence despite known controversy – to allow Asia Green's ".persiangulf" gTLD application to go forward, adequate redress for the GCC requires us to recommend not a stay of Asia Green's application but the termination of any consideration of ".persiangulf" as a gTLD. The basic flaws underlying the Board's decision cannot be undone with future dialogue. In recognition of ICANN's core values of transparency and consistency, it would seem unfair, and could open the door to abuse, for ICANN to keep Asia Green's application open despite the history. If the issues surrounding ".persiangulf" were not validly considered with the first application, the IRP Panel considers that any subsequent application process would subject all stakeholders to undue effort, time and expense.

IX. FIXING OF COSTS

148. The Parties disagree on whether the procedural rules governing this IRP include the ICANN Bylaws. This is potentially relevant because of differences in language between the costs sections of the Bylaws and the Supplementary Procedures, connected to the good faith pursuit of the cooperative engagement and conciliation processes.

149. Article 9 of the ICANN Supplementary Procedures provides:

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

[75] Ibid, ¶ 128.

150. Article IV, Section 3, of the ICANN Bylaws provides:

> *16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.*
>
> *18.... The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half 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.*

151. The Parties agreed to postpone final submissions on costs, including on the question of whether Paragraphs 16 and 18 of Article IV, Section 3, of the ICANN Bylaws apply in this IRP.

152. As the IRP Panel has determined that the GCC is the prevailing party, no question arises as to the application of Paragraph 16 of Article IV, Section 3, of the ICANN Bylaws.

153. We will await further submissions from the Parties before allocating all or a percentage of the costs of the proceedings to the GCC.

X. DECLARATION

For the foregoing reasons, the Independent Review Process Panel hereby Declares:

1. The action of the ICANN Board with respect to the application of Asia Green relating to the ".persiangulf" gTLD was inconsistent with the Articles of Incorporation and Bylaws of ICANN. These are, in specific: Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.

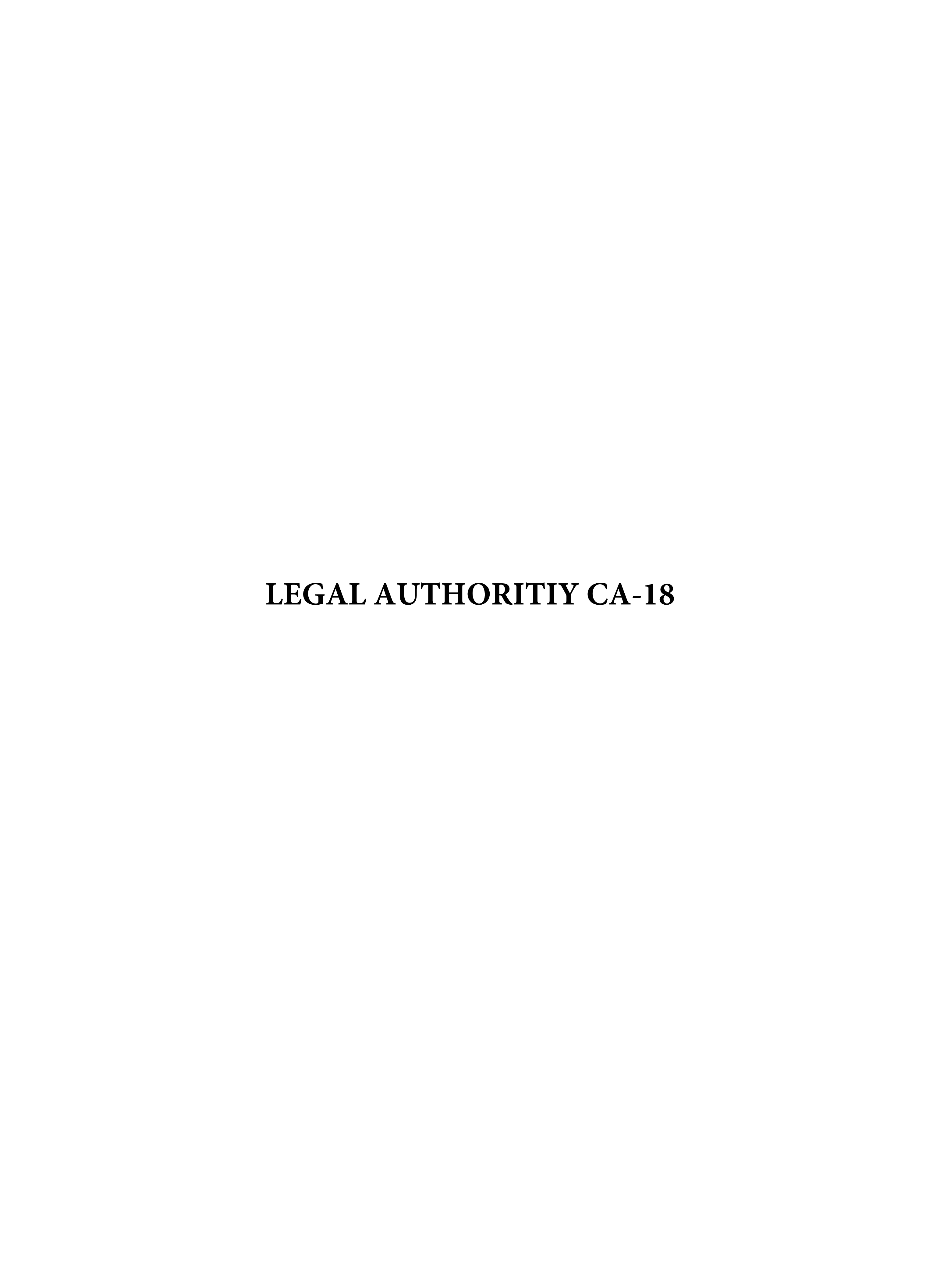
2. Pursuant to Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws, the IRP Panel recommends that the ICANN Board take no further action on the ".persiangulf" gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the ".persiangulf" gTLD.

3. The GCC is the prevailing Party in this IRP.

4. The Parties are to file submissions on costs by 18 November 2016. Following those submissions, all or a percentage of costs will be allocated against ICANN in favor of the GCC.

This Partial Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute the Partial Declaration of this IRP Panel

19 OCTOBER 2016	Lucy Reed
Date	Lucy Reed, Panelist - Chair
19 October 2016	
Date	Anibal Sabater, Panelist
19 OCTOBER 2016	
Date	Albert Jan van den Berg, Panelist



LEGAL AUTHORITIY CA-18

Ex. CA-18

ICDR CASE NO. 01-15-0002-9483

BETWEEN

DOT SPORT LIMITED

Claimant

-and-

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Respondent

FINAL DECLARATION

Independent Review Panel

Prof. Dr. Klaus Sachs

Dr. Brigitte Joppich

Wendy Miles QC (Chair)

Dated 31 January 2017

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1. OVERVIEW

1.1. This Final Declaration is issued in an Independent Review Process ("**IRP**") under Article IV, Section 3 of the Bylaws for Internet Corporation for Assigned Names and Numbers ("**ICANN**") as amended 30 July 2014 ("**Bylaws**"), which stipulates that an IRP is "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". In accordance with Article IV, Section 3.7 of the Bylaws, this IRP is administered by the International Centre for Dispute Resolution ("**ICDR**").

1.2. The dispute arises out of alleged actions or decisions by the ICANN Board: (i) to permit and uphold a third-party community objection to the Claimant's application for the .sport gTLD; and (ii) to fail to take into account the alleged lack of independence and impartiality of the Expert appointed pursuant to the ICANN dispute resolution procedures finally to determine that community objection. The Claimant alleges that the ICANN Board failed to assure compliance with ICANN's Articles of Incorporation ("**Articles**") and Bylaws as well as secondary rules created by ICANN, such as the Applicant Guidebook, in dealing with the community objection.

2. THE PARTIES AND THEIR LAWYERS

2.1. The Claimant is dot Sport Limited ("**dSL**"), a subsidiary of Famous Four Media. The Claimant and Famous Four Media are offering services in the Internet's Domain Name System ("**DNS**").

2.2. The Claimant is represented by:

Mr. Flip Petillion
Crowell & Moring LLP
7, rue Joseph Stevens
B-1000 Brussels
Belgium

2.3. The Respondent is ICANN, a non-profit public-benefit corporation organised and existing under the laws of the State of California with its principal place of business at:

12025 Waterfront Drive
Suite 300
Los Angeles

CA 90094-2536

USA

2.4. The Respondent is represented by:

Messrs. Jeffrey LeVee and Eric Enson and Ms. Rachel Zernik

Jones Day

555 South Flower Street

50th Floor

Los Angeles

CA 90071-2300

USA

3. THE PANEL

3.1. On 9 September 2015, the full IRP Panel was confirmed, in accordance with the ICDR International Arbitration Rules (the "**ICDR Rules**") and its "Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process" issued in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws (the "**Supplementary Rules**").

3.2. The members of the IRP Panel are:

Professor Dr. Klaus Sachs

Dr. Brigitte Joppich

Ms. Wendy Miles QC (Chair)

4. PROCEDURAL HISTORY

4.1. On 19 March 2015, the Claimant filed a Request for IRP (the "**Request**") with the ICDR. The Claimant alleged that ICANN had accepted the decision of an Expert in an Expert Determination "that is contrary to its policies" and that in so doing it had "failed both to act with due diligence and to exercise independent judgment."

4.2. On 8 May 2015, the Respondent filed ICANN's Response to the Request (the "**Response to Request**").

4.3. On 28 September 2015, the Parties and the Panel conducted by telephone the first procedural hearing.

4.4. On 5 October 2015, following the first procedural hearing, the Panel issued Procedural Order No. 1 setting out the procedural stages and timetable for the proceedings and page limits for the Parties' respective submissions.

4.5. On 9 November 2015, the Claimant submitted its Reply (the "**Reply**").

4.6. On 21 December 2015, the Respondent submitted its Sur-Reply (the "**Sur-Reply**").

4.7. On 3 May 2016, the IRP hearing proceeded by three-way video link with the Panel convened in Cologne, Germany, counsel for the Claimant convened in Brussels, Belgium and counsel for ICANN convened in Los Angeles. ICANN sought to use PowerPoint with its oral submissions. Following the Claimant's objection to further written submissions in the form of PowerPoint slides, the Panel directed that ICANN could use PowerPoint during its oral presentation but that the Panel would not retain hard copy slides as part of the record.

4.8. On 11 May 2016, ICANN sent a further written communication to the Panel regarding two issues raised at the hearing in relation to the Ombudsman process. ICANN submitted two further documents as Respondent Exhibits 25 and 26. Also on 11 May 2016, the Claimant (without objecting to the new communication and exhibits) submitted comments in response.

4.9. On 10 January 2017, the ICDR notified the Parties that the Panel had determined that the record for this matter had been closed as of 15 December 2016 and that the Panel should have the Final Declaration issued by no later than mid-January 2017.

5. OVERVIEW OF ICANN'S NEW GTLD PROGRAM AND DISPUTE RESOLUTION PROCESS

5.1. The Claimant raises fundamental procedural fairness issues arising out of two aspects of the program administered by ICANN for the allocation of new generic Top-Level Domain ("**gTLD**") names from 2012: (i) the community objection procedure; and (ii) the Expert Determination procedure. This IRP relates to the ICANN Board's alleged actions or decisions arising out of an Expert Determination that upheld the community objection against the Claimant, including its decision on the Claimant's two Requests for Reconsideration.

5.2. ICANN is the administrative body responsible for allocating Internet Protocol address space and assigning protocol identifiers and generic ("**gTLD**") and country-code

("**ccTLD**") TLDs and managing the DNS. TLDs exist at the top of the DNS naming hierarchy and consist of two or more letters.

5.3. The main policy-making body for gTLDs is the Generic Names Supporting Organization ("**GNSO**"). In 2005, the GNSO started a policy development process aimed at introducing new gTLDs. Representatives were consulted from a wide variety of stakeholder groups, including governments, individuals, civil society, business and intellectual property constituencies, and the technology community. They considered the demand, benefits and risks of new gTLDs, selection criteria to be applied, allocation procedures for new gTLDs, and contractual conditions for new gTLD registries going forward.

5.4. As of 2011, TLDs were limited in number to 22 gTLDs, and around 250 ccTLDs. Based on the GNSO recommendations, ICANN introduced a new gTLD Program, further opening up gTLDs in order to foster diversity, encourage competition, and enhance the utility of the DNS.

5.5. In June 2011, again based on the GNSO consultation, ICANN's Board approved and adopted a new Applicant Guidebook (the "**Applicant Guidebook**"). The ICANN Board further authorized the launch of the 2012 New gTLD Program (the "**New gTLD Program**") in accordance with ICANN's Bylaws, Articles and the new Applicant Guidebook.

5.6. The New gTLD Program application round, launched in 2012, permitted interested applicants to compete for the right to operate new gTLDs. The Applicant Guidebook preamble states that:

> "The new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS."

5.7. The Applicant Guidebook describes the New gTLD Program application process in six modules. The objection procedures are dealt with in Module 3, followed by an attachment containing the New gTLD Dispute Resolution Procedure for resolving disputes arising out of objections.

5.8. The application process specifically permits public comment and formal objection. Within the Module 3 objection procedures, Section 3.2.1 of the Applicant Guidebook

sets out the grounds for objections. The formal objection procedures ensure full and fair consideration of objections based on certain limited grounds outside ICANN's evaluation of applications on their merits.

5.9. The four stated grounds for formal objections are:

> "***String Confusion Objection*** – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied for-gTLD string in the same round of applications.
>
> ***Legal Rights Objection*** – The applied-for gTLD string infringes the existing legal rights of the objector.
>
> ***Limited Public Interest Objection*** – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.
>
> ***Community Objection*** – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted."

5.10. The Applicant Guidebook provides that community objections may be made by "[e]stablished institutions associated with clearly delineated communities". However, "[t]he community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection".

5.11. A community objection must show:

(a) "that the community expressing opposition can be regarded as a clearly delineated community" taking into account various identified factors;

(b) "substantial opposition within the community it has identified itself as representing" taking into account various identified factors;

(c) "a strong association between the applied-for gTLD string and the community represented by the objector" taking into account various identified factors; and

(d) “that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted” taking into account certain identified factors.

5.12. Following a formal community objection the applicant may file a response to the objection and enter the dispute resolution process within 30 days of notification. The designated Dispute Resolution Service Provider (“**DRSP**”) for disputes arising out of community objections is the International Centre for Expertise of the International Chamber of Commerce (the “**ICC Centre for Expertise**”). Through the ICC Centre for Expertise, any objection is resolved by Expert Determination.

5.13. Following an Expert Determination, the applicant may further apply for: (i) reconsideration by ICANN’s Board Governance Committee (the “**BGC**”) through a request for reconsideration (“**Reconsideration Request**”); (ii) involvement of the Ombudsman; and/or (iii) independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles or Bylaws through the IRP.

5.14. ICANN has designated the ICDR to administer the IRP. The Supplementary Rules apply, which incorporate by reference the ICDR Rules.

5.15. The current IRP arises out of the Claimant’s dispute with ICANN arising out of the community objection to its application, the Expert Determination that followed, two Reconsideration Requests and involvement of the Ombudsman.

6. FACTUAL BACKGROUND TO .SPORT GTLD

6.1. This IRP arises out of the Claimant’s application for the .sport gTLD in the New gTLD Program. The background to the Claimant’s application is summarized below.

A. Claimant’s .SPORT Application

6.2. On 13 June 2012, the Claimant filed Application No. 1-1174-59954 to operate the new gTLD called .sport (the “**Application**”).

6.3. According to the Application, the Claimant applied for .sport to:

> “create an environment where individuals and companies can interact and express themselves in ways never before seen on the Internet, in a more

targeted, secure and stable environment. Its aim is to become the premier online destination for such creators and their wide range of users."

6.4. The Claimant further submitted in its Application that:

> "… the aim of .sport is to create a blank canvas for the online sports sector set within a secure environment. The Applicant will achieve this by creating a consolidated, versatile and dedicated space for the sport sector. As the new space is dedicated to those within this affinity group the Applicant will ensure that consumer trust is promoted. Consequently consumer choice will be augmented as there will be a ready marketplace specifically for sports-related enterprises to provide their goods and services. …"

B. SportAccord's .sport Application

6.5. On 13 June 2012 a separate applicant, SportAccord, also applied for the .sport gTLD (the "**SportAccord Application**"). SportAccord described itself in the SportAccord Application as a "Not-for-profit Association" that:

> "serves as the umbrella organization for all (Olympic and non-Olympic) international sports federations as well as organizers of multi-sports games and sport-related international associations … [comprising] 90 international sports federations governing specific sports and 15 organizations which conduct activities closely related to the international sports federations."

C. SportAccord's Community Objection

6.6. On 13 March 2013, the same SportAccord that had submitted the SportAccord Application for the .sport gTLD also opposed the Claimant's Application by way of community objection.

6.7. On 21 May 2013, the Claimant filed a response to SportAccord's objection. In its response, the Claimant alleged that the objector failed to prove that it had: "an on-going relationship" with a "clearly delineated Sport community"; that the alleged community was "clearly delineated"; "substantial opposition" to the application in the alleged community; a strong association between the applied-for gTLD string and alleged community represented by the objector; and a likelihood of material detriment

to the rights or legitimate interests of a significant portion of the alleged community to which the string might be explicitly or implicitly targeted.

D. The .sport Expert Determination

6.8. ICANN subsequently submitted the .sport community objection to a third-party Expert appointed by the ICC Centre for Expertise in accordance with Section 3.4.4 of the Applicant Guidebook. Section 3.4.4 provides, among other things, that:

> "A panel will consist of appropriately qualified experts appointed to each proceeding by the designated DRSP. Experts must be independent of the parties to a dispute resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence."

6.9. On 25 June 2013, the ICC Centre for Expertise notified the parties that it had appointed Mr. Jonathan P. Taylor as Expert. In his Statement of Impartiality and Independence, Mr. Taylor indicated that he had nothing to disclose. In his accompanying curriculum vitae, he indicated that he had previously been involved with organizations and federations that are members of the objector SportAccord.

6.10. On 27 June 2013, the Claimant objected to the appointment of Mr. Taylor on the grounds that: (i) the issues at stake did not require sports law expertise and any sports lawyer would likely prefer a sports organization or federation over a commercial registry operator; and (ii) Mr. Taylor's career appeared to have been intertwined with and depend heavily upon the entities involved with the community objection.

6.11. On 25 July 2013, the ICC notified the parties that it had decided not to confirm the appointment of Mr. Taylor.

6.12. On 30 July 2013, the ICC Center for Expertise informed the parties that it had proceeded with the appointment of Prof. Dr. Guido Santiago Tawil instead (the "**Expert**"). In his Statement of Impartiality and Independence, the Expert stated that he had nothing to disclose. There is nothing to suggest that the ICC Centre for Expertise took additional steps to ensure that the Expert was not also "intertwined with" or dependent upon the entities involved with the community objection. Nor is

there anything to suggest that the Claimant made any further or particular enquiries in that regard at the time of the Expert's appointment.

6.13. On 23 October 2013, the Expert issued his decision (the "**Expert Determination**") upholding SportAccord's community objection. In the Expert Determination, the Expert determined, inter alia, that:

(a) "SportAccord is an established institution which has an ongoing relationship with a clearly delineated community";

(b) SportAccord has "proved several links between potential detriments that the Sport Community may suffer and the operation of the gTLD by an unaccountable registry, such as the sense of official sanction or the disruption of some community efforts";

(c) "the Appointed Expert shares Objector's argument that all domain registrations in a community based '.sport' gTLD will assure sports acceptable use policies" and "this cannot be warranted by Applicant in the same way in the event that the application for the '.sport' gTLD is approved by ICANN"; and

(d) "... even though SportAccord has not proved that dot Sport Limited will not act (or will not intend to act) in accordance with the interests of the Sport Community, the Appointed Expert considers that this is only one factor, among others, that may be taken into account in making this determination."

6.14. The ICANN Board accepted the Expert Determination. Upon receipt of the Expert Determination, however, the Claimant says it started to investigate the Expert's links with the sports industry based on what the Claimant considered to be the "surprising" outcome of the Expert Determination. The Claimant's findings prompted it to submit a Request for Reconsideration.

E. Claimant's First Reconsideration Request

6.15. On 8 November 2013, pursuant to Article IV, Section 2 of the Bylaws, the Claimant filed a first Reconsideration Request with the BGC. The BGC is responsible for assisting the ICANN Board to enhance its performance and, among other things, to consider and respond to Reconsideration Requests submitted to the Board pursuant to the Bylaws. The Claimant sought reconsideration of the ICANN Board's acceptance of the Expert

Determination upholding the community objection regarding its .sport gTLD Application.

6.16. The Claimant raised two primary grounds for review: (i) failure to observe ICANN's procedure by the Expert when applying the relevant standard (likelihood of material detriment to a community); and (ii) breach of ICANN's policy on transparency based on the Expert's failure to disclose material information relevant to his appointment.

6.17. In relation to the second ground, the Claimant alleged that the Expert had not disclosed his attendance at a conference of the International Bar Association in Rio de Janeiro, Brazil, on 22 February 2011 entitled "Olympic-Size Investments: Business Opportunities and Legal Framework", where he co-chaired a panel entitled "The quest for optimising the dispute resolution process in major sport-hosting events".

6.18. On 8 January 2014, the BGC denied the Claimant's first Reconsideration Request. The BGC concluded that the Expert did not apply the wrong standard in contravention of established policy or process and did not appear to have proceeded inconsistently with the standards set forth in the Applicant Guidebook. In particular, the BGC concluded that the Claimant failed to demonstrate that the Expert had applied the wrong standards in that: (i) the Expert did not create a new standard for determining the likelihood of material detriment; (ii) the Expert did not fail to apply the existing standard for cause of the likelihood of material detriment to a community; and (iii) the Expert did not create a new test for examining the alleged material detriment.

6.19. The BGC further concluded that the Expert's purported failure to disclose a possible conflict of interest did not support reconsideration, as a matter of process. In particular, the BGC noted that:

> "[I]t does not appear that the [Claimant] has sought to challenge the Expert's independence under the ICC Rules of Expertise. Although the alleged conflict of interest was discovered after the Expert rendered a determination, the ICC Rules of Expertise would still govern any issues relating to the independence of experts. The reconsideration process is for the consideration of policy- or process-related complaints. Without the [Claimant] attempting to challenge the Expert through the established process set forth in the Guidebook and the ICC Rules of Expertise, there can be no policy or process violation to support

reconsideration - *i.e.*, reconsideration is not the appropriate mechanism to raise the issue for the first time."

6.20. In its determination, the BGC also stated that in accordance with Article IV, Section 2.15 of the Bylaws its determination would be final and did not require Board consideration.

6.21. On 15 January 2014, following the first Reconsideration Request decision, the Claimant wrote to the ICC Centre for Expertise to notify it of the Expert's failure to disclose his involvement in the conference in Rio de Janeiro. On 21 January 2014, the ICC Centre for Expertise responded that:

> "[T]he Expert is no longer in place in this matter and does not have any current functions in connection with this matter. In such situation, neither the Procedure nor the Rules provide a basis for a challenge or a request for the replacement of an Expert."

6.22. The ICC Centre for Expertise concluded therefore that the Expert, having rendered his determination, was *functus officio* and that the ICC Centre for Expertise's role as DRSP in the New gTLD Dispute Resolution Procedure in this matter was therefore at an end.

F. Claimant's Complaint with ICANN's Ombudsman

6.23. On 6 February 2014, the Claimant filed a complaint with ICANN's Ombudsman pursuant to Article V, Section 2 of the Bylaws. The Ombudsman's role is to make sure that ICANN community members are treated fairly. It acts as an impartial mediator to help resolve disputes on issues involving the ICANN Board or supplementary organisations.

6.24. Article V, Section 3 of the Bylaws describes the Ombudsman's role as follows:

> "The Office of Ombudsman shall:
>
> 1. facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN community (excluding employees and vendors/suppliers of ICANN) may have with specific actions or failures to act by the Board or ICANN staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;

> 2. exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN's interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations … ."

6.25. The Claimant, meanwhile, continued its investigation into the Expert's links to the sports industry and discovered new information that it considered further heightened the appearance of bias. In particular, the Claimant discovered that: (i) the Expert's law firm represented a client, DirecTV, in negotiations with the International Olympic Committee ("**IOC**") concerning broadcasting and sponsorship rights to the Olympic Games, which resulted in an agreement concluded 7 February 2014; and (ii) a senior partner in the Expert's law firm acted as president of one of those clients, TyC.

6.26. On 26 March 2014, the Claimant informed ICANN and the Ombudsman about this additional information, as well as the ICC Centre for Expertise on 27 March 2014. On 29 March 2014, the ICC Centre for Expertise responded that there was a specific time limit to object to or challenge Experts within the ICC Expert Determination process, that an Expert Determination had been rendered and this case was closed, and that there was no procedure for re-opening the matter or making a challenge to the Expert within the Rules after closure of the matter.

6.27. On 31 March 2014, the Ombudsman issued a recommendation to members of the ICANN Board. The Ombudsman described the scope of inquiry before him as follows:

> "I have been asked to consider whether new material, which has just come to hand, justifies a recommendation by me to the New gTLD Committee, that they not accept the decision of the expert, Dr. Guido Tawil, in the matter of the .sports objection."

6.28. The Ombudsman took the view that the Expert should have disclosed the new information and that a reasonable appearance of bias might have been created by the ICC Centre of Expertise's stance that it was too late for the Claimant to challenge the Expert Determination on the basis of that material. The Ombudsman recommended

to the ICANN Board that there should be a rehearing of the objection with a different Expert appointed:

> "I am concerned that in this case, there has been no direct comment from Dr. Tawil. I am also concerned that the ICC have taken a stance that it is too late for Famous Four Media to challenge the decision on the basis of material recently disclosed. My concern is, that this may create a reasonable appearance of bias. My view is that the commercial relationship ought to have been disclosed, to give the applicant Famous Four Media an opportunity to make a considered choice as to the suitability of this appointment. Transparency is the best way to ensure that parties are able to make the best choices.
>
> It is therefore my recommendation to the board, that there should be a rehearing of the objection with a different expert appointed."

6.29. On 1 April 2014, the ICC Centre for Expertise sent a letter to ICANN objecting that the Ombudsman had never contacted the ICC for comment regarding the issue of the Expert. According to the ICANN, "the Ombudsman clarified for the Claimant that his email was not a final report and recommendation, and offered the ICC a chance to comment".

6.30. On 2 April 2014, the Claimant filed a second Reconsideration Request with the BGC, as described in more detail below.

6.31. On 7 May 2014, the Ombudsman reported to ICANN that he had spoken to the Claimant's representative "explaining that his [second request for] reconsideration would need to be withdrawn if he was to progress any complaint to me." There is no other contemporaneous record of that conversation taking place or the Claimant's reaction to it.

6.32. On 21 June 2014 in the second Reconsideration Request recommendation discussed further below, ICANN concluded in relation to the Ombudsman review as follows:

> "Recognizing that pursuant to Article V, Section 2 of the ICANN Bylaws, a complaint lodged with the Ombudsman cannot concurrently be pursued while another accountability mechanism on the same issue is ongoing, ICANN has

been advised that the Ombudsman sought confirmation from the [Claimant] as to whether it was aware of these limitations in the Bylaws and how it wished to proceed. ICANN was advised on or about 13 May 2014 that the [Claimant] confirmed that it was fully aware of these Bylaws provisions and that it would like to pursue this [second] Reconsideration Request rather than the Ombudsman's request."

6.33. Subsequently, on 5 May 2015, in connection with the current IRP application, ICANN wrote to the Ombudsman stating that:

> "I understand that in March of last year, you sent a draft report to Cherine, but that report was subsequently withdrawn pending a response from the ICC. Then, around April/May of last year, the Ombudsman investigation was placed on hold because [the Claimant] elected to pursue its reconsideration request. This request was considered and denied by the NGPC on 18 July 2014. Can you tell me what happened with the [Claimant's] complaint after the NGPC's 18 July 2014 decision? Did you finalize your report? Please let me know."

6.34. On the same day the Ombudsman responded by email:

> "I did not take any steps at all after the draft report, and have not been asked to do so by any party. So I closed the file. After the NGPC rejected their complaint I think they decided not to continue with me, but I just never heard again. When I realised they had sought IRP that explained the lack of contact I think, as they had decided to review this differently. Does that help?"

G. Claimant's Second Reconsideration Request

6.35. On 2 April 2014, the Claimant filed its second Reconsideration Request with the BGC pursuant to Article IV, Section 2 of the Bylaws. In its second Reconsideration Request, the Claimant requested reconsideration of: (i) the Expert Determination and ICANN's acceptance of it; (ii) the ICC Centre for Expertise's designation of the Expert; and (iii) the BGC's determination denying the Claimant's first Reconsideration Request, in the light of the Expert's apparent bias (having attended an International Bar Association conference in February 2011 and as a consequence of the Expert's law firm's involvement with interested parties) and violation of ICANN policy and process.

6.36. On 21 June 2014, the BGC recommended that the second Reconsideration Request be denied on the grounds that: (i) the Reconsideration Request was untimely; and (ii) even if it were timely, the "newly-discovered" evidence did not support reconsideration because neither the DirecTV contract nor the TyC relationship was evidence of a conflict of interest sufficient to support reconsideration.

6.37. The BGC found all three claims to be untimely pursuant to Article IV, Section 2.5 of the Bylaws as follows:

> "The [Claimant] claims that its belated discovery of new evidence of a conflict of interest on the part of the Expert justifies a tolling of the 15-day deadline for reconsideration requests. Specifically, [the Claimant] claims that on 25 March 2014 it discovered that: (i) one of the Expert's clients, DirecTV, acquired broadcasting rights for the Olympics on 7 February 2014, following the issuance of the Expert Determination ('DirecTV Contract'); and (ii) a partner in the Expert's law firm is president of TyC, a company which has a history of securing Olympics broadcasting rights and of which DirecTV Latin America is the principal shareholder ('TyC Relationship'). In other words, the [Claimant] suggests that an alleged connection between the Expert (or his law firm) and DirecTV, a 'recipient of IOC broadcasting rights,' creates a conflict of interest because SportAccord and the IOC enjoy a 'close collaborative relationship.'
>
> "The [Claimant's] argument does not support reconsideration. The [Claimant] does not explain how it suddenly became aware of this information on 25 March 2014, or explain why it could not reasonably have become aware of the information at an earlier date. The only recent event that the [Claimant] claims creates an alleged conflict of interest is the DirecTV Contract, but that contract was signed on 7 February 2014, almost two months prior to the filing of the instant Request (and nearly five months after the Expert issued the Determination). [The Claimant's] only other evidence for an alleged conflict is the TyC Relationship, a business relationship that appears to be decades old. Further, all of the [Claimant's] evidence regarding the DirecTV Contract and the TyC Relationship is based on publicly available information from Internet sites such as Wikipedia, Chambers and Partners, and a public sports website, which could have been discovered prior to 25 March 2014.

> "The [Claimant] does not explain why it failed to discover the alleged conflicts earlier. Because the [Claimant] could have become aware of the alleged conflicts earlier, the [Claimant's] belated discovery of publicly-available information does not justify tolling the 15-day time limit."

6.38. Following consideration of all relevant information provided, on 18 July 2014, the New gTLD Program Committee ("**NGPC**") reviewed and adopted the BGC's recommendation and denied the second Request for Reconsideration as being untimely, and on the further basis that the allegedly "newly-discovered" information relating to a purported conflict of interest did not support reconsideration.

6.39. On the record, neither the BGC's recommendation nor the NGPC's decision took into account the substantive findings or recommendations of the Ombudsman, noting merely that the Ombudsman process had been discontinued when the second Reconsideration Request was commenced in accordance with the ICANN dispute resolution procedures.

H. Cooperative Engagement Process

6.40. The Claimant subsequently filed a Cooperative Engagement Process ("**CEP**") Request pursuant to Article IV, Section 3.14 of the Bylaws.

6.41. The cooperative engagement process is published on ICANN.org and is incorporated into Section 3 of the Bylaws. The Cooperative Engagement Process description provides that:

> "[P]rior to initiating an independent review process, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. It is contemplated that this cooperative engagement process will be initiated prior to the requesting party incurring any costs in the preparation of a request for independent review."

6.42. In accordance with that Cooperative Engagement Process, the Independent Review Process filing date for the Claimant was extended.

I. IRP Request

6.43. On 19 March 2015, the Claimant submitted the current Notice and Request for IRP. The procedural history thereafter is summarized at Section 4 above.

6.44. In its Notice and Request for IRP, the Claimant seeks review of ICANN's actions or decisions on the alleged grounds that:

(a) the ICANN Board failed to establish, implement and supervise a fair and transparent dispute resolution process in failing to remedy apparent bias;

(b) the ICANN Board failed to establish, implement and supervise a fair and transparent dispute resolution process in the selection of the Expert;

(c) the ICANN Board failed to establish, implement and supervise a fair and transparent dispute resolution process in allowing the Expert to develop and perform an unfair and arbitrary review process:

(i) the ICANN Board failed to comply with its obligation to provide non-discriminatory treatment by accepting SportAccord's community objection, while other objections with identical characteristics were denied;

(ii) the dispute resolution process was unfair and non-transparent because of the Expert's disregard of ICANN's policy;

(iii) the dispute resolution process was unfair, non-transparent and arbitrary because of the lack of meaningful reasoning; and

(d) the ICANN Board failed to correct the mistakes in the dispute resolution process and denied the Claimant its right to be heard by an independent and impartial Expert.

7. IRP PANEL'S ANALYSIS

A. Overview

7.1. This IRP is the final stage in the ICANN New gTLD Dispute Resolution Procedure. The process is governed by the ICANN Bylaws, Articles, Applicant Guidebook and "Core Values". The IRP requires the Claimant to show that: (i) it was materially affected by a decision or action by the Board; (ii) the decision or action is inconsistent with the Articles or Bylaws; and (iii) the request for IRP was made within 30 days of the posting of the Board minutes recording that decision or action.

7.2. The essence of the Claimant's complaint has been consistent throughout the New gTLD application, objection and dispute resolution process. The Claimant alleges that it: (i) satisfied the necessary criteria for the application process for .sport, which, unlike .olympic, was subject to an unrestricted, open and competitive application process; (ii) was treated less favourably than SportAccord during the community objection process as a result of SportAccord's (a competitor's) community objection; and (iii) was treated unfairly in the Expert Determination process by which SportAccord's community objection was upheld because of the Expert's apparent bias.

7.3. The Claimant contends that throughout the Reconsideration Requests, the Ombudsman procedure and the CEP, ICANN failed properly to take into account the Claimant's concerns and reconsider and reject the Expert Determination in light of those concerns. According to the Claimant, it remains for this IRP Panel to determine whether or not the ICANN Board acted inconsistently with its Articles, Bylaws and other governing instruments in finding that the Expert Determination was not subject to reconsideration by ICANN, including as a result of apparent lack of independence or impartiality on the part of the Expert.

B. Timeliness

7.4. ICANN's Bylaws, Article IV, Section 3.3 provides that:

> "A request for independent review must be filed ***within thirty days of the posting of the minutes*** of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation."

7.5. ICANN accepts that the Claimant's request for IRP in relation to the first and second Reconsideration Requests is timely. ICANN does not accept that earlier decisions or actions by the ICANN Board, including its adoption of the Applicant Guidebook and/or the Expert Determination itself, are timely or otherwise open to review.

7.6. It is not necessary, however, for this IRP Panel to determine whether or not the Claimant is out of time to seek review of the Applicant Guidebook or the Expert Determination. The ICANN Board decisions or actions that the Claimant seeks to review are all contained within the scope of the first and second Reconsideration Requests. Some of those decisions and actions pertain to the ICANN Board's

interpretation and application of the Applicant Guidebook and its response to and treatment of the Expert Determination. However, the decisions and actions themselves were taken within the scope of the Reconsideration Requests and therefore within the timely scope of the current IRP.

C. Alleged Grounds for Review

7.7. The Claimant has raised four separate grounds for review of the ICANN Board's adoption of the BGC's and NGPC's decisions on the first and second Reconsideration Requests.

7.8. ***First***, the Claimant relies on an overriding principle of good faith, which it claims "is considered to be the foundation of all law and all conventions". The Claimant refers specifically to ICANN's Core Values as requiring ICANN, among other things, "to obtain informed input from those entities most affected by ICANN's decisions."

7.9. Article I, Section 2 of the Bylaws further provides that the Core Values are "deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances". The Bylaws state that:

> "Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."

7.10. ***Second***, the Claimant relies on ICANN's requirement of accountability. In particular, ICANN's Core Values require that it must "[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness." It further relies upon Article VI, Section 1 of the Bylaws, which requires ICANN to "be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws."

7.11. ***Third***, the Claimant relies on Article II of the Bylaws, which sets out the powers of ICANN, including restrictions at Section 2 and non-discriminatory treatment standards at Section 3. Specifically, Article II, Section 3 provides that:

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

7.12. ***Fourth***, the Claimant relies on ICANN's "Core Values" set out in the ICANN Bylaws, Article I, Section 2, together with ICANN's mission statement, in respect of transparency. The Bylaws "should guide the decisions and actions of ICANN" when it is "performing its mission", include, the Claimant submits, to "employ[] open and transparent policy development mechanisms".

7.13. In general, ICANN's Core Values, as set out in full in the ICANN Bylaws, Article I, Section 2, describe the overall goals and objectives that govern ICANN's decision-making. Specifically, the 11 Core Values that "should guide the decisions and actions of ICANN" when it is "performing its mission" are:

(a) to preserve and enhance the operational stability, reliability, security, and global interoperability of the Internet;

(b) to respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters within ICANN's mission;

(c) to the extent feasible and appropriate, to delegate coordination functions;

(d) to seek and support broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet;

(e) where feasible and appropriate, to promote and sustain a competitive environment;

(f) to introduce and promote competition in the registration of domain names;

(g) to employ open and transparent policy development mechanisms;

(h) to make decisions by applying documented policies neutrally and objectively, with integrity and fairness;

(i) to act with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entitles most affected;

(j) to remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness; and

(k) to recognize that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

7.14. As to procedure, Article IV, Section 3 of the ICANN Bylaws – as part of the accountability and review provisions – deals with the IRP. The process is confined to review of ICANN Board actions or decisions asserted by an affected party to be inconsistent with the Articles or Bylaws. In particular, Section 3.2 provides that:

> "Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action."

7.15. For the sake of completeness, the Panel further notes that the Applicant Guidebook is described in its preamble as being "the implementation of Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period." It is described in the IRP Final Declaration in *Booking.com v ICANN* as "the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs."

D. Standard of Review

7.16. The standard of review is set out at Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplementary Rules.

7.17. Article IV, Section 3.4 of the Bylaws provides that:

> "Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), 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 IRP Panel must apply a defined standard of review to the IRP request, focusing on:

a. did the Board act without conflict of interest in taking its decision?;

b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the community?"

7.18. Article 8 of the Supplementary Rules reiterates those three questions and further provide as follows:

> "8. Standard of Review
>
> The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
>
> If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review."

7.19. The IRP Panels in *Booking.com v ICANN* and *ICM Registry v ICANN* confirmed that the business judgement rule standard is "to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN … that bear on the propriety of its conduct." Where the Board's action or inaction may be compared against relevant provisions of ICANN's governing documents, the IRP Panel's task is to *compare* the Board's action or inaction to the governing documents and to *declare* whether they are consistent.

7.20. Unlike the IRP Requests in *Booking.com v ICANN* and *VistaPrint v ICANN*, which were determined effectively to be untimely challenges to the underlying process that had been established by the ICANN Board, this IRP Request concerns the review of the ICANN Board's adoption of the two Reconsideration Request decisions.

E. Analysis

7.21. The Panel considers below whether the Board acted consistently with ICANN's Articles, Bylaws and the procedures established in the Applicant Guidebook, comparing the Board's decisions to Article II, Section 3 of the Bylaws, then to the standard set out in Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplementary Rules and considers other relevant Bylaws and ICANN governing documents, including the Applicant Guidebook and ICANN's Core Values.

7.22. The primary issues, once distilled, are as follows:

(a) Did the ICANN Board fail to establish, implement and supervise a fair and transparent dispute resolution process:

(i) in failing to remedy apparent bias?

(ii) in the selection of the Panel?

(iii) in allowing the appointed Panel to develop and perform an unfair and arbitrary review process?

(b) Did the ICANN Board fail to correct the mistakes in the dispute resolution process and deny the Claimant its right to be heard by an independent and impartial Panel?

7.23. Each of these issues is considered in relation to the two ICANN Board decisions to reject the Claimant's Reconsideration Requests.

(i) Did the ICANN Board fail to establish, implement and supervise a fair and transparent dispute resolution process in failing to remedy apparent bias, in the selection of the Panel and/or in allowing the appointed Panel to develop and perform an unfair and arbitrary review process?

1. Claimant's Position

7.24. The Claimant's first complaint arises out of the process that led to the appointment of the Expert and the lack of any opportunity to take into account the Expert's alleged lack of independence or impartiality and/or apparent bias if discovered only after the Expert Determination had been rendered.

7.25. The Claimant points out that "ICANN's community objection dispute resolution rules are silent on the discovery of apparent bias after an expert determination has been rendered." In its first Request for Reconsideration, the BGC concluded that the ICC Rules of Expertise would still govern the Expert's independence and impartiality; that was plainly not the case. The Claimant considers that the ICANN Board's decision to accept the Expert Determination knowing that there was no recourse to deal with the discovery of the Expert's apparent bias was in breach of ICANN's obligations to act in good faith, transparently, and without discrimination.

7.26. The Claimant further alleges that ICANN failed to provide the appointed panels with adequate training and to ensure that they were familiar with the industry, and that this violation resulted in ICANN's failure to provide due process.

7.27. As to the international law standard of good faith, the Claimant alleges that this encompasses an obligation to ensure procedural fairness and due process which was not discharged in this case. In particular, the Claimant alleges that the ICANN Board "allowed a community objection that was (i) arbitrary and discriminatory, (ii) not a fair application of ICANN's policy, and (iii) lacking in meaningful reasoning."

7.28. In particular, the Claimant alleges that:

(a) the ICANN Board failed to comply with its obligation to provide non-discriminatory treatment by accepting SportAccord's community objection in circumstances where other objections with "identical characteristics" such as for .basketball, .gay, and .islam were all rejected;

(b) the ICANN Board permitted a dispute resolution process that was unfair and non-transparent because the Expert disregarded ICANN's policy by failing to make the necessary disclosures in his Declaration of Acceptance and Statement of Independence and Impartiality and "made an erroneous and unfair application of ICANN's policy on community objections by reversing the

burden of proof and using a divergent standard to assess the likelihood of material detriment to the community invoked by the objector"; and

(c) the ICANN Board's dispute resolution process was unfair, non-transparent and arbitrary because of the lack of meaningful reasoning in the Expert Determination.

2. ICANN's Position

7.29. According to ICANN, "neither the appointment of the Expert nor the Expert Determination constitutes ICANN Board action." Therefore, ICANN identifies the "only Board actions at issue here" as being "(1) the decisions by the Board to deny Claimants' two Reconsideration Requests; and (2) the Board's adoption of the Guidebook."

7.30. ICANN submits that the Board properly denied reconsideration to the Claimant's allegation concerning the Expert's conflict of interest.

7.31. First, ICANN maintains that the Claimant "fails to demonstrate that the BGC or the NGPC violated ICANN's Articles or Bylaws with respect to its determination on Claimant's reconsideration requests" based on the Expert's failure to disclose "his participation in the Dispute Resolution Conference" and "his law firm's relationships with two companies with alleged ties to the IOC."

7.32. In particular, ICANN submits that "[r]econsideration of the actions of a third-party service provider or expert in the New gTLD Program, such as the ICC (or its appointed expert), is appropriate only when its actions [contradicted] established ICANN policy(ies)' or procedures", in accordance with Article IV, Section 2.2(a) of the Bylaws. ICANN argues that:

> "The Board (through the BGC and NGPC) properly denied both of Claimant's reconsideration requests because, as the Board explained, the evidence reflects that: (1) both the ICC and the Expert followed the ICC's established policies and procedures with respect to the Expert's appointment (and thereby, followed ICANN's established procedure that the ICC use its process for determining an expert's impartiality); and (2) Claimant's challenge to the Expert was untimely under the ICC's Rules and Practice Note (and thereby

ICANN's established procedure that challenges to experts must comport with the ICC's rules)."

7.33. Secondly, ICANN submits that the Board correctly found that the ICC and Expert had followed established procedures with respect to the Expert's appointment. In particular, ICANN refers to Article 7(4) of the ICC Rules for Expertise. In response to the Claimant's allegation that the Expert failed to disclose certain information in relation to DirecTV and TyC, ICANN submits that:

> "[T]he BGC and NGPC correctly determined that the Expert had followed established policy and procedure in completing the Impartiality Statement required by the ICC. Disclosure requirements for neutrals are generally assessed in accordance with the guidelines set forth in the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration ("**IBA Conflict Guidelines**"). Nothing in the IBA Conflict Guidelines, however, requires disclosure of the type of information identified by the Claimant."

7.34. ICANN goes on to argue that (i) there is no provision in the IBA Conflict Guidelines to require an Expert to disclose that he participated in a conference involving an area of law allegedly relevant to a party; (ii) IBA Conflict Guideline 2.3.6 requiring disclosure of a significant commercial relationship "does not apply to the DirecTV Contract or the TyC Relationship" because "[n]either … involves a commercial relationship with the IOC"; and (iii) even if there were a commercial relationship with the IOC, "the IOC is not an affiliate of SportAccord" but instead is "an umbrella organization for all international sports federations (Olympic *and non-Olympic*), as well as organizers of multi-sport games and sport-related international associations."

7.35. Thirdly, as to timeliness of the second Reconsideration Request, ICANN submitted that the Board was correct to find that the challenge to the Expert was untimely. ICANN cites Articles 7(4) and 11(4) of the ICC Rules for Expertise, and paragraph 9 of the ICC Practice Note, which provide that any objections to the Expert must be made within five days. ICANN relies upon this deadline as its basis for arguing that any challenge by the Claimant to the appointment of the Expert arising out of the DirecTV Contract and TyC Relationship is out of time. Moreover, after the Expert decision is delivered, the case is closed and cannot be reopened, i.e., the Expert is *functus officio* and cannot be subject to challenge.

7.36. Finally regarding timeliness, ICANN argues that "all of the information Claimant cites to support its conflicts argument was publicly available and could have been discovered earlier with an exercise of due diligence."

3. Panel's Determination

7.37. In considering whether or not the ICANN Board failed to establish, implement and supervise a fair and transparent New gTLD application dispute resolution process, it is necessary for the IRP Panel to review the dispute resolution process and examine its implementation and supervision by the ICANN Board in the current application. Such review is limited to considering the role of the ICANN Board in remedying apparent bias, in ensuring fairness in the selection of a Panel and in preventing an unfair and arbitrary Expert Determination review process, specifically in the context of the Claimant's application for the .sport gTLD.

7.38. As set out at paragraphs 5.6 to 5.14 above, based on the GNSO recommendations, ICANN organized a new gTLD application process as set out in the Applicant Guidebook. The Applicant Guidebook sets out in six modules the stages in the application process. Module 3 sets out the objection procedures and the New gTLD Dispute Resolution Procedure.

7.39. Section 3.2.1 of the Applicant Guidebook provides that "[a] formal objection may be filed on any one of … four grounds", including:

> "***Community Objection*** – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted."

7.40. The Guidebook provides that community objections may be made by "[e]stablished institutions associated with clearly delineated communities". However, "[t]he community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection". In particular Section 3.2.2.4 provides in relation to standing that only:

> "Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in

the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution – Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community – Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements."

7.41. There is nothing in the objection procedure that prevents an objection by another applicant in the gTLD process, including for the same gTLD. The string confusion objection process specifically names other applicants in the gTLD process as having standing in respect of a string objection. Therefore, provided that the community

objector satisfies the criteria outlined above, it is entitled to object irrespective of whether it is also an applicant in respect of the same gTLD.

7.42. Any complaint by the applicant arising out of a community objection is subject to the Applicant Guidebook, Module 3, New gTLD Dispute Resolution Procedure. The designated DRSP for community objections is the ICC Centre for Expertise. As indicated above, the Claimant in this IRP objected to the SportAccord community objection and the dispute was referred to the ICC Centre for Expertise for determination.

7.43. If the standing of a community objector is subject to challenge, it is for the Expert to determine whether or not the community objector has the necessary standing as a matter of fact. In the .sport Expert Determination, the Expert determined that SportAccord did have the necessary standing.

7.44. That said, it would appear that the Claimant's primary concern is not the standing of SportAccord to submit a community objection as such, but rather the treatment of the Claimant throughout the dispute resolution process in relation to that objection once it had been brought. In particular, the Claimant alleges that there was apparent bias on the part of the Expert insofar as he was, or appeared to have been, predisposed in favour of SportAccord in making his Expert Determination to uphold the community objection.

7.45. Thereafter, according to the Claimant, in failing to take any steps to deal with the apparent bias of the Expert, instead approving the Expert Determination, rejecting two Reconsideration Requests and failing to take into account the matters raised in the Ombudsman's report, the ICANN Board's own actions and decisions were inconsistent with the ICANN Articles, Bylaws and other governing instruments.

7.46. As set out above, the standard of review is set out at Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplementary Rules. Therefore, in examining whether the ICANN Board acted in good faith, was accountable, and acted in a non-discriminatory and transparent manner, this IRP Panel must focus on the (i) existence of any conflict of interest; (ii) exercise of due diligence and care; and (iii) exercise of independent judgment believed to be in the best interests of the community.

7.47. ***First***, in relation to conflict of interest, the Claimant has made no allegation in this respect on the part of the ICANN Board. The Claimant strongly suggests that potential conflicts of interest existed on the part of SportAccord in making its community objection and, potentially, on the part of the Expert due to his alleged apparent bias in favour of SportAccord. However, in order to meet the necessary standard of review for this IRP Panel, the Claimant would need to allege and establish that the ICANN Board, as opposed to a third-party objector or the Expert appointed pursuant to the dispute resolution procedure in the Applicant Guidebook, acted with a conflict of interest. Such conflict of interest may have been alleged on the part of the BGC, NGPC, or some other function of the ICANN Board, but it was not.

7.48. ***Secondly***, the ICANN Board, including the BGC and NGPC, must have exercised due diligence and care in having a reasonable amount of facts in front of them in taking the decision or action under review. Accordingly, the IRP Panel must consider whether or not this standard was met in relation to:

(a) the BGC's decision of 8 January 2014 to reject the first Reconsideration Request in light of the Claimant's concerns as to the Expert's apparent bias, the ICC Centre for Expertise's inability to take into account allegations of lack of independence and impartiality and the NGPC's acceptance of the Expert Determination despite these factors; and

(b) the BGC's recommendation of 21 June 2014 and the NGPC's decision of 18 July 2014 to reject the second Reconsideration Request in light of the Claimant's new and additional concerns as to the Expert's apparent bias and in light of the content of the Ombudsman's recommendation to conduct a new Expert Determination.

7.49. Other IRP Panel Declarations have made clear that neither the NGPC acceptance of the Expert Determination nor the IRP itself is intended to be an appeal process or forum for substantive review of Expert Determinations. The IRP Panels in *Booking.com v ICANN* and *Vistaprint v ICANN* were asked to review the underlying Expert Determinations. Each concluded that a Reconsideration Request provides for procedural review and is not a substantive appeal:

(a) in *Booking.com v ICANN*, the IRP Panel concluded that the Claimant was not challenging the validity or fairness of the process;

(b) in *Donuts v ICANN*, the IRP Panel stated that "whatever label one uses to describe the approach (e.g., 'objective', 'de novo,' or 'independent') that approach does not allow the Panel to base its determination on what it, itself, might have done, had it been the Board. The explicit standard of review—for better or for worse—is much narrower than that";

(c) in *VistaPrint v ICANN* the IRP Panel characterized the claim of disparate treatment in the Expert Determination as "a close question", recommending that the Board conduct the Reconsideration Request step in the process that was, at the time of the IRP Panel, not yet engaged; and

(d) in *Dot Registry v ICANN*, the IRP Panel addressed primarily issues of adequacy and burden of proof in respect to the BGC's denial of a Reconsideration Request.

7.50. In the next gTLD application round, it has been proposed that a new appeal procedure for Expert Determinations be considered; at present no such appeal process exists. Accordingly, it is not currently possible for the Claimant to seek or obtain substantive review of the Expert Determination.

7.51. In the current case, in addition to substantive issues, questions of fairness and validity of the process are directly engaged. It is the Claimant's fundamental concern of bias, or apparent bias, on the part of the Expert towards SportAccord and the organisations it is connected with, in particular, which leads to a procedural fairness concern. In the Claimant's view, the Expert's perceived connections and affinity to the IOC and other bodies associated with SportAccord may render him more inclined to consider SportAccord, as a sporting body, to be better suited to administer the .sport gTLD than a commercial body such as the Claimant. By contrast, an Expert with no such sporting affiliations would be more likely to assess the Claimant against the applicant criteria without making a choice of a sport body over a commercial body.

7.52. The procedural fairness concern created by the alleged apparent bias was at the centre of the first Reconsideration Request. The BGC rejected that first Reconsideration Request after the Claimant had drawn to the BGC's attention its concerns as to the Expert's alleged apparent bias. In particular, in its first Request for Reconsideration, the Claimant raised its concern that:

> "[At]t a major conference of the International Bar Association in Rio de Janeiro, Brazil entitled 'Olympic-Size Investments: Business Opportunities and Legal Framework', [the Expert] was co-chair of a panel entitled ***'The quest for optimising the dispute resolution process in major sport-hosting events***' in which the following was discussed:
>
> *'The panel will debate the trends and best practices of resolving disputes in challenging environments with time-sensitive deadlines. Panellists will address issues related to arbitration, dispute boards, expert determination, mediation and electronic discovery on infrastructure projects for big international sports events. The experiences of Atlanta, Barcelona and the London Olympic Games will be discussed. The panel will also address the unique aspects of sports disputes and the potential use of a fast-track dispute resolution process in this area.'*"

7.53. The Claimant submitted to the BGC that the Expert "failed in his obligation to disclose a material factor relevant to confirmation of his appointment, and for this reason the resulting Determination must now be considered invalid on the grounds of failure to disclose facts or circumstances that would have, in the eyes of the parties, given rise to doubts as to the arbitrator's impartiality or independence, prior to accepting his or her appointment as Expert." This, according to the Claimant, was an obvious breach of the ICANN policy on transparency.

7.54. In its decision to reject the first Reconsideration Request, dated 8 January 2014, the BGC applied the standard of review set out in the Bylaws, Article IV, Section 2. According to the BGC, a successful reconsideration requires that an action or inaction contradicts established ICANN policy, failed to take into account material information or resulted from the Board's reliance on false or inaccurate information. It stated that:

> "In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, here the BGC is not to evaluate the Panel's conclusion that there is substantial opposition from a significant portion of the community to which the Requester's applications for .sports may be targeted. Rather, the BGC's review is limited to whether the Panel violated any established policy or process, which the Requester suggests was accomplished when the Panel

'derogated substantially' from the applicable standard for evaluating community objections."

7.55. The BGC found that the Expert had not derogated substantially from the applicable standard because:

(a) the Claimant had failed to demonstrate that the Expert had applied the wrong standards in contravention of established policy or process in that the Expert:

(i) did not create a new standard for determining the likelihood of material detriment;

(ii) did not fail to apply the existing standard for cause of the likelihood of material detriment to a community; and

(iii) did not create a new test for examining the alleged material detriment; and

(b) the Expert's purported failure to disclose a possible conflict of interest does not support reconsideration.

7.56. The basis for the BGC's conclusion that the Expert's purported failure to disclose a possible conflict of interest did not support reconsideration was that the Applicant Guidebook provides that the ICC Centre of Expertise will follow its adopted procedures for requiring independence and that "[t]he ICC Rules of Expertise would therefore govern any challenges to the independence of experts appointed to evaluate community objections," and that the Claimant "provides no evidence demonstrating that the Expert failed to follow the applicable ICC procedures for independence and impartiality prior to his appointment."

7.57. The BGC's conclusion in this respect is flawed. The duty of impartiality and independence is an ongoing one; the duty to disclose information that may, in the eyes of a party, give rise to concerns as to the impartiality or independence of the Expert continues throughout the dispute resolution process until a final decision is rendered. Accordingly, the fact that the Expert completed his Statement of Independence and Impartiality at the time of his appointment does not mean that no issue as to independence or impartiality can arise at a later stage.

7.58. This ongoing duty to disclose lies at the heart of ICC dispute resolution.

7.59. The second flaw in the BGC's reasoning is its conclusion that:

> "Although the alleged conflict of interest was discovered after the Expert rendered a determination, the ICC Rules of Expertise would still govern any issues relating to the independence of experts. The reconsideration process is for the consideration of policy- or process-related complaints. Without the [Claimant] attempting to challenge the Expert through the established process set forth in the Guidebook and the ICC Rules of Expertise, there can be no policy or process violation to support reconsideration – *i.e.,* reconsideration is not the appropriate mechanism to raise the issue for the first time."

7.60. The BGC further relied upon the Claimant's successful challenge of the initial Expert, Mr. Taylor, in support of the Claimant having "demonstrated familiarity with the ICC Rules of Expertise by successfully challenging and replacing the first expert appointed to the matter."

7.61. This reasoning is wrong and failed to take into account the fact that once the Expert has rendered a decision he is *functus officio* and the ICC as administering body similarly has no ongoing role.

7.62. Nevertheless, on 15 January 2014, immediately following the BGC's decision to reject the Claimant's first Reconsideration Request, the Claimant wrote to the ICC Centre for Expertise to request that it "reconsider whether in fact the appointment of [the Expert] was valid in light of the information at hand." By response dated 21 January 2014, the ICC stated that:

> "… the Expert has rendered the Expert Determination in case EXP/471/ICANN/88 and that it was notified to the parties by letter dated 25 October 2013.
>
> Subsequently, this matter has been closed.
>
> Accordingly, the Expert is no longer in place in this matter and does not have any current functions in connection to this matter. In such situation, neither the Procedure nor the Rules provide a basis for a challenge or a request for the replacement of an Expert."

7.63. According to the Applicant Guidebook, ICANN's New gTLD Dispute Resolution Procedures "were designed with an eye toward timely and efficient dispute resolution" and "apply to all proceedings administered by each of the dispute resolution service providers (DRSP)." Moreover, "[e]ach of the DRSPs has a specific set of rules that will also apply to such proceedings."

7.64. The scope of the dispute resolution procedure and role of the relevant DRSP is set out in more detail in the Applicant Guidebook as follows:

> "(b) The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure (the "Procedure").
>
> (c) Dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider ("DRSP") in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).
>
> (d) By applying for a new gTLD, an applicant accepts the applicability of this Procedure and the applicable DRSP's Rules that are identified in Article 4(b); by filing an objection to a new gTLD, an objector accepts the applicability of this Procedure and the applicable DRSP's Rules that are identified in Article 4(b). The parties cannot derogate from this Procedure without the express approval of ICANN and from the applicable DRSP Rules without the express approval of the relevant DRSP."

7.65. The purpose of delegating dispute resolution services to independent third-party providers, such as the ICC and the ICDR, is to create an independent process outside of the ICANN framework. In order to retain that independence, it is unsurprising that ICANN, through the BGC or otherwise, has very limited review power in respect of the substantive procedure conducted through a DRSP, such as an Expert Determination.

7.66. In the implementation of the New gTLD Program as a whole, occasionally a situation may arise where the New gTLD Dispute Resolution Procedure and the applicable DRSP's Rules, applied according to established policy or process, nevertheless do not

result in a fair, transparent or non-discriminatory outcome. One such example is the apparent inconsistency in several Expert Determinations arising out of string confusion objections, which led the ICANN Board to interfere with individual Expert Determinations which, on their face, appear to meet the necessary standard.

7.67. In the current situation, the Expert was appointed in accordance with the DRSP's Rules and rendered an Expert Determination. Subsequently, the Claimant raised an express concern that factors relating to the Expert's independence and impartiality became apparent only after the Expert Determination. The Claimant's concern appears to have at least facial validity.

7.68. As indicated above, as a matter of the ICC Centre for Expertise's procedure, as the ICC Centre for Expertise made clear in its letter of 21 January 2014, by the time these factors arose, the Expert Determination had been rendered and the Expert was *functus officio*. Accordingly, the ICC Centre for Expertise had no further function or role in relation to the Expert Determination. That power rested solely and exclusively with ICANN and its remaining procedures of Reconsideration Request, the Ombudsman and the IRP.

7.69. The BGC's decision to reject the first Request for Reconsideration on the basis that the Claimant "has not stated proper grounds for reconsideration" because "there is no indication that [the] Panel violated any policy or process in reaching the determination sustaining SportAccord's community objection" fails to take into account the following factors:

(a) the Claimant reasonably became aware of the information concerning the independence and impartiality of the Expert after the Expert Determination had been rendered;

(b) such information may have impacted the integrity of the decision-making process and, therefore, the integrity of the Expert Determination;

(c) there was no "established process set forth in the Guidebook and the ICC Rules of Expertise" through which option "to challenge the Expert" at that time; and

(d) absent any "established process", any action or decision by the ICANN Board in response to a genuine complaint as to the Expert's impartiality or

independence arising after the Expert is *functus officio*, must be guided by the Core Values in ICANN's Bylaws, including to:

(i) preserve and ***enhance the operational stability, reliability***, security, and global interoperability of the Internet;

(ii) where feasible and appropriate, to ***promote and sustain a competitive environment***;

(iii) ***introduce and promote competition*** in the registration of domain names;

(iv) employ ***open and transparent policy*** development mechanisms;

(v) make decisions by ***applying documented policies neutrally and objectively, with integrity and fairness***; and

(vi) ***remain accountable*** to the Internet community through ***mechanisms that enhance ICANN's effectiveness***.

7.70. ICANN's documented policies leave a Claimant with the options only of a Reconsideration Request, Ombudsman or an IRP in order to seek redress in the event of an arbitrator's apparent bias that only arises or becomes known after the Expert Determination is rendered. In those circumstances, the outsourced delegated role of the ICC Centre for Expertise is fulfilled and at an end.

7.71. Broadly, it is for the ICANN Board, through its NGPC, BGC and/or Ombudsman, to preserve ***and*** enhance the reliability of the system, the competitive environment of the registration process and the neutrality, objectivity, integrity and fairness of the decision-making system.

7.72. In the event that an Expert appointed in accordance with the Module 3 procedure were lacking in independence or impartiality, or there were otherwise an appearance of bias, then it is the ICANN Board that must redress that bias. In the current circumstances, it is plain that reconsideration is the only mechanism available to the Claimant to raise the issue of new information concerning independence and impartiality that has arisen only after the Expert Determination has been rendered and the DRSP process is at an end.

7.73. Had the BGC considered and assessed the new information and determined that it did not give rise to a material concern as to lack of independence or impartiality so as to undermine the integrity or fairness of the Expert Determination, and refused reconsideration on that basis, that action or decision may have been unreviewable. However, the BGC simply refused to consider the new information and its refusal is in contravention of the BGC's obligation to exercise due care and diligence.

7.74. Immediately following the first Reconsideration Request decision, on 6 February 2014, the Claimant filed a complaint with ICANN's Ombudsman. According to the ICANN website:

> "The ICANN Ombudsman is independent, impartial and neutral. The Ombudsman's function is to act as an informal dispute resolution office for the ICANN community, who may wish to lodge a complaint about ICANN staff, board or problems in supporting organizations. The purpose of the office is to ensure that the members of the ICANN community have been treated fairly. The Ombudsman is impartial and will attempt to resolve complaints about unfair treatment, using techniques like mediation, shuttle diplomacy and if needed, formal investigation. The Ombudsman is not an advocate for you, but will investigate without taking sides in a dispute. The process is informal, and flexible.
>
> …
>
> "The Ombudsman cannot make, change or set aside a policy, administrative or Board decision, act, or omission, but may investigate these events, and to use ADR technique to resolve them and make recommendations as to changes."

7.75. Given the nature of the Ombudsman's role, as neutral mediator, the status of his recommendation to the ICANN Board as a draft as opposed to a final recommendation, as alleged by ICANN, is irrelevant. The Ombudsman was engaged in a process to "facilitate the fair, impartial, and timely resolution of problems and complaints" raised by the Claimant as an "affected member[] of the ICANN community."

7.76. The existence of a written recommendation to the ICANN Board, and the fact that the ICANN Board appears wholly to have disregarded that recommendation, is a relevant factor for this IRP Panel's consideration as to whether or not the ICANN Board acted in accordance with its governing instruments.

7.77. As ICANN is at pains to point out, including in further and unsolicited post-hearing submissions and evidence, the Ombudsman did not proceed after the Claimant submitted its second Reconsideration Request. The ICANN Board accordingly did not follow or refer to his recommendation in considering the Reconsideration Request.

7.78. Nevertheless, the content of the Ombudsman's recommendation, including his neutral recommendation that a new expert determine the .sport community objection, was before the BGC when it received the Claimant's second Reconsideration Request. It had not been formally withdrawn or revoked by the Ombudsman and provided valuable information to the BGC. That recommendation suggested that the Board refer the Claimant's community objection to a new expert due to concerns regarding the Expert's apparent bias.

7.79. The second Reconsideration Request contained two additional items of information that were neither before the BGC during its first Reconsideration Request decision nor the Ombudsman when he made his recommendation. These were that:

(a) one of the Expert's clients, DirecTV, acquired broadcasting rights for the Olympics on 7 February 2014, following the issuance of the Expert Determination; and

(b) a partner in the Expert's law firm is president of TyC, a company which has a history of securing Olympics broadcasting rights and of which DirecTV Latin America is the principal shareholder.

7.80. The new allegations gave rise to a concern that the connection between the Expert (or his law firm) and DirecTV, a recipient of IOC broadcasting rights, created a conflict of interest because SportAccord and the IOC enjoy a close collaborative relationship.

7.81. In its recommendation on the second Reconsideration Request, commenced with the benefit of further allegations of apparent bias and following the Ombudsman's

recommendation, the BGC did consider the "newly-discovered" evidence, but found that it did not support reconsideration. In particular:

(a) in relation to the DirecTV Contract, the BGC deemed this to be irrelevant because the contract in question had not been executed at the time of the Expert Determination and the first BGC decision; and

(b) in relation to the TyC Relationship, the BGC considered this to be "decades old" and not considered earlier because it had not been raised earlier.

7.82. As with the first Reconsideration Request decision, the BGC appeared to focus on the role of the ICC procedures and the Expert's duty to disclose. In relation to the TyC Relationship in particular, the BGC concluded that:

> "[T]he Expert submitted to the ICC, and to the parties, his *curriculum vitae*, as well as his Declaration of Acceptance and Availability and Statement of Impartiality and Independence in accordance with the ICC Rules of Expertise. … As such, reconsideration is not appropriate with respect to the Expert's disclosure."

7.83. The BGC failed to take into account the problems that arise from what the Expert ***did not*** disclose in his Statement of Impartiality and Independence. He did not disclose the panel participation that gave rise to the first Reconsideration Request, nor any existing DirecTV relationship that ultimately gave rise to the DirecTV Contract or TyC Relationship. In relation to the DirecTV relationship, although the DirecTV Contract itself was executed after the Expert Determination, the Expert's law firm was likely in the process of negotiating that contract prior to the Expert Determination. All or some of these matters may give rise to apparent bias and the fact that they were not disclosed cannot be preclusive of any reconsideration in relation to them.

7.84. As to the BGC's finding that the Claimant's challenge to the Expert was untimely, the IRP Panel considers that, provided the Claimant was not reasonably aware of the factors giving rise to concerns of apparent bias at the time of the disclosure, and it has submitted that it was not, then it simply was not in a position to have challenged the arbitrator earlier. It quite justifiably relied on the Expert's disclosure in the carefully designed ICC standard forms. As the Ombudsman said in his report:

> "[T]he failure to undertake due diligence would in my view prevent any subsequent challenge to the appointment. In this case, there appears to have been both an adequate search, but also the entirely reasonable reliance upon the certificate of impartiality."

7.85. As the Ombudsman recognized, a fair system of dispute resolution must allow for review of a decision by an impartial and independent decision-maker in the event that previously undisclosed information reasonably becomes available only after the final decision is rendered. The sole basis for the decision-maker's mandate is the existence of his or her contracted-for independence and impartiality. If that falls away, the decision must be capable of reconsideration.

7.86. As to the BGC's second finding that the "newly discovered" evidence did not support reconsideration, the Ombudsman, in contrast, looked to the IBA Conflict Guidelines 2004 to assess whether or not "in the eyes of the reasonable bystander, an appearance of bias" existed. In particular, the Ombudsman referred to the IBA Conflict Guidelines' Waivable Red List, paragraph 2.3.7, which provides that "[t]he arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties."

7.87. The Ombudsman referred further to the IBA Conflict Guidelines' comment that:

> "In addition, a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in either non-appointment, later disqualification or successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so."

7.88. Tellingly, the BGC did not consider the IBA Conflict Guidelines (although it accepts in its submissions in this IRP that they are the standard governing neutrals), or any other standards for the requirements of independence and impartiality in neutral, binding decision-making bodies. Instead, it repeatedly relied upon a very technical argument that the necessary forms were completed, no objection was made during the process, and no steps can be taken now with the ICC as its role is at an end, therefore all delegated DRSPs have been complied with and the BGC having reviewed that process is satisfied.

7.89. In relying on this technical, procedural point, the BGC fails to engage with the substance of the concerns raised by the Claimant, i.e., the actual evidence that it alleges gives rise to apparent bias. Only the Ombudsman engaged in that analysis to any degree, and the BGC failed to take into account his analysis. If the BGC refuses to deal with apparent bias based on information arising only after an Expert Determination is rendered, then the question arises what other mechanism exists in the ICANN dispute resolution process to address it. It cannot be the case that there is no such mechanism, otherwise the process would risk extremely unfair and unjust results.

7.90. Accordingly, the IRP Panel is of the view that in order to have upheld the integrity of the system, in accordance with its Core Values, the ICANN Board was required properly to consider whether allegations of apparent bias in fact gave rise to a basis for reconsideration of an Expert Determination. It failed to do so and, consequently, is in breach of its governing documents.

7.91. This is a meaningful breach because several of the IBA Conflict Guidelines are invoked by the factors raised by the Claimant. In particular:

(a) in relation to the panel, Guideline 3.5.2 refers to circumstances where "[t]he arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise" and identifies that as Orange List;

(b) in relation to the TyC Relationship, Guideline 2.3.6 (referred to by the Ombudsman) refers to circumstances where "[t]he arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties" and identifies that as Waivable Red List; and

(c) in relation to the TyC Relationship and/or the DirecTV Contract, three Orange List Guidelines are applicable:

(i) Guideline 3.1.4: "The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator";

(ii) Guideline 3.2.1: "The arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator"; and

(iii) Guideline 3.2.3: "The arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute."

7.92. In light of the direct applicability of the IBA Conflict Guidelines in repeated respects, it is highly possible that a proper review of the evidence of apparent bias against those Guidelines as a whole could result in the BGC – like the Ombudsman – ordering a rehearing with a different expert appointed.

(ii) Did the ICANN Board fail to correct the mistakes in the dispute resolution process and deny the Claimant its right to be heard by an independent and impartial Expert?

7.93. The second limb of this IRP Request is that the Board failed to correct the mistakes in the process. In this respect, ICANN's technical procedural argument is more compelling. That is, provided the process was followed to the letter, it is not subject to mistakes that require rectification.

7.94. The finding of the IRP Panel is that the process is not in fact at fault; it is implicit in the Bylaws, Articles and Applicant Guidebook that an apparent bias must be dealt with by the Board, if it arises after the Expert Determination has been rendered and no other recourse is available.

7.95. The process itself therefore does not contain mistakes; the mistake is in the implementation of the process. In particular, the BGC and NGPC failed to apply the necessary consideration to the new evidence of apparent bias, in substance, against a satisfactory standard such as the IBA Conflict Guidelines.

7.96. Accordingly, on this second limb, the IRP Panel finds no basis for review.

8. COSTS

8.1. The Claimant seeks recovery of its costs in this IRP. Neither party has submitted any costs submission as to the amount of legal or other costs incurred by the parties.

8.2. The ICDR Rules, Article 34, provide in relation to the costs of arbitration that:

"The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case.

Such costs may include:

(a) the fees and expenses of the arbitrators;

(b) the costs of assistance required by the tribunal, including its experts;

(c) the fees and expenses of the Administrator;

(d) the reasonable legal and other costs incurred by the parties;

(e) any costs incurred in connection with a notice for interim or emergency relief pursuant to Articles 6 or 24;

(f) any costs incurred in connection with a request for consolidation pursuant to Article 8; and

(g) any costs associated with information exchange pursuant to Article 21."

8.3. The Panel fixes costs in respect of (i) fees and expenses of the Panel and (ii) fees and expenses of the ICDR acting as administrator of the proceedings in the sum of US$152,673.26

8.4. Taking into account the specific circumstances of this case, in particular the concerns outlined above in particular at paragraph 7.70, the Panel allocates the costs at paragraph 8.3 in favour of the Claimant. Accordingly, ICANN must reimburse to the Claimant its share of fees and expenses of the Panel and fees and expenses of the ICDR acting as administrator of the proceedings.

8.5. As to the reasonable fees and expenses of the Parties, the Panel makes no order for allocation to either Party and each shall be responsible for its own fees and expenses..

9. DECLARATION

9.1. In accordance with Article IV, Section 3.11 of the Bylaws, the Panel:

(a) Declares that the action of the ICANN Board in failing substantively to consider the evidence of apparent bias of the Expert arising after the Expert Determination had been rendered was inconsistent with the Articles , Bylaws and/or the Applicant Guidebook;

(b) Recommends that the Board reconsider its decisions on the Reconsideration Requests, in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines; and

(c) Declares the ICDR fees and expenses totaling US$5,750.00 and the fees and expenses of the Panelists totaling US$146,923.26 shall be borne entirely by ICANN. Therefore, ICANN shall reimburse to the Claimant its share of fees and expenses of the Panel and ICDR in the sum of US$79,211.64 upon demonstration by Claimant that these incurred fees and expenses have been paid.

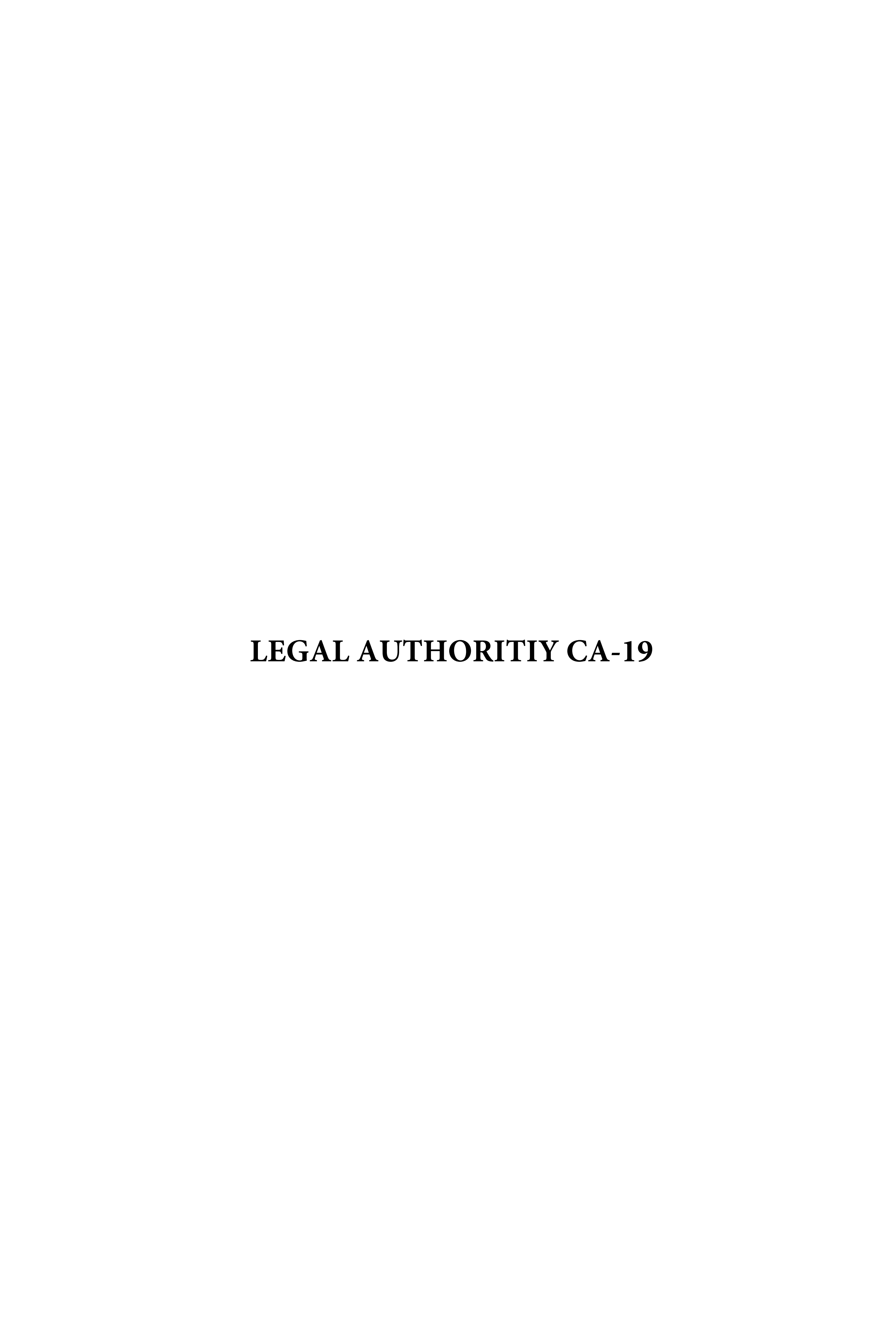
9.2 This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Signed:

Prof. Dr. Klaus Sachs
Date: 31 January 2017

Dr. Brigitte Joppich
Date: 31 January 2017

Wendy Miles QC
Date: 31 January 2017



LEGAL AUTHORITIY CA-19

Ex. CA-19

67 Cal.App.2d 225
District Court of Appeal, Second District, Division 3, California.

DE HAVILAND
v.
WARNER BROS. PICTURES, Inc.

Civ. 14643.
|
Dec. 8, 1944.
|
Hearing Denied Feb. 1, 1945.

Synopsis

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Olivia De Haviland against Warner Bros. Pictures, Inc., to terminate a contract for plaintiff's services as a motion picture actress. Judgment for plaintiff, and defendant appeals.

Modified, and affirmed as modified.

Attorneys and Law Firms

****984** ***228** Froston & Files, Ralph E. Lewis, and Charles A. Loring, all of Los Angeles, for appellant.

Gang, Kopp & Tyre, of Los Angeles, for respondent.

Opinion

SHINN, Justice.

Defendant has appealed from a judgment declaring at an end its contract for the services of plaintiff as a motion picture actress. The ground of the decision was that the contract had run for seven years, the maximum life allowed such contracts by former Civil Code section 1930, now section 2855 of the Labor Code, St.1937, p. 259. It was executed April 14, 1936, for a term of fifty-two weeks and gave the employer the right to extend the term for any or all of six successive periods of fifty-two weeks each. These options were exercised from time to time by the employer so as to cover the entire contract period. The services commenced May 5, 1936, and Except as interrupted by certain periods of suspension, were continued to August 13, 1943. The present action was commenced August 23, 1943. The contract gave the Producer, defendant, the right to suspend plaintiff for any period or periods when she should fail, refuse or neglect to perform her services to the full limit of her ability and as instructed by the Producer and for any additional period or periods required to complete the portrayal of a role refused by plaintiff and assigned to another artist. Plaintiff was to receive no compensation while so suspended or thereafter untio she offered to resume her work. It was provided that the Producer had the right to extend the term of the contract at its option, for a time equal to the periods of suspension. There were several such suspensions after December 9, 1939, and one suspension of 30 days which plaintiff agreed to and which was occasioned by her illness. In each instance defendant exercised its right to extend the term of the agreement. The several periods of suspension totaled some twenty-five ***229** weeks. The facts as to the suspensions are not in dispute; defendant's right to impse them is not questioned. Plaintiff's reason for refusing the several roles was that they were unsuited to her matured ability and that she could not faithfully and conscientiously portray them. Her good faith and motives are not in issue, ****985** but according to the contract the Producer was the sole judge in such matter and she had to do as she was told. The sole question is whether the provisions for suspension, and for extension of the term of the agreement, were lawful and effective insofar as they purported to bind plaintiff beyond seven years from the date her services were commenced. If they were lawful, plaintiff still owes twenty-five weeks of service; otherwise the contract came to an end May 5, 1943.

As enacted in 1872, section 1980 of the Civil Code read as follows: 'A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant, cannot be enforced against the employee beyond the term of two years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.'

In 1931, page 1493 section 1980 was amended to read as follows:

'A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant, and other than a contract entered into pursuant to the proviso hereinafter in this section contained cannot be enforced against the employee beyond the term of seven years from the commencement of service under it;

'Exceptional services. Provided, however, that any contract, otherwise valid, to perform or render service of a special,

unique, unusual, extraordinary or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render such service, for a term not beyond a period of seven years from the commencement of service under it.

'Presumptive measure of compensation. Notwithstanding the provisions hereinabove in this section contained, if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.'

In 1937 the section was repealed and ***230** section 2855 of the Labor Code was enacted, as follows: 'A contract to render personal service, other than a contract of apprenticeship as provided in Chapter 4 of this division, may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render such service, for a term not to exceed seven years from the commencement of service under it. If the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.'

Section 2 of the Labor Code provides: 'The provisions of this code, in so far as they are substantially the same as exsting provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments.'

It is clear that section 2855 of the Labor Code is a restatement and continuation of former Civil Code section 1980 and not a new enactment.

It is the contention of defendant that under section 1980, as amended in 1931, a contract for 'exceptional services' could be enforced against an employee for seven years of *actual* service, even though the employee would thereby be required to render services over a period of more than seven calendar years. Defendant's argument, in substance, is as follows: 'If it had not been the intention to take contracts for exceptional services out of the seven years' limitation, there would have been no occasion for the 1931 amendment, since employers holding contracts for the exclusive services of articles (a term we use to denote all of those who contract to render 'exceptional services') could enjoin the rendering of the services of their employees to others during the term of the contract (Lumley v. Gye, 2 El. & Bl. 216, 118 Eng.Rep. 749; Civil Code, sec. 3423); section 1980 of the Civil Code had always made an exception of contracts of apprenticeship; the 1931 amendment, in addition to changing the term of seven years, created another exception expressed in the first paragraph by the words 'other than a contract entered into pursuant to the proviso hereinafter in this section contained.' ***231** The effect of this language, it is claimed, was to take ****986** contracts for 'exceptional services' out of the general limitation of seven years and to state a special rule for them as found in the proviso. Our attention is then directed to the wording of the proviso that contracts for exceptional services 'may nevertheless be enforced against the person contracting to render such service, *for a term not beyond a period of seven years* from the commencement of service under it.' It is argued that the phrase 'for a term not beyond a period of seven years' in the proviso, instead of the phrase 'beyond the term of seven years' which was retained in the paragraph relating to contracts for services of a general nature, had a peculiar significance. The rule is cited that 'when different language is used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning and effect' (McCarthy v. Board of Fire Com'rs, 1918, 37 Cal.App. 495, 174 P. 402, 403), and it is said in defendant's brief: 'Under the rule above stated, such a distinctive choice of different words in two parts of the same statute must have indicated a different meaning and a different intent, and among other things, it indicates that 'term' was not used in the sense of mere lapse of time, since 'period' was also used, but referred to a 'term' established by the contract.'

If we are to accept defendant's construction of the section as amended, we must add words to the phrase used in the priviso so that it would read 'for a term not beyond a period of seven years *of actual service* from the commencement of service under it.' In fact, the words 'of actual service' could have been used appropriately after the word 'term' and also after the words 'seven years' if it had been the intention to do away with the limitation of seven calendar years from the commencement of service. It is true that the exception in the first clause of contracts for exceptional services, to which the proviso relates, suggests a possible intention to take such contracts out of the general rule, but the proviso itself is the enacting clause and the controlling one. It is the clause which determines whether the general limitation was intended to be removed as to contracts for exceptional services. Defendant's contention is that there could have been only one purposein

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amending the section, namely, to allow the enforcement against employees of contracts for personal services to the extent of seven years of actual service, ***232** regardless of the time over which such services might extend. With this we cannot agree. The difficulty with the argument, and which we think is insurmountable, is that the legislature has not used the words ‘of service,’ and the failure to use those or equivalent words is far more significant as indicating the purpose of the enactment than the entire amendment as written. We cannot believe that the phrase ‘for a term not beyond a period of seven years' carries a hidden meaning. It cannot be questioned that the limitation of time to which section 1980 related from 1872 to 1931 was one to be measured in calendar years. It is conceded that contracts for general services are limited to seven calendar years. The substitution of years of service for calendar years would work a drastic change of state policy with relation to contracts for personal services. One would expect that such a revolutionary change, even as applied to a particular class of contracts, would be given expression in clear and unmistakable terms. It is difficult—in fact, too difficult—to believe that a purpose which could have been expressed so simply and clearly was intentionally buried under the camouflage of uncertainty and ambiguity. That the 1931 amendment of section 1980 was ineptly phraised may not be doubted. Confirmation of this fact is to be found in the changes of phraseology that were made when the section was carried into the Labor Code. The obvious redundancy in the phrase ‘for a term not beyond a period of seven years' was corrected and the innocuous phrase ‘other than a contract entered into pursuant to the proviso hereinafter in this section contained’ was eliminated. The words ‘cannot be enforced’ in the first clause were changed to ‘may not be enforced.’ This latter change, we might say, was obviously in the interest of grammatical purity and was not intended to confer any discretionary power upon the courts in the matter of enforcing personal service contracts. The words ‘may not’ as used are mandatory.

Although as a rule legislative enactments are drawn under expert guidance and with much care, it is inevitable that ambiguity will be encountered occasionally. But the ambiguities found in the 1931 amendment amounted to no more than imperfections of phraseology and fell far short of working any change in the substantive law. The language of section 1980, Civil Code, was carefully revised in the drafting of the Labor Code section. The ambiguous language which ***233** was suggestive of a possible ****987** meaning that contracts of artists might be enforced for seven years of actual service was eliminated. The result, we think, was to state in the Labor Code section the true meaning of amended section 1980 and to state it in more carefully chosen terms. Again the phraseology which was used clearly indicated that the limitation applied to calendar years; otherwise the phrase ‘term of service’ or ‘years of service’ would have been used. The later enactment, we think, may be regarded as an interpretation by the legislature of the meaning of section 1980, that is to say, that the phrases which were eliminated from that section were merely redundant and had added nothing to its meaning.

What we have said does not fully answer the question why section 1980 was amended, if it was not to make a special rule for the enforcement of contracts of artists. Defendant's argument is that if it did not serve that purpose it served no purpose at all. The amendment would seem to have been unnecessary, for it worked no change in the substantive or procedural rights of either the employer or the employee. It is not questioned by either party that before the amendment was adopted, employers who had contracted for the exclusive services of artists could enforce their contracts for the term limited by section 1980 by means of injunction restraining the rendering of services of their employees to others. Both plaintiff and defendant cite Lumley v. Gye, supra, in support of this proposition. Prior to 1919, section 3423 of the Civil Code provided that an injunction may not be granted to prevent the breach of a contract which would not be subject to specific performance. In 1919, p. 328, the section was amended so as to except contracts for exceptional services such as the one in issue, which provide a rate of compensation of not less than $6,000 per annum. But even though the amendment of section 1980 did not enlarge the rights of employers to enforce such contracts other than to extend the term to seven years, the amendment was nevertheless desirable because it constituted a statement of a well established rule of equity and there is a good purpose served by the codification of established rules of law or equity. Even after the 1939 amendment of section 3423, there was in the codes no specific, affirmative statement of the right of an employer to enforce any kind of contract for personal services, by injunction or ***234** otherwise. The amendment of section 3423 inferentially gave the employer the right to an injunction in certain cases. The amendment of 1980 stated the right in affirmative terms. It had the effect at least of correlating the two sections and removing any doubt as to what was intended by the amendment of section 3423, which, by inference only, extended the right of injunction in certain cases to the contract rights of the employers of artists. It was undoubtedly to the advantage of all those who might be affected, to have the law put in statutory form. These were

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sufficient reasons, was we believe the real reasons, for the amendment of section 1980.

We have not overlooked the earnest arguments of counsel as to whether a producer of motion pictures should or should not have the right to the exclusive services of an artist for a period of seven years of service. It is to be presumed that the legislature considered such matters in legislating upon the subject, but the arguments do not aid us in determining what the code sections mean. While the purpose sought to be accomplished in the enactment of a statute may be considered as an aid to interpretation, the question whether the legislature has acted at all in a given particular must find answer in the statute itself. We think the expressions of the various enactments cannot be bent to a shape that will fit defendant's argument, and that the several extensions of plaintiff's contract due to her suspensions were ineffective to bind her beyond May 5, 1943, seven years after her services commenced.

A second contention is that if defendant had not the right under the code to demand seven years of service, plaintiff has waived the right to question the validity of the extensions, which carried beyond the seven year period. By her breaches of the contract, it is claimed, she brought into operation the provisions for extension and is now estopped to avoid them. Defendant relies upon section 3513 of the Civil Code, reading as follows: 'Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.' Defendant insists that the limitations of said sections 1980 and 2855 were enacted solely for the benefit of employees and not for a public reason, and may be waived. Reliance is placed upon Stone v. Bancroft, 1903, 139 Cal. 78, 70 P. 1017, 72 P. 717, as a supporting authority. But the case went no further than to hold ****988** that the statute, section 1980, as it ***235** then read, was not available to the employer as a defense to an action for salary earned after the (then) two years statutory period, for the reason that the limitation applied to actions by the employer but not to those brought against him by the employee. It was in that connection that the court held the limitation to be for the benefit of the employee only. No question of waiver or of public policy was involved or mentioned.

The fact that a law may be enacted in order to confer benefits upon an employee group, far from shutting out the public interest, may be strong evidence of it. It is safe to say that the great majority of men and women who work are engaged inr endering personal services under employment contracts. Without their labors the activities of the entire country would stagnate. Their welfare is the direct concern of every community. Seven years of time is fixed as the maximum time for which they may contract for their services without the right to change employers or occupations. Thereafter they may make a change if they deem it necessary or advisable. There are innumerable reasons why a change of employment may be to their advantage. Considerations relating to age or health, to the rearing and schooling of children, new economic conditions and social surroundings may call for a change. As one grows more experienced and skillful there should be a reasonable opportunity to move upwards and to employ his abilities to the best advantage and for the highest obtainable compensation. Legislation which is enacted with the object of promoting the welfare of large classes of workers whose personal services constitute their means of livelihood and which is calculated to confer direct or indirect benefits upon the people as a whole must be presumed to have been enacted for a public reason and as an expression of public policy in the filed to which the legislation relates. It was said in Re Miller, 1912, 162 Cal. 687, 695, 124 P. 427, 429: 'The courts must always assume that the Legislature in enacting laws intended to act within its lawful powers, and not to violate the restrictions placed upon it by the Constitution.' The validity of legislation infringing upon the right of contract is to be judged from its tendency to promote the welfare of the general public rather than that of a small percentage of citizens. In re Kazas, 1937, 22 Cal.App.2d 161, 70 P.2d 962.

***236** The power to restrict the right of private contract is one which does not exist independently of the power to legislate for the purpose of preserving the public comfort, health, safety, morals and welfare. The power to provide for the comfort, health, safety and general welfare of any or all employees is granted to the legislature by Article XX, section 17 ½ of the state Constitution. Enactments exercising the power have been upheld in many instances. In re Twing, 1922, 188 Cal. 261, 204 P. 1082; In re Petition of Ballestra, 1916, 173 Cal. 657, 161 P. 120; Sears v. Superior Court, 1933, 133 Cal.App. 704, 24 P.2d 842; In re Samaha, 1933, 130 Cal.App. 116, 19 P.2d 839; People v. McEntyre, 1938, 32 Cal.App.Supp.2d 752, 84 P.2d 560. In Re Oswald, 1926, 76 Cal.App. 347, page 351, 244 P. 940, page 941, the court said of an act making it a misdemeanor to refuse in certain circumstances to pay wages when due; 'We are persuaded that the public has an interest in the prevention of wrongs of this character, just as much as it is interested in the prevention of some other of those wrongs against property or wrongs against persons which are commonly regarded as being properly within the scope of operation of

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crimina law.' Penal statutes, within constitutional limitations, are conclusive evidence that the prohibited acts would be against the public interest. The several statutes which were involved in the cases last cited were enacted for the benefit of employees and also to regulate the employer-employee relationship in the interest of the public at large. The code sections we are considering are no less closely identified with public interest. Under the same principles, a law of Louisiana limiting the term of personal service contracts was upheld as a proper exercise of the police power and an expression of state policy in Shaughnessy v. D'Antoni, 5 Cir., 1938, 100 F.2d 422. See also Hill v. Missouri-Pac. Ry. Co., D.C. 1933, 8 F.Supp. 80; Page v. New Orleans Public Service, Inc., 1936, 184 La. 617, 167 So. 99; Caldwell v. Turner, 1911, 129 La. 19, 55 So. 695. The rights of employees as now declared by section 2855 of the Labor Code fall squarely within the prohibition of section 3513 of the Civil Code, that rights created in the public interest may be contravened by private agreement.

Finally, it may be pointed out that the construction of the code sections contended for by defendant would render the ****989** law unworkable and would lead to an absurd result. If an employee may waive the statutory right in question by his ***237** conduct, he may waive it by agreement, but if the power to waive it exists at all, the statute accomplishes nothing. An agreement to work for more than seven years would be an effective waiver of the right to quit at the end of seven. The right given by the statute can in favor of those only who have contracted to work for more than seven years and as these would have waived the right by contracting it away, the statute could not operate at all. It could scarcely have been the intention of the legislature to protect employees from the consequences of their improvident contracts and still leave them free to throw away the benefits conferred upon them. The limitation of the life of personal service contracts and the employee's rights thereunder could not be waived.

One of the conclusions of law was the following: 'Defendant may not enforce the Contract against plaintiff and defendant should be enjoined and restrained from enforcing the Contract or attempting to enforce the Contract against plaintiff or interfering with the rendition by plaintiff of services for persons, firms or corporations other than defendant.' The judgment contained an injunctive provision in the same language. Defendant challenges this provision as unsupported by the pleadings, the proof or the findings. The objection is well founded. Both plaintiff and defendant sought a declaration of their respective rights a declaration of their respective proof was not addressed to any other issue. Plaintiff was the only witness and her testimony and the documentary evidence that was received related only to the services she had performed and to those she had declined to perform and which led to the suspensions. The facts were not in dispute. Plaintiff offered to prove, in claiming a right to an injunction, that defendant had sent out many letters to other producers stating its position with reference to the contract and its claim that plaintiff was still in is employ. The offer was rejected and the court in so ruling stated, 'I think the objection should be sustained. You see it is not an action in which Miss DeHavilland is seeking relief from any threatened boycott or threatened action on the part of Warner Brothers. That is not in this case.' The findings covered the essential facts as to the making of the contract, the dispute as to its meaning, and found that plaintiff did not violate the contract or default thereunder after May 5, 1943. There was no finding of facts which would justify an injunction.

The last finding was: 'All of the allegations of the answer of defendant inconsistent with the foregoing findings ***238** of fact are untrue.' This was no finding at all upon the facts as to the several breaches of the contract and the extensions which were alleged in the answer. No point is made by defendant of the failure to find specifically upon the issue raised by the answer and no harm could have resulted from such failure in view of the stipulation made which covered all of the material facts upon which defendant relies.

There is nothing in the record that would justify a belief or even a suspicion that defendant will not respect and abide by the final declaration of the court as to the rights of the parties in the premises. An injunction is not proper to restrain the commission of acts in the future unless there is good reason to believe they will be committed if there is no restraint. Where no similar acts have been committed in the past and none are threatened to be committed in the future, and where it appears reasonable to believe they will not be committed, there is no occasion for an injunction and no right to one. The fact that defendant has openly insisted that plaintiff is still bound to it by contract does not justify the belief that it will do so contrary to a final decree that the contract has ended. See Sunset Scavenger Corp. v. Oddou, 1936, 11 Cal.App.2d 92, 53 P.2d 188.

The judgment is modified by striking out all of paragraph 5 after the words, 'Defendant may not enforce the contract against plaintiff,' and as modified is affirmed, respondent to recover costs.

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DESMOND, P. J., and PARKER WOOD, J., concur.

All Citations

67 Cal.App.2d 225, 153 P.2d 983

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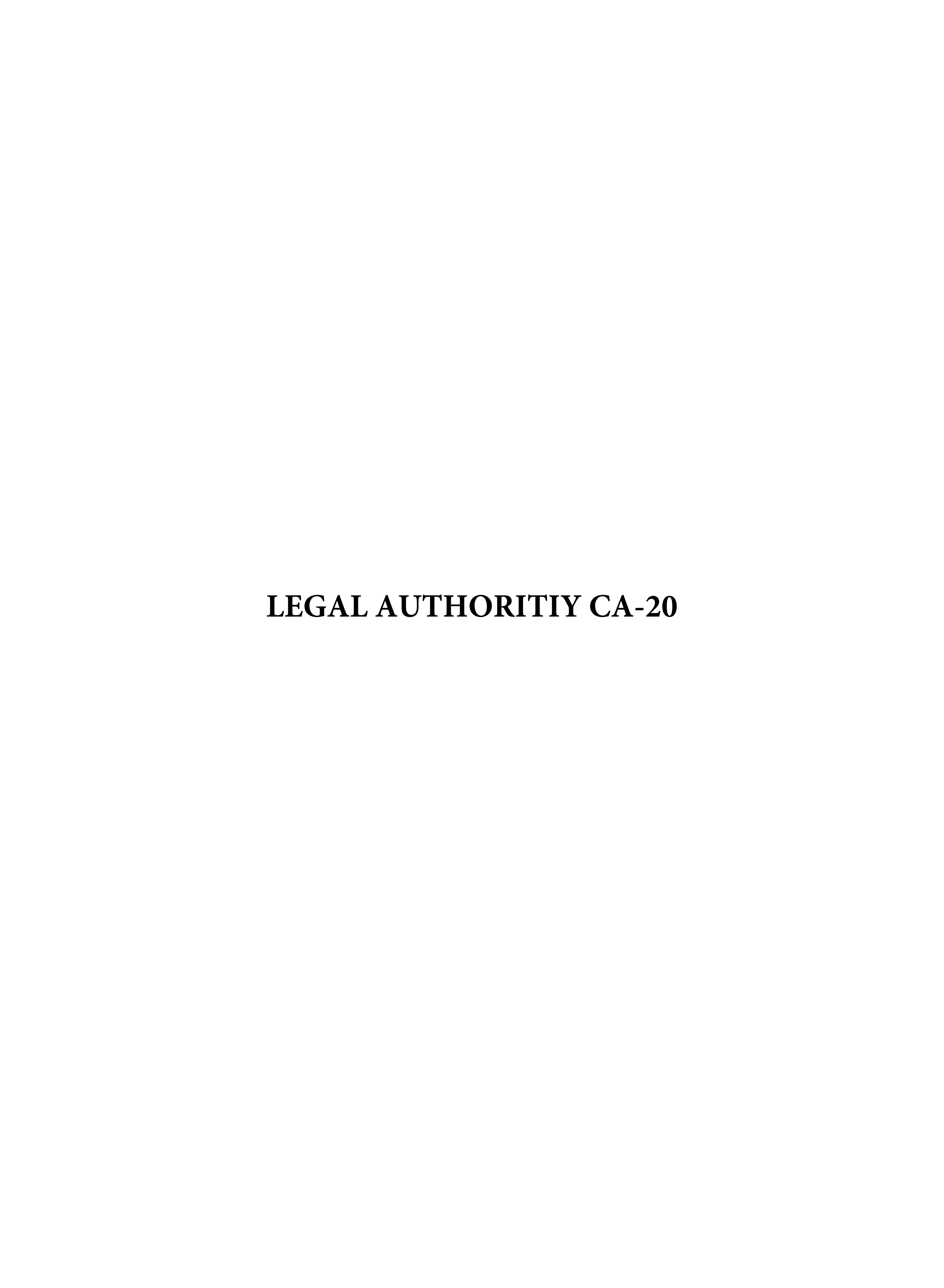

LEGAL AUTHORITIY CA-20

Ex. CA-20

127 Cal.App.4th 197
Court of Appeal, Second District, Division 3, California.

Paul WOOLLS, Petitioner,
v.
SUPERIOR COURT of Los Angeles County, Respondent;
Thomas C. Turner et al., Real Parties in Interest.

No. B177992.
|
Feb. 28, 2005.
|
Review Denied June 8, 2005.

Synopsis
Background: Homeowner moved to vacate arbitration award in dispute with contractor. The Superior Court, Los Angeles County, No. EC038595, Laura A. Matz, J., denied motion, and homeowner petitioned for writ of mandate.

Holdings: The Court of Appeal, Klein, P.J., held that:

arbitration provisions in parties' agreement were in total noncompliance with statute;

contractor's failure to comply with statute rendered arbitration provisions unenforceable against homeowner;

enforcement of statute was not preempted by Federal Arbitration Act (FAA); and

it was not relevant that homeowner was licensed attorney.

Writ of mandate issued.

West Codenotes

Recognized as Preempted
West's Ann.Cal.C.C.P. § 1298.7.

Attorneys and Law Firms

****428** Paul Woolls, in pro. per., for Petitioner.

No appearance for Respondent.

Law Offices of John A. Belcher, John A. Belcher and Nicholas W. Song, Pasadena, for Real Parties in Interest.

Opinion

KLEIN, P.J.

***200** Petitioner Paul Woolls (Woolls) seeks a writ of mandate to set aside respondent superior court's order denying his petition to vacate an arbitration award obtained by real parties in interest Thomas C. Turner and Thomas Turner dba T & T Construction (collectively, Turner). Woolls moved to vacate the award on the ground the arbitration agreement failed to comply with Business and Professions Code section 7191. [1]

Section 7191 requires arbitration provisions in contracts for work on residential property of one to four units to satisfy certain disclosure requirements, *including an advisement to the consumer that he or she is giving up the right to have the dispute litigated in a court or jury trial.* ****429** (§ 7191, subd. (b).) The essential issue presented is the consequence of an arbitration agreement's noncompliance with section 7191.

We conclude the noncompliant arbitration provision cannot be enforced "against any person other than the licensee." (§ 7191, subd. (c).) Therefore, we grant Woolls's petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The two arbitration provisions.*
On October 8, 2002, Woolls, a homeowner, and Turner, a contractor, entered into a written agreement for the renovation and expansion of Woolls's single family residence (the Agreement). The Agreement, signed by the parties, contained the following arbitration provision: "All claims, disputes, and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, *shall be decided by mediation and then arbitration* in accordance with the Construction Industry ***201** Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. Notice of demand for arbitration shall be filed in writing with the other party of this Agreement and with the American Arbitration Association." (Italics added.)

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On the same date, Woolls and Turner also initialed the cover sheet of a second, unsigned document which contained specifications for the project (Specifications). The Specifications contained the following arbitration provision: "Claims or disputes between the Contractor and the Owner arising from this Agreement that are not settled through negotiation shall be offered for mediation according to the rules of the American Arbitration Association. *Disagreements not settled by mediation shall be offered for arbitration* as per the rules of the American Arbitration Association. Work shall not be halted or slowed by the Contractor during negotiation, mediation, or arbitration of such disputes." (Italics added.)

Neither of these arbitration provisions included an advisement that by agreeing to arbitration, a party is waiving the right to a court or jury trial.

2. *Disputes arise and lead to Turner's instituting arbitration proceedings against Woolls.*

During the course of the work, disputes arose among Woolls, Turner and Stock Building Supply of California dba Terry Lumber (Terry Lumber)[2] regarding Turner's performance of the terms of the contract and Terry Lumber's billing for building materials. Ultimately, Woolls replaced Turner with other contractors to complete the work.

On or about October 8, 2003, Terry Lumber recorded a mechanics' lien against Woolls's property for the sum of $6,936.81.

On January 5, 2004, Terry Lumber filed suit against Turner and Woolls. The first cause of action against Turner pled a breach of contract. The second cause of action against Woolls sought foreclosure of the mechanics' lien.

On February 2, 2004, Woolls answered the complaint and filed a cross-complaint against Terry Lumber and Turner.

Turner initiated an arbitration proceeding against Woolls pursuant to the arbitration clause in the construction contract.

***202** 3. *The arbitration proceeds, notwithstanding Woolls's objections, and concludes in an award for Turner.*

On March 16, 2004, prior to the start of the arbitration, Woolls submitted written ****430** objections to the arbitrator, contending the arbitration agreement failed to comply with section 7191 in various particulars so as to render the arbitration clause unenforceable against Woolls.

Despite a pending motion by Woolls to stay the arbitration, and despite Woolls's objections to the arbitrator, the arbitrator proceeded with the hearing on March 16 through 18, 2004. According to the writ petition, Woolls participated in the arbitration "to preserve his rights and to prevent a runaway default judgment."

On April 5, 2004, the arbitrator issued an award, directing Woolls to pay $46,881.58 to Turner, as well as administrative fees, the arbitrator's compensation and expenses.

4. *Woolls unsuccessfully moves to vacate the award for noncompliance with section 7191.*

Turner filed a petition to confirm the award and Woolls filed a petition to vacate the award. Woolls again argued the arbitration agreement did not comply with section 7191, rendering it unenforceable.

On August 9, 2004, after hearing the matter, the trial court issued an extensive minute order, concluding the arbitration provision was enforceable against Woolls, "despite the absence of full compliance with the cautionary statements set forth in [section] 7191." The ruling provides:

"The parties do not dispute that they entered into two contracts for the construction on this project, both of which contained arbitration provisions. The parties also do not seriously dispute that neither of these arbitration provisions complies strictly with the requirements set forth in Business & Professions Code § 7191.... [¶] ... [¶]

"*This statute, although enacted in 1994, has not yet been interpreted in any published appellate decision.* Woolls argues the proper interpretation of [section 7191,] subdivision (c) is that an arbitration provision which does not comply with the prior subdivision regarding font size and language cannot be enforced against anyone other than the licensee. [Turner] argues that the use [in subdivision (c)] *of the term 'may' permits discretion of the part of the trial court with respect to the enforcement of the provision,* and that circumstances here dictate against strict enforcement of this provision and in favor of ***203** enforcing the arbitration provision against the home owner. There is a strong public policy in favor of arbitration of disputes and any doubts concerning the scope of arbitrable disputes should generally be resolved in favor of arbitration. [Citation.] When interpreting agreements to

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arbitrate, the court should generally liberally interpret such an agreement, and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question. [Citation.] This statute, as it [a]ffects the enforceability of arbitration agreements, presumably should also be read in this context of favoring arbitration.

"In interpreting a statute, the court begins with the language of the statute as the most reliable indicator of legislative intent. [Citation.] Accordingly, where the word 'may' is used in a statute, it has been held that the word may be read to make the provisions permissive, rather than mandatory. [Citation.]

"*Here, the statute instructs that the arbitration provision 'may not' be enforced against a particular party, not that it 'shall not' be enforced. In these circumstances, the court finds that the use of the term 'may' gives rise to a permissive meaning, and may be construed to read that the court 'may' enforce a non-complying arbitration provision if the circumstances so warrant. Such circumstances* ****431** *are present here.* The statute appears primarily directed to putting a residential consumer on notice that he or she is giving up any rights to a jury trial and/or to an appeal of the arbitrator's decision. Business and Professions Code § 7191(b). Here, however, *Woolls is a licensed attorney, who was fully aware that by signing an arbitration provision, he was waiving his right to a jury trial and his right to appeal. In fact, Woolls has testified that he objected to the inclusion of the arbitration provision in the agreements, that the parties actually negotiated this point, and that Woolls voluntarily executed the agreement knowing it contained an arbitration provision.* Moreover, even though Woolls raised the issue of fraud in the procurement of the provision at several junctures in the proceeding, he did not raise the issue of the provision's technical failure to follow Business & Professions Code § 7191 as a ground for this argument until the first day of the arbitration. Instead, Woolls has argued all along that he voluntarily signed the agreement, knowing it contained an arbitration provision, but that he agreed to arbitration based on fraudulent statements by Turner that Turner never had any client complain about his work. He has never argued that he did not fully appreciate the meaning and effect of the arbitration provision.

"*On the day of the arbitration, rather than pursue his then recognized rights under the Business & Professions Code, Woolls instead voluntarily participated in the arbitration, and raised his own cross claims. These circumstances indicate enforcement* [*of*] *the arbitration provision against* ***204** *Woolls is justified despite the absence of full compliance with the cautionary statements set forth in Business & Professions Code § 7191*." (Italics added.) [3]

After concluding section 7191 did not preclude enforcement of the agreement to arbitrate, the trial court continued the matter for a further hearing on Woolls's claim of fraud in the inducement of the arbitration provision.

On September 20, 2004, Woolls filed the instant petition for writ of mandate. Three days later, we issued an order to show cause [4] and stayed further proceedings below pending determination of the petition or further order of this court.

CONTENTIONS

Woolls contends an arbitration provision which fails to comply with section 7191 is not enforceable against anyone other than the contractor/licensee; interpretation of similar disclosure requirements supports the conclusion that noncompliant arbitration provisions should not be enforced against anyone other than the licensee; and public policy also supports such a conclusion.

DISCUSSION

1. *The Legislature has expressed a strong public policy in favor of arbitration; at the same time, arbitration cannot be imposed where an arbitration agreement has not been perfected in accordance with statutory requirements.*

Code of Civil Procedure section 1280 et seq., as enacted and periodically ****432** amended by the Legislature, represents a comprehensive statutory scheme regulating private arbitration in this state. (*Moncharsh v. Heily Blase* (1992) 3 Cal.4th 1, 9, 10 Cal.Rptr.2d 183, 832 P.2d 899.) "Through this detailed statutory scheme, the Legislature has expressed a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' (... see also *Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220, 226 [96 L.Ed.2d 185, 193, 107 S.Ct. 2332] [Federal Arbitration Act, 9 U.S.C. § 1 et seq., establishes federal policy in favor of ***205** arbitration].) Consequently, courts will "indulge every intendment to give effect to such proceedings." [Citations.]" (*Moncharsh, supra,* at p. 9, 10 Cal.Rptr.2d 183, 832 P.2d 899.)

Although arbitration is favored (*Moncharsh, supra,* 3 Cal.4th at p. 9, 10 Cal.Rptr.2d 183, 832 P.2d 899), there is also "the recognition that 'the right to select a judicial forum, vis–21a–vis arbitration, is a " 'substantial right,' " not lightly to be deemed waived.' [Citations.]" (*Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 643, 223 Cal.Rptr. 838.)

Toward that end, the Legislature has imposed mandatory disclosure requirements for arbitration provisions in various types of contracts. (See, e.g., § 7191 [contract for work on residential property of one to four units]; Code Civ. Proc., § 1295 [contract for medical services containing a provision for arbitration of professional negligence claim]; Health Saf.Code, § 1363.1 [arbitration provision in health care service plan].)

Here, the Legislature sought to ensure that an agreement to arbitrate disputes arising out of a contract for work on residential property of up to four units is obtained through a proper waiver of the right to a judicial forum. (§ 7191.) In furtherance of that goal, it adopted section 7191 to "[p]rohibit the use of a binding arbitration clause in a contract for work on a residential property unless the contract contains a specified disclosure that the binding arbitration clause results in a waiver of the right to *a judicial resolution of a dispute* concerning the contract." (Sen. Floor Analysis, Assem. Bill No. 3302 (1993–1994 Reg. Sess.) Aug. 22, 1994, p. 2, italics added.)

2. *The pertinent statute.*

Section 7191, adopted in 1994, imposes certain disclosure requirements in specified residential contracts. The statute provides in relevant part:

"(a) If a contract for work on residential property with four or fewer units contains a provision for arbitration of a dispute between the principals in the transaction, the provision *shall* be clearly titled 'ARBITRATION OF DISPUTES.'

"If a provision for arbitration is included in a printed contract, it *shall* be set out in at least 10–point roman boldface type or in contrasting red print in at least 8–point roman boldface type, and if the provision is included in a typed contract, it *shall* be set out in capital letters.

"(b) Immediately before the line or space provided for the parties to indicate their assent or nonassent to the arbitration provision described in subdivision (a), and immediately following that arbitration provision, the following *shall* appear:

***206** 'NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND ****433** YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.' 'WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.'

"If the above provision is included in a printed contract, it *shall* be set out either in at least 10–point roman boldface type or in contrasting red print in at least 8–point roman boldface type, and if the provision is included in a typed contract, it *shall* be set out in capital letters." (§ 7191, subds. (a), (b), italics added.)

Subdivision (c) of section 7191 specifies the consequence for noncompliance with the statute. It states: "A provision for arbitration of a dispute between a principal in a contract for work on a residential property with four or fewer units that does not comply with this section *may not be enforceable against any person other than the licensee.*" (§ 7191, subd. (c), italics added.)

3. *The two arbitration provisions herein failed to comply with section 7191.*

Turner contends the arbitration provisions herein were in substantial compliance with section 7191, and that is sufficient to pass muster. The argument fails. Scrutiny of the arbitration provisions in the Agreement and in the

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Specifications in light of the requirements of section 7191 compels the conclusion they totally failed to comply with section 7191, under *any* standard.

Contrary to the statute, the arbitration provisions were not titled "ARBITRATION OF DISPUTES." (§ 7191, subd. (a).) The arbitration provision in ***207** the Agreement bore no title at all. As for the arbitration provision in the Specifications, it was simply titled "DISPUTES," with no reference to arbitration.

More importantly, the two arbitration provisions lacked the disclosure paragraph set forth in section 7191, subdivision (b), which alerts the consumer, inter alia, "BY INITIALING IN THE SPACE BELOW ... YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL." In fact, the arbitration provisions lacked any mention of the waiver of the right to a court or jury trial. In this regard, the Agreement simply stated that all disputes "shall be decided by mediation and then arbitration." Similarly, the Specifications provided that "disputes between the Contractor and the Owner arising from this Agreement that are not settled through negotiation shall be offered for mediation" and that "[d]isagreements not settled by mediation shall be offered for arbitration." In short, the arbitration provisions herein were silent with respect to the waiver of the right to a court or jury trial.

****434** Additionally, section 7191 requires an arbitration clause to be initialed by the parties in spaces below. (§ 7191, subd. (b).) Here, no spaces were provided for the parties' initials. As a result, the arbitration provision in the Agreement was not separately initialed—the Agreement was simply signed by the parties at the end of the document. Likewise, the arbitration provision contained in the Specifications was not separately initialed. The Specifications themselves were unsigned and solely were initialed by Woolls and Turner on the cover sheet.

We conclude there was a total failure of the arbitration provisions to comply with section 7191.

4. *Noncompliance with section 7191 renders the arbitration provisions unenforceable against Woolls.*

Subdivision (c) of section 7191 specifies the consequence for noncompliance with the statute. It states: "A provision for arbitration of a dispute between a principal in a contract for work on a residential property with four or fewer units that does not comply with this section *may not be enforceable against any person other than the licensee.*" (§ 7191, subd. (c), italics added.)

Because the statute provides a noncompliant arbitration "*may not be enforceable*" (§ 7191, subd. (c)), rather than "shall not be enforceable," the trial court herein concluded it was vested with *discretion* to enforce the noncompliant arbitration provisions. Thus, the issue is presented as to whether the trial court properly found it had discretion to disregard the ***208** arbitration provisions noncompliance with section 7191, or whether a noncompliant arbitration clause is *per se* unenforceable.

a. *Principles of statutory construction.*

"The touchstone of statutory interpretation is the probable intent of the Legislature. When interpreting a statute, we must ascertain legislative intent so as to effectuate the purpose of a particular law. Of course our first step in determining that intent is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632–633 [59 Cal.Rptr.2d 671, 927 P.2d 1175].) When the words are clear and unambiguous, there is no need for statutory construction or resort to other indicia of legislative intent, such as legislative history. (*California Fed. Savings Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].) But language that appears unambiguous on its face may be shown to have a latent ambiguity; if so, a court may turn to customary rules of statutory construction or legislative history for guidance. (*Stanton v. Panish* (1980) 28 Cal.3d 107, 115 [167 Cal.Rptr. 584, 615 P.2d 1372].)" (*Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1371, 64 Cal.Rptr.2d 741; accord, *Union Bank of California v. Superior Court* (2004) 115 Cal.App.4th 484, 488, 9 Cal.Rptr.3d 137.)

b. *The term "may not" is prohibitory, not permissive; thus, section 7191 prohibits enforcement of a noncompliant arbitration provision.*

As indicated, section 7191, subdivision (c) states a noncompliant arbitration provision "*may not be enforceable* against any person other than the licensee." (§ 7191, subd. (c), italics added.)

Generally speaking, "the word 'may' is permissive—you can do it if you want, but you aren't being forced to—while the word 'shall' is mandatory—no way you can do

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it. (See, e.g., *Woodbury v.* ****435** *Brown–Dempsey* (2003) 108 Cal.App.4th 421, 433 [134 Cal.Rptr.2d 124] ['Ordinarily, the word "may" connotes a discretionary or permissive act; the word "shall" connotes a mandatory or directory duty.']; *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1389 [129 Cal.Rptr.2d 892] [generally explaining that 'may' is discretionary, 'shall' is mandatory]; see also *Dean v. Kuchel* (1951) 37 Cal.2d 97, 101–102 [230 P.2d 811] ['The word "may" is at least reasonably susceptible of a permissive meaning rather than mandatory or prohibitory....'].)" (*County of Orange v. Bezaire* (2004) 117 Cal.App.4th 121, 129, 11 Cal.Rptr.3d 478.)

Here, however, the pertinent language is "may not," rather than "may"—section 7191, subdivision (c), states a noncompliant arbitration ***209** provision "*may not* " be enforced against anyone other than the licensee. "May not" is prohibitory, as opposed to permissive. For example, *People v. Torres* (1995) 33 Cal.App.4th 37, 39 Cal.Rptr.2d 103, which states a witness "[*m*]*ay* [*n*]*ot* [e]xpress an [o]pinion as to [w]hether a [c]rime [h]as [b]een [c]ommitted" (*id.* at p. 47, 39 Cal.Rptr.2d 103, italics added), then goes on to explain that a witness is "*prohibit*[*ed*] ... from expressing an opinion as to whether a crime has been committed." (*Ibid.,* italics added.)

Because "may not" is prohibitory, the plain and commonsense meaning of section 7191, subdivision (c) is that it prohibits enforcement of a noncompliant arbitration provision against anyone other than the licensee, leaving no room for any exercise of discretion by the trial court.

c. *Assuming arguendo the statute is ambiguous, the legislative history confirms enforcement of a noncompliant arbitration provision is prohibited.*

Assuming arguendo section 7191, subdivision (c) is ambiguous with respect to whether compliance with the statute is mandatory or merely precatory, we resort to the legislative history for clarification. The legislative history confirms a noncompliant arbitration provision shall not be enforceable against any person other than the licensee.

Section 7191 was added to the Business and Professions Code by Assembly Bill 3302 (1993–1994 Reg. Sess.), which was approved by the Governor on September 29, 1994. The final amendments to AB 3302 occurred in the Senate on August 22, 1994. With the final Senate amendments, the wording of the proposed statute, at subdivision (c), was: "A provision for arbitration of a dispute between a principal in a contract for work on a residential property with four or fewer units that does not comply with this section *may not be enforceable* against any person other than the licensee." (Sen. Amend. to Assem. Bill No. 3302 (1993–1994 Reg. Sess.) Aug. 22, 1994, § 5, italics added.) The final vote took place in the Assembly on August 25, 1994, when the Assembly concurred in the Senate amendments.

The bill analysis for the final Assembly vote states that the Senate amendments, inter alia, "[p]rovide that a provision for arbitration of a dispute between a principal in a contract for work on residential property with four or fewer units *shall not be enforceable* against any person other than the licensee unless the contract also contains the required disclosure." (Assem. Floor Analysis, Concurrence in Sen. Amends., Assem. Bill No. 3302 (1993–1994 Reg. Sess.) as amended Aug. 22, 1994, italics added.)

***210** Thus, at the time of the final vote on AB 3302, the Legislature understood and intended that an arbitration provision which fails to satisfy section 7191 "shall not be enforceable."

****436** Guided by the legislative history, we conclude an arbitration provision which fails to comply with section 7191 cannot be enforced against any person other than the licensee. (§ 7191, subd. (c).) [5]

d. *Analogous case law is in accord.*

Our conclusion that compliance with section 7191 is mandatory is consistent with *Malek v. Blue Cross of Cal.* (2004) 121 Cal.App.4th 44, 16 Cal.Rptr.3d 687, wherein this court construed the arbitration disclosure requirements of Health and Safety Code section 1363.1. That statute, pertaining to health care service plans, specifies an arbitration agreement "shall include" certain specified disclosures. (Health Saf.Code, § 1363.1.)

We noted that Health and Safety Code section 1363.1 is silent on the effect of noncompliance with its requirements. (*Malek, supra,* 121 Cal.App.4th at p. 64, 16 Cal.Rptr.3d 687.) However, "to construe the statute as *optional* would render it ineffective, a construction that we must avoid. Moreover, it would be inconsistent with the legislative intent that these disclosures be included in '[a]ny health care service plan that includes terms that require binding arbitration....' This language evidences an implicit legislative determination that these disclosures *must be* included in a health care service plan to safeguard against patients unknowingly waiving their

constitutional right to a jury trial. Section 1363.1, therefore, establishes the requirements that *must be satisfied* in order to arbitrate disputes involving a health care service plan. Accordingly, even though section 1363.1 is silent on the effect of noncompliance, because the disclosure requirements are mandatory, the failure to comply with those requirements renders an arbitration provision unenforceable." (*Malek, supra,* 121 Cal.App.4th at p. 64, 16 Cal.Rptr.3d 687, first italics added.)

Here, the disclosure requirements contained in section 7191, subdivisions (a) and (b), are mandatory. Section 7191 repeatedly provides those provisions "shall" appear in the contract. (§ 7191, subds.(a), (b).) Therefore, to construe section 7191 as optional would render it ineffective, a construction we must avoid. (See *Malek, supra,* 121 Cal.App.4th at p. 64, 16 Cal.Rptr.3d 687.)

Consequently, we construe the language in section 7191 that a noncompliant arbitration provision "may not be enforceable" (§ 7191, subd. (c)), to ***211** mean that a failure to comply with section 7191 renders an arbitration provision *per se* unenforceable "against any person other than the licensee." (§ 7191, subd. (c).)

5. *Enforcement of section 7191 herein is not barred by federal law.*

Turner contends section 7191 is preempted by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (hereafter FAA) and therefore the arbitration clauses' noncompliance with section 7191 is not a ground to invalidate the arbitration agreement. As explained below, Turner's preemption argument is meritless.

a. *Turner's burden of establishing preemption.*

We begin with the premise that "[a]lthough federal law may preempt state law, '[c]ourts are reluctant to infer preemption, and it is the burden of the party ****437** claiming that Congress intended to preempt state law to prove it.' [Citation.]" (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815, 135 Cal.Rptr.2d 1, 69 P.3d 927; accord, *Marshall v. Bankers Life Casualty Co.* (1992) 2 Cal.4th 1045, 1052, 10 Cal.Rptr.2d 72, 832 P.2d 573.) Therefore, Turner has the laboring oar with respect to the claim of preemption. Turner has not met his burden.

b. *Preemption by the FAA where transactions involve interstate commerce.*

By way of background, the FAA applies to any "contract evidencing a transaction involving commerce" which contains an arbitration clause. (9 U.S.C. § 2.) Section 2 of the FAA provides that arbitration provisions shall be enforced, "save upon such grounds as exist at law or in equity for the revocation of any contract." (*Ibid.*) Thus, "a state court may, without violating section 2, refuse to enforce an arbitration clause on the basis of 'generally applicable contract defenses, such as fraud, duress, or unconscionability.' (*Doctors Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687 [116 S.Ct. 1652, 1656, 134 L.Ed.2d 902, 909] (*Casarotto*).) Critically, however, a state court may not defeat an arbitration clause by applying state laws 'applicable *only* to arbitration provisions.' (*Ibid.*)" (*Smith v. PacifiCare Behavioral Health of Cal., Inc.* (2001) 93 Cal.App.4th 139, 151, 113 Cal.Rptr.2d 140.)

Thus, in *Casarotto,* the Supreme Court found the FAA preempted a Montana statute which required " '[n]otice that [the] contract is subject to arbitration' " to be typed in underlined capital letters on the first page of the contract for the arbitration clause to be enforceable. (*Casarotto, supra,* 517 U.S. at p. 683, 116 S.Ct. 1652.) Because the Montana statute conditioned enforceability of the ***212** arbitration agreement "on compliance with a special notice requirement not applicable to contracts generally," it was preempted. (*Id.* at p. 687, 116 S.Ct. 1652.)

For the FAA to apply, a contract must involve interstate commerce. (9 U.S.C. § 2.) Turner does not cite any authority for the proposition that an agreement between a California homeowner and a California contractor to renovate a single family residence in La Canada, California, involves interstate commerce so as to implicate the FAA. To the contrary, given this record, case law points to the opposite conclusion.

In *Allied–Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753, two homeowners sued a termite control company in Alabama state court. The company invoked the contracts arbitration clause and sought a stay to allow arbitration to proceed. The lower court denied the stay. That ruling was upheld by the Alabama Supreme Court pursuant to a state statute making written, predispute arbitration agreements invalid and unenforceable. (*Id.* at pp. 268–269, 115 S.Ct. 834.)

The United States Supreme Court reversed. (*Allied–Bruce Terminix Cos. v. Dobson, supra,* 513 U.S. at p. 268, 115 S.Ct. 834.) After examining the FAAs language, background and structure, the high court concluded the term "involving" commerce is broad and is indeed the functional equivalent of " 'affecting' " commerce. (513 U.S. at pp. 273–274, 115 S.Ct. 834.) The court recognized the FAA's reach coincides with that of the Commerce Clause (U.S. Const., art. I, § 8, cl.3), and the FAA applies not only to the actual physical interstate shipment of goods but also contracts relating to interstate commerce. (*Id.* at p. 274, 115 S.Ct. 834.)

After ruling the FAA broadly applies to contracts involving interstate commerce ****438** (*Allied–Bruce Terminix Cos. v. Dobson, supra,* 513 U.S. at p. 277, 115 S.Ct. 834), the high court readily concluded the "transaction in this case, in fact, involved interstate commerce. In addition to the multistate nature of Terminix and Allied–Bruce, the termite-treating and house-repairing material used by Allied–Bruce in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama." (*Id.* at p. 282, 115 S.Ct. 834.)

In *Basura v. U.S. Home Corp.* (2002) 98 Cal.App.4th 1205, 120 Cal.Rptr.2d 328, this court addressed whether Code of Civil Procedure section 1298.7, which permits a purchaser to sue for construction defects despite having signed an agreement containing an arbitration clause, is preempted by the FAA.

***213** The *Basura* litigation arose out of a large scale residential development project in Palmdale. After reviewing the declarations in the record, we found, "the indicia of interstate commerce are far greater than in *Allied–Bruce Terminix* .... [T]he construction of the subject development project in Palmdale involved the receipt and use of building materials and equipment such as GE Appliances, Merrilet Cabinets, Majestic Fireplaces, Alanco Windows, Carrier Heat Air equipment, Progress Lighting, Delta plumbing, World Carpet, and Armstrong flooring, which were manufactured and/or produced in states outside California, including Nevada, Arizona, Connecticut, Indiana, South Carolina, Pennsylvania, Michigan, Tennessee and Georgia, and which were shipped to the jobsite in Palmdale. Further, in connection with the instant development: [U.S. Home] contracted with out-of-state design professionals, trade contractors, subcontractors and others; [U.S. Home] communicated by interstate mail and telephone with out-of-state manufacturers, design professionals, trade contractors, subcontractors and their employees; and [U.S. Home] engaged in marketing and advertising activities throughout the country using interstate media. [¶] These uncontroverted facts in the record compel the conclusion that the ... agreements between [U.S.Home] and plaintiffs involved interstate commerce." (*Basura, supra,* 98 Cal.App.4th at p. 1214, 120 Cal.Rptr.2d 328.)

c. *Turner failed to meet his burden to establish preemption.*

The instant case, involving the renovation of a single family residence, lies at the opposite end of the spectrum from *Basura,* which involved the construction of a large scale housing development and presented numerous indicia of interstate commerce.

Moreover, unlike the record presented in *Basura,* Turner did not make any evidentiary showing in furtherance of his assertion this transaction involves interstate commerce. Although Turner argued the issue of federal preemption in his papers below, Turner did not submit any declarations to show the instant transaction involves interstate commerce.

Because Turner has not presented a factual record to establish preemption, his reliance on *Hedges v. Carrigan* (2004) 117 Cal.App.4th 578, 11 Cal.Rptr.3d 787 is misplaced. *Hedges* found an agreement to purchase a single family residence "was a contract which evidenced a transaction involving commerce within the meaning of [the FAA]." (*Id.* at p. 586, 11 Cal.Rptr.3d 787.) There, the evidence showed, "[t]he anticipated financing involved the use of a $213,400 Federal Housing Administration home loan which is subject to the ***214** jurisdiction of the United States Department of Housing and Urban Development headquartered in Washington, D.C. Further, the various copyrighted forms used by the parties and their brokers ****439** could only be utilized by members of the National Association of Realtors." (*Ibid.*)

Unlike the showing made in cases such as *Basura* and *Hedges,* Turner has not presented any *facts* to show the instant transaction involved interstate commerce. This case is akin to *Steele v. Collagen Corp.* (1997) 54 Cal.App.4th 1474, 1490, 63 Cal.Rptr.2d 879, wherein the party asserting preemption "made no attempt to establish its actions" fell within the ambit of federal law. We conclude Turner failed to meet his burden of establishing the FAA precludes enforcement of section

7191 herein. (*Olszewski v. Scripps Health, supra,* 30 Cal.4th at p. 815, 135 Cal.Rptr.2d 1, 69 P.3d 927.)

6. *Because an arbitration clause which fails to comply with section 7191 is unenforceable against the consumer, Woolls's status as an attorney is irrelevant.*

Turner contends, and the trial court found, that because Woolls is a licensed attorney he was fully aware that by signing the arbitration provision, he was waiving his right to a jury trial and his right to appeal. Turner asserts those factors militate against enforcing section 7191 in this fact situation.

As explained, section 7191 prescribes the consequence for noncompliance therewith. A noncompliant arbitration provision is not "enforceable *against any person other than the licensee.*" (§ 7191, subd. (c), italics added.) We decline to rewrite the statute to provide that a noncompliant arbitration provision is also enforceable against a consumer who, due to education, training or experience, is aware that by agreeing to arbitration he or she is waiving the right to a court or jury trial. This court's role is simply to interpret the statute as it was enacted, not to add to, detract from, or fine-tune it.

Further, the trial court's approach herein would only result in additional litigation, with the parties in future cases contesting whether the consumer was aware that he or she was giving up the basic right to a court or jury trial, notwithstanding a contract's failure to comply with section 7191. Such an outcome also would be at odds with section 7191, which imposes mandatory notice provisions as a condition to the enforceability of an agreement to arbitrate.

***215 CONCLUSION**

The two arbitration provisions herein fail to comply with section 7191. Accordingly, the purported agreements to arbitrate are unenforceable against Woolls. [6]

DISPOSITION

The order to show cause is discharged. Let a peremptory writ of mandate issue, directing respondent superior court to vacate its order entered on August 9, 2004, and to enter a new order granting Woollss petition to vacate the arbitrators award. Woolls is awarded his costs in this proceeding. (Cal. Rules of Court, rule 56 *(l).*)

We concur: KITCHING and ALDRICH, JJ.

All Citations

127 Cal.App.4th 197, 25 Cal.Rptr.3d 426, 05 Cal. Daily Op. Serv. 1778, 2005 Daily Journal D.A.R. 2349

Footnotes

1 All further statutory references are to the Business and Professions Code, unless otherwise indicated.

2 Terry Lumber is not a party to the instant proceeding.

3 In view of Woolls's filing of a motion to stay the arbitration, as well as his written objections to the arbitrator before the hearing, wherein Woolls contended the arbitration agreement was unenforceable because it failed to comply with section 7191, the trial court erred in ruling that Woolls's participation in the arbitration after the arbitrator overruled his objections amounted to a waiver.

4 Arbitration proceedings are entitled to calendar preference in all courts. (Code Civ. Proc., § 1291.2.)

5 If our interpretation of section 7191 is not what the Legislature intended, the statute could use clarification. (See *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 304, fn. 6, 81 Cal.Rptr.2d 456.)

6 Because the arbitration provisions are unenforceable due to noncompliance with section 7191, it is unnecessary to address Turner's contention that Woolls was not fraudulently induced to sign the arbitration agreements.

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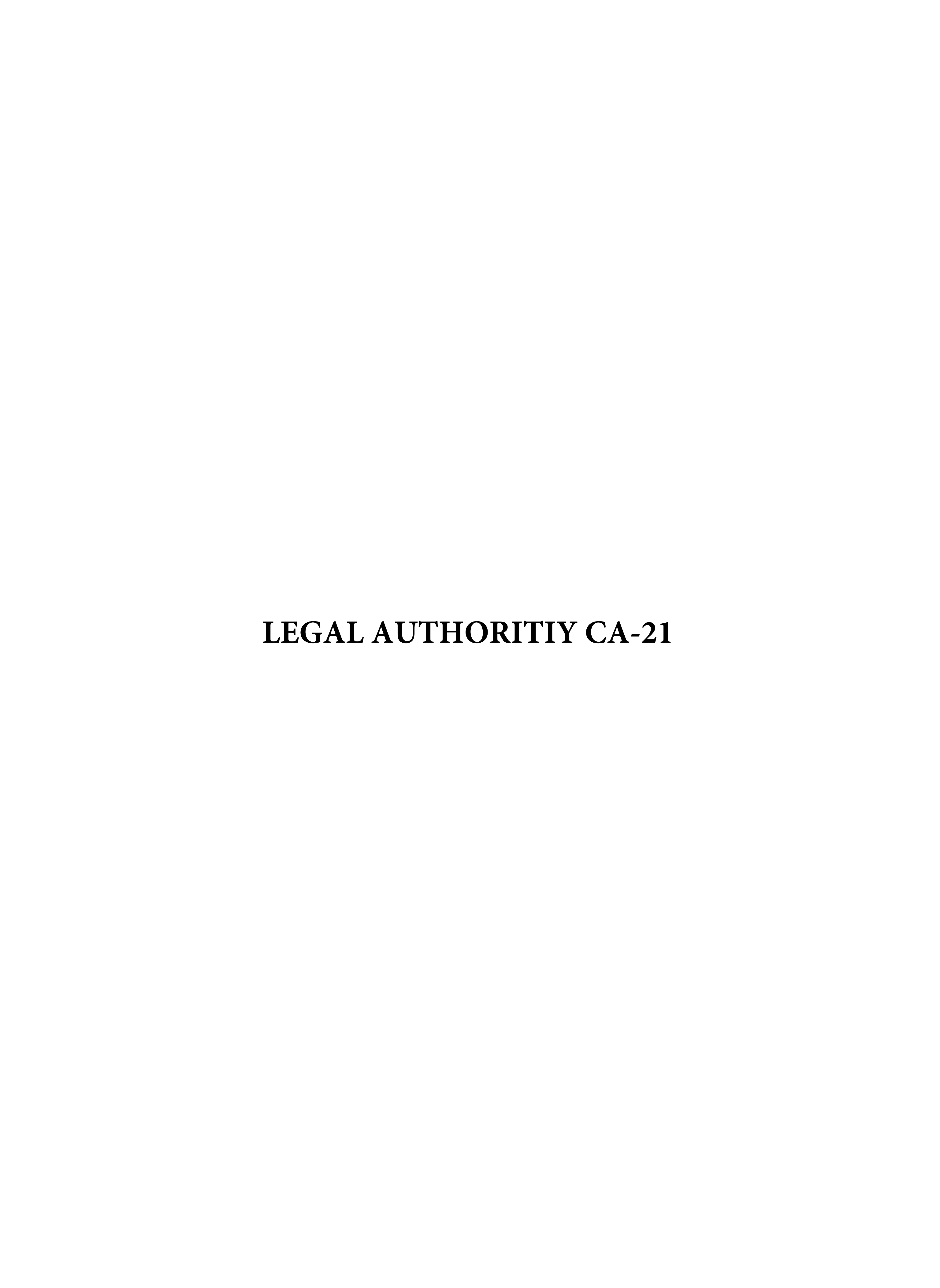
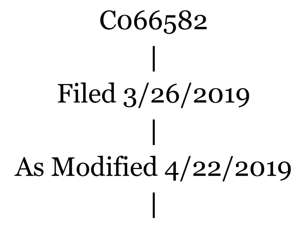


LEGAL AUTHORITIY CA-21

Ex. CA-21

34 Cal.App.5th 676
Court of Appeal, Third District, California.

SUSTAINABILITY, PARKS, RECYCLING AND WILDLIFE DEFENSE FUND (SPRAWLDEF), Plaintiff and Appellant,
v.
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY et al., Defendants and Respondents;
Waste Connections, Inc., et al., Real Parties in Interest and Respondents.



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Synopsis

Background: Interest group filed petition for writ of administrative mandamus and complaint for declaratory judgment to contest issuance of revised permit for landfill. The Superior Court, Sacramento County, No. 34200980000301, George Patrick Marlette, J., denied the petition and complaint, and interest group appealed.

Holdings: The Court of Appeal, Murray, J., held that:

interest group forfeited contention that revised permit was improper because it allowed expanded operations not in conformance with countywide siting element of countywide integrated waste management plan, and

statute does not require a local government agency or the California Integrated Waste Management Board to deny a permit revision on the ground that the expanded operations are not already described in the siting element.

Affirmed.

**400 APPEAL from a judgment of the Superior Court of Sacramento County, George Patrick Marlette, Judge. Affirmed. (Super. Ct. No. 34200980000301)

Attorneys and Law Firms

The Smith Firm and Kelly T. Smith, Sacramento, for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Denise Ferkich Hoffman and Matthew G. Bullock, Deputy Attorneys General, for Defendant and Respondent.

Dennis Bunting, County Counsel, Lori A. Mazzella, Assistant County Counsel, for Defendant and Respondent.

Gary J. Smith and Jacob P. Duginski, San Francisco, Beveridge & Diamond, Attorneys for Real Party in Interest and Respondent.

Opinion

MURRAY, J.

**401 *680 This case involves issuance of a revised permit for the Potrero Hills Landfill in Solano County, pursuant to the California Integrated Waste Management Act (the Waste Management Act; Pub. Resources Code, § 40000 et seq.).[1] Appellant Sustainability, Parks, Recycling and Wildlife Defense Fund (SPRAWLDEF) contends the revised permit is improper because it allows expanded operations not in conformance with the "countywide siting element" (§§ 41700-41701; Cal. Code Regs., tit. 14, § 18755 et seq.)[2] of Solano County's countywide integrated waste management plan (CIWMP). (§§ 41750-41750.1 [elements to be included in CIWMP].)

SPRAWLDEF appeals from the trial court's denial of its petition for a writ of administrative mandamus (§ 45042; Code Civ. Proc., § 1094.5), which was filed against: (1) the County Department of Resource Management as the local enforcement agency (LEA) (§§ 40130, 43200) for integrated waste management, which granted the revised permit and rejected SPRAWLDEF's administrative challenge to the revised permit; (2) the former California Integrated Waste Management Board (the Board), which has since been replaced by the California Department of Resources, Recycling and Recovery (DRRR),[3] which declined to entertain an administrative appeal (§ 45031),[4] on the grounds that (a) SPRAWLDEF failed to exhaust administrative remedies by failing to assert the conformance issue at the County level, and (b) that the conformance argument lacked merit *681 because the only statutory requirement for

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expansion is in section 50001, subdivision (a), which allows expansion as long as the *location* of the landfill is identified in the countywide siting element (§ 50001); [5] and (3) real parties ****402** in interest—Waste Connections, Inc., and Potrero Hills Landfill, Inc. (collectively, Potrero Hills)—which are the owners/operators of the landfill. [6]

In this court, SPRAWLDEF reasserts its conformance argument and claims the Board, as an *administrative* body, had no right to invoke the *judicial* doctrine of failure to exhaust administrative remedies to decline to hear SPRAWLDEF's administrative appeal. SPRAWLDEF also complains the Board deliberated in closed session, in violation of the Bagley-Keene Open Meeting Act (Gov. Code, § 11120 et seq.).

We conclude SPRAWLDEF failed to preserve the conformance issue at all stages of the administrative proceedings. The Board was not required to entertain the administrative appeal. To the extent the Board nevertheless addressed the merits, given the statutory language, SPRAWLDEF fails to demonstrate reversible error. As to the open meeting law, we conclude that even if closed session deliberations were improper, SPRAWLDEF fails to show prejudice warranting the nullification remedy it seeks.

***682** We affirm. [7]

STATUTORY/REGULATORY OVERVIEW

The Waste Management Act establishes a comprehensive program for solid waste management. (§ 40002.) It established the Board, and subsequently DRRR, with power to enforce the Waste Management Act with corrective action orders, cease and desist orders, cleanup orders, and civil penalties. (§§ 40400-40510, 43300, 45000, 45005, 45010-45024; *San Elijo Ranch, Inc. v. County of San Diego* (1998) 65 Cal.App.4th 608, 613-614, 76 Cal.Rptr.2d 601 (*San Elijo Ranch*).) Section 40052 states: "The purpose of this division is to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner to ****403** conserve water, energy and other natural resources, to protect the environment, to improve regulation of existing solid waste landfills, to ensure that new solid waste landfills are environmentally sound, to improve permitting procedures for solid waste management facilities, and to specify the responsibilities of local governments to develop and implement integrated waste management programs."

The Waste Management Act also authorizes the establishment of local enforcement agencies (LEAs), which have broad duties and powers (§§ 43200-43209), including issuance of solid waste permits to operate landfills (§ 44001), inquiry into the violation of the terms or conditions of solid waste permits (§ 43200; Regs., §§ 18302-18303), temporary suspension of permits (§ 44305, subd. (a)), issuance of cease and desist orders (§ 45005), assessment of civil penalties (§ 45011), issuance of notices and orders requiring correction of permit violations (§ 45000, subd. (a); Regs., § 18304), and, in the absence of correction, initiation of judicial proceedings (Regs., § 18304).

The Waste Management Act expressly provides that "the responsibility for solid waste management is a shared responsibility between the state and local governments" (§ 40001, subd. (a)), and that local governmental responsibilities "are integral to the successful implementation" of the Waste Management Act. (Former § 40703.) DRRR consults and coordinates with LEAs. (Former § 40703, §§ 40910, 41791.2, 42500, 42501, 42511, 42540, 42600, 42650, 43217, 43301, 43307, 47103.) DRRR may investigate LEA performance (§ 43216.5) and initiate judicial action if it finds that the LEA has failed to take appropriate steps. (Regs., § 18350; see also *San Elijo Ranch, supra*, 65 Cal.App.4th at p. 613, 76 Cal.Rptr.2d 601.)

***683** As part of its CIWMP (§ 40900), "[e]ach county shall prepare a countywide siting element which provides a description of the areas to be used for development of adequate transformation [[8]] or disposal capacity concurrent and consistent with the development and implementation of the county and city source reduction and recycling elements adopted pursuant to this part." (§ 41700.)

Under section 41701, "Each countywide siting element and revision thereto shall include, but is not limited to, all of the following: [¶] (a) A statement of goals and policies for the environmentally safe transformation or disposal of solid waste that cannot be reduced, recycled, or composted. [¶] (b) An estimate of the total transformation or disposal capacity in cubic yards that will be needed for a 15-year period to safely handle solid wastes generated with the county that cannot be reduced, recycled, or composted. [¶] (c) The remaining combined capacity of existing solid waste transformation or disposal facilities existing at the time of the preparation of the

siting element, or revision thereto, in cubic yards and years. [¶] (d) The identification of an area or areas for the location of new solid waste transformation or disposal facilities, or the expansion of existing facilities, that are consistent with the applicable city or county general plan, [9] if the county **404 determines that existing capacity will be exhausted within 15 years or additional capacity is desired. [¶] (e) For countywide elements submitted or revised on or after January 1, 2003, a description of the actions taken by the city or county to solicit public participation by the affected communities, including, but not limited to, minority and low-income populations."

Anyone who wants to operate a solid waste facility must apply to the LEA for a permit. (§ 44001.)

Permit holders who wish to change the design or operation of the landfill must comply with section 44004, which provides in pertinent part: "(a) An *684 operator of a solid waste facility shall not [10] make a significant change in the design or operation of the solid waste facility that is not authorized by the existing permit, unless the change is approved by the enforcement agency [LEA], the change conforms with this division and all regulations adopted pursuant to this division [§ 43020 authorizing Board to adopt and revise regulations, which set forth minimum standards for solid waste handling, transfer, composting, transformation, and disposal], and the terms and conditions of the solid waste facilities permit are revised to reflect the change. [¶] (b) If the operator wishes to change the design or operation of the solid waste facility in a manner that is not authorized by the existing permit, the operator shall file an application for revision of the existing solid waste facilities permit with the enforcement agency. ... [¶] (c) The enforcement agency shall review the application to determine all of the following: [¶] (1) Whether the change conforms with this division and all regulations adopted pursuant to this division. [¶] (2) Whether the change requires review pursuant to Division 13 (commencing with Section 21000) [the California Environmental Quality Act (CEQA)]. [¶] (d) Within 60 days from the date of the receipt of the application for a revised permit, the enforcement agency shall inform the operator, and if the enforcement agency is a [LEA], also inform the [B]oard, of its determination to do any of the following: [¶] (1) Allow the change without a revision to the permit. [¶] (2) Disallow the change because it does not conform with the requirements of this division or the regulations adopted pursuant to this division. [¶] (3) Require a revision of the solid waste facilities permit to allow the change. [¶] (4) Require review under Division 13 (commencing with Section 21000) before a decision is made." [11] (§ 44004, subds. (a)-(d)(4).)

**405 Section 44004, subdivision (h)(2)(i)(1), requires the Board, "to the extent resources are available, [to] adopt regulations that ... define the term 'significant change in the design or operation of the solid waste facility that is not authorized by the existing permit.' " The only such regulation we found in effect at the time of the relevant events here is in the *685 CEQA regulations, California Code of Regulations, title 27, section 21563, subdivision (d)(6), which states: " 'Significant Change in the design or operation of the solid waste facility that is not authorized by the existing permit' means a change in design or operation of a solid waste facility where the [L]EA has determined pursuant to § 21665 that the change is of such consequence that the solid waste facilities permit needs to include further restrictions, prohibitions, mitigations, terms, conditions or other measures to adequately protect public health, public safety, ensure compliance with State minimum standards or to protect the environment. The definition is only for purposes of determining when a permit needs to be revised and should not be utilized for any other purpose."

The LEA may issue the permit only "if it finds that the proposed solid waste facilities permit is consistent with this division and any regulations adopted by the [B]oard pursuant to this division [Division 30, Waste Management, § 40000 et seq.] applicable to solid waste facilities." (§ 44008, subd. (b).) "The enforcement agency shall issue the permit only if it finds that the proposed solid waste facilities permit is consistent with the standards adopted by the [B]oard." (§ 44010.) The permit shall contain conditions determined appropriate by the LEA. (§ 44014.) The LEA may issue a revised permit only after sending a copy to the Board, which may concur or object and must object if the permit is inconsistent with the statutes and regulations (§§ 44004, subd. (h), 44007, 44009).

If the Board objects to the proposed changes, the LEA shall consider the objections. (§ 44009, subd. (a)(2) [Board "shall submit those objections to the [LEA] for its consideration"].) If the Board does not concur or object within 60 days, it is deemed to have concurred in issuance of the permit. (§ 44009, subd. (a)(1).) The LEA shall issue, modify, or revise a permit "if the [B]oard has concurred in that issuance, modification, or revision of the permit pursuant to Section 44009." (§ 44014, subd. (a).) The permit shall contain conditions determined appropriate by the LEA. (§ 44014, subd. (b).)

In addition to these provisions regarding *modification* of permits, section 50001 speaks of establishment *or expansion* of solid waste facilities. (See fn. 5, *ante*.) Section 50001 provides that, after a LEA has a state-approved CIWMP in place, "a person shall not establish or *expand* a solid waste facility, as defined in Section 40194, in the county unless" (1) it is a disposal facility (like Potrero Hills), "the location of which is identified" in the countywide siting element or amended siting element, or (2) it meets specified recycling requirements and is identified in a nondisposal facility element or updated element. (§ 50001, see fn. 5, *ante*, italics added.)

If the LEA in issuing a permit fails to act as required by law, "any person" may petition the LEA for a hearing (§ 44307), which may be heard by an ***686** independent hearing panel (§ 44308) as was the case here. The request for a hearing must include "a statement of the issues." (§ 44310, ****406** subd. (a)(1).) The LEA must file a response. (§ 44310, subd. (a)(4).)

After the hearing panel issues its decision (§ 44310, subd. (c)), any party to the hearing may pursue an administrative appeal to the Board "to review the written decision of the hearing panel ...." (§ 45030, subd. (a).) [12] The appeal is not a matter of right. Under section 45031, the Board may: "(a) determine not to hear the appeal if the appellant fails to raise substantial issues. [¶] ... [¶] (c) Determine to accept the appeal and to decide the matter ... [or] [¶] (d) Determine to accept the appeal and hold a hearing." (§ 45031, see fn. 4, *ante*.)

A former statute allowed a party to proceed to court without pursuing an administrative appeal to the Board, but that statute was repealed in 2008. (Former § 45033, repealed by Stats. 2008, ch. 500, § 34, eff. Jan. 1, 2009.)

A party aggrieved by the Board's decision "may file with the superior court a petition for a writ of mandate for review thereof." (§ 45040.) "The evidence before the court shall consist of the records before the hearing panel or hearing officer and the [B]oard, if any, including the enforcement agency's records, and any other relevant evidence that, in the judgment of the court, should be considered to effectuate and implement the policies of this division [Division 30, Waste Management, § 40000 et seq.]." (§ 45041.) "Except as otherwise provided in this chapter, Section 1094.5 of the Code of Civil Procedure shall govern proceedings pursuant to this article." (§ 45042.)

The statutes and regulations call for periodic review and revision, if necessary, of permits, CIWMPs, and siting elements. [13] (E.g., § 44015 ["A solid waste facilities permit issued or revised under this chapter shall be reviewed and, if necessary, revised at least once every five ***687** years"]; § 41770; [14] Regs., § 18788, subd. (a)(3)(B), (F).) [15] Regulations section 18794.4 states ****407** that each county must prepare an annual report which includes "a discussion on the status of its Siting Element and Summary Plan. The information provided shall serve as a basis for determining if the Siting Element and/or Summary Plan should be revised. [¶] (b) The Siting Element section in the annual report shall address at least the following: [¶] (1) Any changes in the remaining disposal capacity description provided pursuant to Section 18755.5 since the Siting Element was adopted; [¶] (2) Whether the county or regional agency has maintained, or has a strategy which provides for the maintenance of, 15 years of disposal capacity; [¶] (3) The adequacy of, or the need to revise, the Siting Element; and [¶] (4) If a jurisdiction determines that a revision of the Siting Element is necessary, the annual report shall contain a timetable for making the necessary revisions. ..." (Regs., § 18794.4.)

With this background in mind, we turn to the background of this case.

FACTUAL AND PROCEDURAL BACKGROUND

Potrero Hills operates a landfill in Solano County pursuant to a county permit. The permit first issued in 1989, was revised in 1996, and was revised again in 2006. At issue in this appeal is the 2006 revision.

The landfill is described in the 1995 Solano County CIWMP "Siting Element," adopted by county resolution No. 96-5. The trial court allowed ***688** SPRAWLDEF to add the siting element as a "supplement" to the administrative record, over defense objections. It had not been presented as evidence to the LEA or the Board.

The siting element, in addition to describing the Potrero Hills Landfill as it existed at that time, discussed an anticipated expansion of Potrero Hills that has since been processed and is not at issue in this appeal. The siting element said: "When [Potrero Hills Landfill] decides to move forward with its proposed landfill expansion, additional CEQA environmental analysis will be required. A part of this analysis will include a siting criteria evaluation to determine whether the

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proposed landfill expansion conforms to the Solano County Countywide Siting Element solid waste disposal facility siting criteria." A map showed a proposed expansion area to the east of the existing Potrero Hills Landfill. [16] A five-year review by the LEA in 2002 found no changes from the operations allowed by the 1996 permit.

In 2006, Potrero Hills initially proposed a design change increasing the landfill height as well as other significant ****408** changes. [17] In October 2006, Potrero Hills submitted an amended application for a revised permit, removing the request to increase the landfill height. The amended application is the application at issue here. It did not propose physical changes to the landfill or an expansion of the landfill area. Instead, it sought to: (1) increase operating hours to 24 hours per day from Monday through Friday and 20 hours per day on Saturday and Sunday; (2) exclude alternative daily cover (ADC) materials and recyclables from tonnage limits; and (3) adjust sludge limitation that will be counted against tonnage limits.

On October 25, 2006, the LEA sent a proposed revised permit with conditions to the Board, as required by section 44007. In December 2006, the Board voted but did not attain the necessary four votes to concur in or object to the proposed revised permit, and therefore the Board, by inaction, was deemed to have concurred in issuance of the permit in accordance with section 44009. [18]

***689** Meanwhile, on December 6, 2006, SPRAWLDEF submitted to the LEA a petition for administrative hearing, asserting the LEA failed to act as required by law or regulation. (§§ 44307 [LEA shall hold a hearing "upon a petition to the enforcement agency from any person requesting the enforcement agency to review an alleged failure of the agency to act as required by law or regulation"], 44310, subd. (a)(1) ["hearing shall be initiated by the filing of a written request for a hearing with a statement of the issues," and a request by a person other than the person subject to the action shall be filed "within 30 days from the date the person discovered or reasonably should have discovered, the facts on which the allegation is based"].)

As noted, a petitioner's request for a hearing must include a statement of the issues. (§ 44310, subd. (a)(1).) SPRAWLDEF's administrative petition to the LEA did not include the conformance issue. Instead, the petition set forth a list of six other issues. [19] As we will discuss *post*, SPRAWLDEF attempts on appeal to shoehorn the conformance issue into the sixth issue it listed in its petition: "6. The ****409** LEA failed to reject or condition the landfill permit application for failing to address the inconsistency of tipping fees [[20]] in effect at [Potrero Hills], among the lowest in Northern California, with the landfill diversion goals of the Solano County [CIWMP] and the goals of [CIWMPs] of other counties such as Contra Costa, Alameda, Santa Clara, San Mateo, San Francisco, Marin, Sonoma, Mendocino, Lake, and Napa, which rely for financing on per-ton recycling surcharges or fees or business taxes and ***690** consequently suffer loss of public funds and ability to attain the goals of the California Integrated Waste Management Act."

The LEA rejected the request for an administrative hearing. SPRAWLDEF filed a petition for writ of mandate in Solano County Superior Court, which denied the petition but was reversed by the Court of Appeal, First Appellate District, Division Three, which in October 2008 published an opinion holding SPRAWLDEF was entitled to a hearing under section 44307. (*Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v. County of Solano Dept. of Resource Management* (2008) 167 Cal.App.4th 1350, 1353, 84 Cal.Rptr.3d 889 (*SPRAWLDEF I*).)

On May 18, 2009, the LEA hearing was held before an independent hearing panel. (§ 44308.)

During the hearing panel's discussion of issue number 6, one panel member said, "Item number six was a little -- very wide ranging in terms of diversion goals and talking about tipping fees and all that stuff. [¶] I know that tipping fees are basically market driven and, you know, ... if you're trying to compare things to San Francisco or Alameda County, stuff in Solano County is going to be cheaper. [¶] I do know that there was some concern about, you know, there's plenty of landfill capacity, there was evidence -- or there was information that was submitted to this panel regarding unused capacity and how much capacity there is in landfills. [¶] It seemed to me that the argument was about not allowing the landfill to expand, but I don't believe that that's the issue being brought to us right -- today. The issue is about whether or not the LEA failed to reject or condition the landfill application. The application was not necessarily for an expansion of a landfill. ..." Another panel member said, "For me it wasn't a decision about whether or not we should have allowed the expansion in the first place, but whether or not the LEA did what it was supposed to do. [¶] So leaving aside the issue of

whether the permit should have ever been granted in the first place, I am completely satisfied as to the issues that have been before this panel today, the applicant or the petitioner has not met their burden." SPRAWLDEF did not disagree with the panel members that the hearing was not about expansion.

In May 2009, the hearing panel issued its written "DECISION ON SUBMITTED MATTER," concluding SPRAWLDEF failed to show that the LEA failed to act as required by law or regulation in issuing the revised permit to Potrero Hills. Regarding issue No. 6 (tipping fees), the hearing panel stated: "Considerable evidence was presented concerning tipping ****410** fees. However, tipping fees do not fall within the purview of the LEA. They are market-driven. Although the current level of tipping fees at Potrero Hills is an issue that should be addressed by the appropriate body within the County of ***691** Solano, the LEA's role does not encompass this determination." [21] The hearing panel's disposition added that evidence had been presented identifying past problems with Potrero Hills and, while none was substantial enough to alter the hearing panel's determination, "to the extent the Hearing Panel has the ability to influence the actions of both the LEA and Potrero Hills going forward, it encourages both to continue to act with vigilance regarding the concerns of the environmental community and in accordance with state standards."

In June 2009, SPRAWLDEF appealed the hearing panel's decision to the Board. There, SPRAWLDEF argued for the first time that the revised permit did not "conform" to the description in the siting element, and the siting element had not been amended with a proper description of the expanded operations. Although section 50001 (see fn. 5, *ante*) allows expansion of a landfill "the location of which is identified" (*ibid.*) in the siting element, SPRAWLDEF argued that other statutes and regulations made it clear that a "description" of proposed expanded operations, not mere identification of location, was required in the siting element in order to approve a revised permit.

The Board gave notice that, at its regular meeting on July 21, 2009, it would consider whether or not to hear the appeal (§ 45031, see fn. 4, *ante*) in "an informal hearing considering what is essentially a legal matter – has SPRAWLDEF properly raised substantial issues in its appeal." The Board advised the parties that, "[f]ollowing the hearing, the Board may decide the matter in open session or may retire to closed session to deliberate." No one objected.

At the meeting, the Board heard arguments as to whether the Board should decline to hear the appeal on the ground the conformance issue was a new issue which had not been raised before the hearing panel.

The Board then went into closed session to deliberate. Again, no one objected to deliberations in closed session. The Board returned and informed the parties that the appeal was rejected, and a written decision would follow. The written decision, dated July 22, 2009, showed the vote was unanimous, and said the Board decided not to hear the administrative appeal based on "three separate and independent grounds," as follows:

"First, SPRAWLDEF appealed to the Board an issue that [SPRAWLDEF] did not raise in its 2006 Petition and did not raise to the [h]earing [p]anel. ***692** Under Sections 45030 – 45032 of the Public Resources Code which govern appeals to the Board, and under the governing principles of the appellate process as practiced in the courts of this state and before adjudicative bodies, the Board is not obliged to hear a purported 'appeal' of an issue that was not raised by the appellant in its original request for a hearing or in that hearing.

"Second, SPRAWLDEF has submitted no legal authority for its contention that the LEA has a duty or the authority to deny or condition a proposed solid waste facilities permit on the ground that tipping fees differ among landfills in various counties in the region, even if, as ****411** SPRAWLDEF argues, those fee differences influence local governments' and private parties' decisions as to where they dispose their solid waste and which decisions consequently affect the ability of various cities and counties to fund recycling and waste reduction programs that help them achieve the goals of the IWMA [Integrated Waste Management Act]. Staff is not aware of any such authority in the IWMA or Board regulations.

"Third, SPRAWLDEF's new basis for the appeal is without merit under the IWMA and could not be the basis for the Board overturning the LEA's actions. SPRAWLDEF maintains that the LEA should have denied or conditioned the 2006 revised solid waste facility permit for Potrero Hills Landfill because it was not 'in conformance with' the Countywide Siting Element. This contention is based on the fact the description of the facility in the proposed revised permit is not the same as the description of the facility in the Countywide Siting Element. However, the permitting requirements do not require 'conformance with' the Countywide Siting Element for a permit to be issued.

Public Resources Code section 44009 [22] authorizes objection to a proposed permit if it is not consistent with the requirements of Public Resources Code section 50001 [see fn. 5, *ante*]. Public Resources Code section 50001(a)(1) provides that no facility shall be established or expanded unless 'the **location ... is identified** in the countywide siting element (emphasis added).' In this case, the location of the facility was identified (SPRAWLDEF has not contested otherwise) and therefore, the proposed permit was consistent with the requirements of Public Resources Code section 50001. SPRAWLDEF's contention would require the Board to expand this requirement beyond its plain meaning in the statute (it should be noted that the term 'conformance' appears nowhere in either ... section 44009 or ***693** 50001). Since this contention, which was not even argued before the [h]earing [p]anel, does not have any legal merit, it does not raise a substantial issue for the Board to consider. [23]

"For these reasons, SPRAWLDEF failed to raise a substantial issue in its Appeal to the Board. Because SPRAWLDEF failed to raise a substantial issue in its Appeal, the Board, acting pursuant to Section 45031(a) determines that it will not hear the Appeal."

On August 20, 2009, SPRAWDEF filed a petition for writ of mandate and complaint ****412** for declaratory relief in the trial court. (§ 45040.) [24] The pleading sought nullification of the Board's action on the ground that the closed deliberations violated the open meeting requirements. (Gov. Code, § 11130.3, see fn. 28, *post*.) The pleading also sought to void the permit until the County amended its siting element so that the proposed changes conformed with the siting element and to require the Board to conduct an administrative appeal.

Over objections by other parties, the trial court allowed SPRAWLDEF to supplement the record with documents that had not been submitted in the administrative proceedings, including the County's 1995 siting element. Also included in the supplemental record were records documenting Board debates over the meaning of the word "expansion" and the Board's interpretation of section 50001 as requiring identification only, not description, in the siting element, i.e., as long as the siting element shows the location of a facility as a "dot on the map," the operations may be expanded without revising the siting element to include a description of the expanded operations. One such document is resolution No. 2000-330, adopted by the Board on September 19, 2000, which stated in part:

***694** "WHEREAS, in order to determine the appropriate interpretation of the differently phrased requirements in PRC section 50001, the Board has held several public hearings, and Board staff has conducted several workshops; and

"WHEREAS, at those hearings and workshops, the Board received an overwhelming amount of testimony indicating that there had been specific legislative intent to limit the 'Post-Gap' finding to a requirement that a facility's location be identified in the CSE [countywide siting element] or NDFE [nondisposal facility element], but not require (as had been during the 'Gap') that the facility's description be in conformance with the description in the CSE or NDFE.

"NOW, THEREFORE, BE IT RESOLVED that in considering proposed Solid Waste Facility Permits, the Board shall interpret PRC 50001 to only require a finding that the facility's location be identified in the CSE or NDFE, either by the facility address or general location on a map, and shall not review the facility's conformance to the description set forth in those documents for the purposes of this finding." [25]

After hearing argument, the trial court on September 28, 2010, issued its written order denying the mandamus petition and declaratory relief complaint and entered judgment.

Regarding the open meeting law, the trial court noted SPRAWLDEF had received advance notice in the formal notice of hearing that the Board may choose to deliberate in closed session, yet SPRAWLDEF never objected. The trial court cited Government Code section 11126, subdivision (c)(3), which allows closed deliberations in proceedings required ****413** to be conducted under the *formal* hearing provisions of the APA (Gov. Code, § 11500 et seq.) "or similar provisions of law" (*id.*, § 11126, subd. (c)(3)). The court noted section 45030 says the Board shall conduct hearings on appeals in accordance with the *informal* hearing provisions of the APA (Gov. Code, § 11445.10), which the court viewed as "similar provisions of law." The trial court added: "Petitioner's argument that the Board could hold a closed session to deliberate on the appeal itself, but not on the 'preliminary hearing' decision as to whether to accept the appeal, raises a distinction without a real difference. The determination as to whether the appeal raised a 'substantial issue' inevitably touched on the full merits of the case, as the Board's decision demonstrates. The decision as to whether to accept the appeal was, in effect, a decision on the ***695** appeal, subject to the procedures required under ... section

45030(e), and the Bagley-Keene Open Meeting Act did not prohibit the Board from deliberating in closed session."

The trial court then determined that the doctrine of exhaustion of administrative remedies applies to an administrative appeal to the Board; the tipping fee issue raised before the hearing panel was not equivalent to the conformance issue raised for the first time in the administrative appeal to the Board; the failure to raise the conformance issue at the county level afforded a proper basis for the Board to determine absence of a substantial issue for administrative appeal; the Board was not required to hear the case as an appeal from its own deemed concurrence in the revised permit; and SPRAWLDEF failed to show a substantial issue regarding tipping fees. The trial court also rejected SPRAWLDEF's claim for declaratory relief to declare that an expansion must be described in a siting element, because declaratory relief is unavailable when the Legislature has designated a remedy to review administrative action. (See *County of Los Angeles v. State Water Resources Control Bd*. (2006) 143 Cal.App.4th 985, 1002, 50 Cal.Rptr.3d 619.)

DISCUSSION

I.-IV. [**]

V. Preserving All Issues at Each Administrative Stage

SPRAWLDEF argues the Board, as an administrative agency, lacked authority to invoke the judicial doctrine of exhaustion of administrative remedies. We conclude the Board had discretion to find that SPRAWLDEF *forfeited* the conformance issue by failing to preserve it at all stages of the administrative proceedings.

The real issue here is not exhaustion of administrative remedies, but "a corollary principle to the doctrine that administrative remedies must be exhausted. That principle is: a litigant must fully present its arguments and evidence at the administrative hearing. ' "Before seeking judicial review a party must show that he has made a full presentation to the administrative agency upon all issues of the case *and at all prescribed stages of the administrative proceedings*." ' [Citation.] 'The requirement that a litigant present his or her arguments and evidence fully at the administrative hearing level is analogous to the doctrine of exhaustion of administrative remedies, ***696** though it is based on different policies.' (1 Cal. Administrative Mandamus: Laying the Foundation at the Administrative Hearing (Cont.Ed.Bar 3d ed. ([2015]) § 3.49, p. [3-36] ([Cal.] Administrative Mandamus).))" (****414** *In re Electric Refund Cases* (2010) 184 Cal.App.4th 1490, 1502, 110 Cal.Rptr.3d 117, italics added.)

"The requirement that a full presentation be made before the adjudicating agency applies equally when a second administrative agency, exercising appellate functions, enters the picture. A party may not raise new issues on review before such a tribunal if the issues could have been asserted before the lower administrative body." (Cal. Administrative Mandamus, *supra*, § 3.73, p. 3-50; *Harris v. Alcoholic Bev. etc. Appeals Bd*. (1961) 197 Cal.App.2d 182, 187, 17 Cal.Rptr. 167 (*Harris I*).) "When the facts are not in dispute, however, a party may not be precluded from raising a new question of law." (Cal. Administrative Mandamus, p. 3-50; *Harris v. Alcoholic Bev. etc. Appeals Bd*. (1966) 245 Cal.App.2d 919, 924, 54 Cal.Rptr. 346 (*Harris II*).)

Harris I, supra, 197 Cal.App.2d 182, 17 Cal.Rptr. 167, is instructive in the context of an administrative procedure involving an appeal at second level of administrative review. The *Harris I* court held the Alcoholic Beverage Control Appeals Board improperly considered a new issue raised by a liquor licensee for the first time on administrative appeal of a decision of the Department of Alcoholic Beverage Control suspending the liquor license. (*Id*. at pp. 184, 187, 17 Cal.Rptr. 167.) The *Harris I* court wrote: " 'It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or "skeleton" showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court. [Citation.] The rule compelling a party *to present all legitimate issues* before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play.' " (*Id*. at p. 187, 17 Cal.Rptr. 167, italics added.)

We conclude the tipping fees issue was not the equivalent of the conformance issue SPRAWLDEF belatedly asserted. Indeed, the siting element was never presented to the LEA so that it could determine whether the revised permit was in conformance thereof. SPRAWLDEF simply did not present the conformance issue to the LEA.

We do note that *Harris I* is not directly on point factually. There, the licensee stipulated at the beginning of the initial

administrative hearing that the specific matter was not at issue, causing the department to forego its witnesses. (*Harris I, supra*, 197 Cal.App.2d at p. 186, 17 Cal.Rptr. 167.) In a subsequent appeal, *Harris II, supra*, 245 Cal.App.2d 919, 54 Cal.Rptr. 346, the court held that the appeals ***697** board could properly consider a new defense of entrapment that the licensee had failed to raise at the departmental hearing, because it was clear the board considered the undisputed facts to show entrapment as a matter of law. (*Id*. at pp. 923-924, 54 Cal.Rptr. 346.)

Here, we observe that while there is a legal question as to whether a revised permit must conform to the siting element, there are also factual disputes, e.g., what constitutes "expansion,"[30] whether the revised permit reflects an expansion, and whether the expansion conflicts with the siting element. SPRAWLDEF views the revision as an enormous expansion of operations, while its opponents disagree. These are matters that would have been fleshed ****415** out had the issue been raised at the first stage of the administrative review at the LEA hearing.

Unlike exhaustion of administrative remedies, which is a jurisdictional requirement (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 589, 96 Cal.Rptr.2d 880 (*Tahoe Vista*)), forfeiture for failure to preserve issues affords some discretion to the reviewing body. A treatise on administrative hearings notes: "At the administrative proceeding, a party must preserve all points he or she intends to urge on appeal. Authorities differ on whether this doctrine of preservation of issues is part of the exhaustion of remedies or is a separate but related rule. Professor Pierce includes it in his discussion of exhaustion of administrative remedies. 2 Pierce, Administrative Law Treatise § 15.8 (5th ed 2010). Cooper views it as a separate but related rule. 2 Cooper, State Administrative Law 595 (1965). The preservation of issues doctrine differs from the exhaustion of remedies doctrine. The latter is jurisdictional, while the former does not bar a reviewing court from considering an issue not raised before the agency when circumstances warrant (*e.g.*, when an injustice would result). *Hormel v. Helvering* (1941) 312 U.S. 552, 557, [61 S.Ct. 719, 721–722, 85 L.Ed. 1037, 1041]. See also *Greenblatt v. Munro* (1958) 161 [Cal.App.]2d 596, 606 [326 P.2d 929]...." (Cal. Administrative Hearing Practice (Cont.Ed.Bar 2d ed. (2013) § 8.108, p. 8-69.))

" 'The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review.' " (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 873, 50 Cal.Rptr.3d 636 (*Citizens for Open Government*).) But the same reasoning justifies the requirement that a party fully present *all issues* at every stage of administrative proceedings. It is unfair to criticize the County for something that ***698** SPRAWLDEF never argued to the hearing panel at the county level, particularly when there are factual matters in dispute.

SPRAWLDEF quotes from this court's opinion in *Tahoe Vista, supra*, 81 Cal.App.4th 577, 96 Cal.Rptr.2d 880, that the purpose of the doctrine of exhaustion of administrative remedies "is fully served when parties raise all issues before the administrative body with ultimate or final responsibility to approve or disapprove the project, even if those issues were not raised before subsidiary bodies in earlier hearings." (*Id*. at p. 594, 96 Cal.Rptr.2d 880, citing *Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 860, 226 Cal.Rptr. 575 (*Browning-Ferris*).) However, LEA is not a mere subsidiary body, but rather has independent authority as an enforcement agency to issue revised landfill permits (§ 44008), though it must consider any objections raised by the Board (§ 44009) and is subject to discretionary review by the Board (§ 45031). (See generally §§ 43200-43222, 44300-44310; *No Wetlands Landfill Expansion v. County of Marin* (2012) 204 Cal.App.4th 573, 581-582, 138 Cal.Rptr.3d 873 [approval of landfill permit is vested in LEA, not the county itself].)

Moreover, *Tahoe Vista* was a CEQA case subject to CEQA's specific exhaustion requirements. There, the county planning commission was a subsidiary body to the county board of supervisors, and the county code expressly stated that an issue had to be presented to the planning commission first in order to be considered by the board of supervisors. (*Tahoe Vista, supra*, 81 Cal.App.4th at p. 592, 96 Cal.Rptr.2d 880.) The appellants had raised the issue at the first level but failed to raise it to the ****416** board of supervisors. (*Id*. at p. 584, 96 Cal.Rptr.2d 880.) This court concluded the appellants failed to exhaust their administrative remedies (*id*. at pp. 592-594, 96 Cal.Rptr.2d 880), but specified its decision was limited, because it turned on the specific provisions of the county code (*id*. at p. 592, fn. 6, 96 Cal.Rptr.2d 880).

In another CEQA case, the court in *Browning-Ferris*, *supra*, 181 Cal.App.3d 852, 226 Cal.Rptr. 575, held there was no failure to exhaust administrative remedies where the appellant had not presented its issue to the city planning commission

during public hearings on the draft EIR, but did present the issue to the city council before that body approved the EIR. (*Id.* at p. 860, 226 Cal.Rptr. 575.) By doing so, the appellant had pursued its administrative remedies before the agency with the ultimate responsibility for giving final approval of the EIR. (*Ibid.*) The municipal code specified that the planning commission must find an EIR complete and in compliance with CEQA, but the process did not end at that point, and the city council had to approve the EIR. (*Ibid.*)

Here, it is the LEA which issues the permit, though with opportunity for Board input. The Board has discretion to entertain an appeal from a LEA decision, but it need not do so. (§ 45031.) If the Board does not exercise that ***699** discretion, the LEA's decision is final. Therefore, the subsidiary bodies rule upon which SPRAWLDEF relies does not apply here.

SPRAWLDEF argues the instant case is like *Citizens for Open Government, supra*, 144 Cal.App.4th 865, 50 Cal.Rptr.3d 636. In that CEQA case, the court held that a citizens' group, which voiced its objections at planning commission hearings and had its contentions reviewed by the city council in an administrative appeal filed *by another party*, could pursue mandamus relief in the trial court, even though the citizens' group had not filed its own administrative appeal to the city council. That scenario is clearly different from the circumstances presented here. SRAWLDEF quotes language from that case, that the city code did not require specification of issues for an administrative appeal, and the city council gave independent and new consideration of the matter as the final decisionmaker. (*Id.* at p. 877, 50 Cal.Rptr.3d 636.) However, the appellate court observed that CEQA expressly requires a final decision by an elected body, and exhaustion of administrative remedies turns on procedures specific to the particular public agency. (*Id.* at p. 876, 50 Cal.Rptr.3d 636.) SPRAWLDEF argues section 45030 requires only that the administrative appellant raise a substantial issue; it does not require that the issue must have been raised before the LEA. However, as we have noted, here Board review is discretionary, unlike in CEQA cases where the decision must be made by an elected body.

SPRAWLDEF argues this court should consider the issue even if it was not raised to the LEA, because section 45041 states: "The evidence before the court shall consist of the records before the hearing panel or hearing officer and the board ... *and any other relevant evidence that, in the judgment of the court, should be considered to effectuate and implement the policies of this division*." (Italics added.) In its reply brief, SPRAWLDEF suggests for the first time that the Board should have considered the issue even if it was not raised to the LEA, because section 45032 [31] ****417** provides that the evidence before the board shall include the record before the hearing panel and the LEA "and any other relevant evidence that, in the judgment of the board, should be considered to effectuate and implement the policies of ***700** this division." (§ 45032, subd. (a).) Even if we address the point raised improperly for the first time in a reply brief (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763-766, 60 Cal.Rptr.2d 770), the statutes allowing the court and the Board to consider *new evidence* say nothing about entertaining *new issues*. The new evidence must be relevant, which means it must relate to the issues decided. Clearly, the statutes merely allow new evidence on the issues properly presented, consistent with Code of Civil Procedure section 1094.5, subdivision (e), which provides: "Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may ... remand[ ] the case to be reconsidered in light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case."

Additionally, as stated by the trial court, the importance of preserving issues at all administrative stages is reflected in the Legislature's 2008 repeal of former section 45033, [32] which had provided that a person could file a court action despite failure to appeal to a hearing panel or the Board. The legislative history of the bill in which former section 45033 was repealed did not address the appeal specifically but indicated, "This bill revises the enforcement responsibilities of the solid waste law, as specified," and further stated, "[a]ccording to the sponsor, [the Board], there are gaps in the statutory authority of [the Board] that impede the agencies from taking enforcement actions to protect the public health and the environment from illegal or inappropriate solid waste disposal and solid waste handling practices. This proposal will fill in those gaps with the necessary language that clarifies [the Board] and LEA responsibilities." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading of Assem. Bill No. 2679 (2007-2008 Reg. Sess.) as amended Aug. 14, 2008, pp. 1, 5.)

We conclude the Board was not required to entertain the administrative appeal of the conformance issue, because that issue was not presented to the LEA.

VI. The Board's Decision on the Merits

Despite declining to entertain the administrative appeal, the Board went further ****418** and said SPRAWLDEF's conformance argument would fail on the merits. SPRAWLDEF fails to show any reversible error on the merits.

***701** Statutory interpretation is a question of law which we review de novo. Where the question also calls for an examination of the underlying factual predicate for application of the statute, review is de novo if the evidentiary record on that point is both sufficient and undisputed. (*Librers v. Black* (2005) 129 Cal.App.4th 114, 124, 28 Cal.Rptr.3d 188.)

In construing a statute, "our fundamental task is 'to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.' [Citations.] We begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. [Citation.] We give the language its usual and ordinary meaning, and 'if there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs.' [Citation.] If, however, the statutory language is ambiguous, 'we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.' [Citation.] Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute. [Citations.] Any interpretation that would lead to absurd consequences is to be avoided." (*Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227, 120 Cal.Rptr.2d 795, 47 P.3d 639.) While in exercising our independent judgment regarding the construction of a statute we may give deference to an agency's interpretation (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8, 78 Cal.Rptr.2d 1, 960 P.2d 1031), no such deference is required here given the plain language of the statute.

Section 50001, subdivision (a), provides that a waste facility cannot be "established or expanded" unless it is (1) a disposal facility "the location of which" is identified in the "countywide siting element," or (2) a facility that recycles at least five percent of its waste that is identified in a nondisposal facility element. (See fn. 5, *ante*.) To "establish" a facility, subdivision (c) of section 50001 adds additional requirements of "identification and description." Subdivision (c) does not address expansions. Thus, for expansions, the statute only requires that the *location* of the disposal facility appear in the siting element. It does not require that the siting element be changed so that the expansion conforms with the siting element.

SPRAWLDEF's position—that an expansion must be described in the countywide siting element in order for a revised permit to issue—would require us to judicially delete from the statute the words "the location of" (see fn. 5, *ante*). Principles of statutory construction require that we avoid interpretations that would render some words surplusage. (*Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 921, 16 Cal.Rptr.2d 226, 844 P.2d 545.) Moreover, it would require that we read into the statute language not ***702** included therein. " '[W]e presume the Legislature intended everything in a statutory scheme, and we should not read statutes to omit expressed language or include omitted language.' " (*People v. Connor* (2004) 115 Cal.App.4th 669, 691, 9 Cal.Rptr.3d 521, quoting *Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886, 894, 113 Cal.Rptr.2d 483; accord, *Yao v. Superior Court* (2002) 104 Cal.App.4th 327, 333, 127 Cal.Rptr.2d 912.) If the Legislature intended a conformance requirement, they would have so said. Indeed, requiring conformance ****419** with the siting element description in revised permits would in many cases inevitably require revision of the siting element, a policy matter that is legislative in nature.

Accordingly, we conclude section 50001 does not require an LEA or the Board to deny a permit revision on the ground that the expanded operations are not already described in the siting element. If SPRAWLDEF believes that expansions should not be allowed unless the siting element is revised and that allowing landfill operations more expansive than those described in the siting element will result in unchecked growth of landfills, then that is something to be taken up with the Legislature. We will not rewrite the statute.

We conclude SPRAWLDEF fails to show grounds for reversal of the judgment.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)-(2).)

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We concur:

RAYE, P. J.

ROBIE, J.

All Citations

34 Cal.App.5th 676, 246 Cal.Rptr.3d 398, 19 Cal. Daily Op. Serv. 3692, 2019 Daily Journal D.A.R. 3459

Footnotes

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of parts I., II., III. and IV.

1 Undesignated statutory references are to the Public Resources Code in effect at the time of the relevant events, except where otherwise noted.

2 "Regulations" references are to title 14 of the California Code of Regulations in effect at the time of the events discussed herein.

3 Though DRRR replaced the Board in 2009 (§§ 40400-40401), some statutes continue to use the term "Board." The Legislature did not amend the statutes but instead stated in section 40400 that, "[a]ny reference in any law or regulation to [the Board] shall hereafter apply to the Department of Resources Recycling and Recovery. ..." We shall use the term "Board" because that was the entity which handled this case.

4 Section 45031 states: "Within 30 days from the date that an appeal is filed with the [B]oard, the [B]oard may do any of the following: [¶] (a) Determine not to hear the appeal if the appellant fails to raise substantial issues. [¶] (b) Determine not to hear the appeal if the appellant failed to participate in the administrative hearing [without good cause]. ... [¶] (c) Determine to accept the appeal and to decide the matter on the basis of the record before the hearing panel, or based on written arguments submitted by the parties, or both. [¶] (d) Determine to accept the appeal and hold a hearing, within 60 days, unless all parties stipulate to extending the hearing date."

5 Section 50001 states: "(a) Except as provided by subdivision (b), after a countywide or regional agency integrated waste management plan has been approved by [DRRR] pursuant to Division 30 (commencing with Section 40000), no person shall establish or expand a solid waste facility, as defined in Section 40194, in the county unless the solid waste facility meets one of the following criteria: [¶] (1) The solid waste facility is a disposal facility or a transformation facility, *the location* of which is identified in the countywide siting element or amendment thereto, which has been approved pursuant to Section 41721. [¶] (2) The solid waste facility is a facility which is designed to, and which as a condition of its permit, will recover for reuse or recycling at least 5 percent of the total volume of material received by the facility, and which is identified in the nondisposal facility element or amendment thereto, which has been approved pursuant to Section 41800 or 41801.5. [¶] (b) Solid waste facilities other than those specified in paragraphs (1) and (2) of subdivision (a) shall not be required to comply with the requirements of this section. [¶] (c) The person or agency proposing to establish a solid waste facility shall prepare and submit a site identification and description of the proposed facility to the task force established pursuant to Section 40950 [county convenes local task force every five years to assist in development of goals and plans]. Within 90 days after the site identification and description is submitted to the task force, the task force shall meet and comment on the proposed solid waste facility in writing. These comments shall include, but are not limited to, the relationship between the proposed solid waste facility and the implementation schedule requirements of Section 41780 and the regional impact of the facility. The task force shall transmit these comments to the person or public agency proposing establishment of the solid waste facility, to the county, and to all cities within the county. The comments shall become part of the official record of the proposed solid waste facility. [¶] (d) The review and comment by the local task force required by subdivision (c) for amendment to an element may be satisfied by the review required by subdivision (a) of Section 41734 for an amendment to an element." (Italics added.)

6 The previous owner/operator, Republic Services, Inc., was named in the petition but was dismissed, and the current owners were substituted.

7 As we explain *post*, we deny the County LEA's request for judicial notice filed August 8, 2012, while this appeal was pending.
We note the administrative record appears to be missing pages 7 and 8, but it does not appear they are of consequence to this appeal.

8 " 'Transformation' means incineration, pyrolysis, distillation, or biological conversion other than composting. [It] does not include composting, gasification, or biomass conversion." (§ 40201.)

9 Section 41702 provides: "An area is consistent with the city or county general plan if all of the following requirements are met: [¶] (a) The city or county adopted a general plan which complies with the requirements of Article 5 (commencing with Section 65300) of Chapter 3 of Division 1 of Title 7 of the Government Code. [¶] (b) The area reserved for a new solid waste facility or the expansion of an existing solid waste facility is located in, or coextensive with, a land use area designated or authorized for solid waste facilities in the applicable city or county general plan. [¶] (c) The land use authorized in the applicable city or county general plan adjacent to or near the area reserved for the establishment of new solid waste transformation or disposal of solid waste or expansion of existing facilities is compatible with the establishment or expansion of the solid waste facility."

10 A 2011 amendment substituted "shall not" for "may not." (Stats. 2011, ch. 476, § 14.) This did not change the meaning; " 'may' " can be mandatory where permissive use would render a statute's criteria illusory. (*California Correctional Peace Officers Assn. v. Tilton* (2011) 196 Cal.App.4th 91, 99, 126 Cal.Rptr.3d 623.)

11 The provision allowing changes through modification, rather than revision, of the permit, was added in 2011 (§ 44004, amended by Stats. 2011, ch. 476, § 14, eff. Jan. 1, 2012), after the events at issue in this appeal. The legislative history of the 2011 legislation includes a bill analysis stating: "An operator of a solid waste facility cannot make a significant change to design or operation unless specified criteria are met and approved by the LEA. And, depending on the modification, the [Board] must also approve the change. This bill attempts to clarify that if an operator is proposing changes to the facility that are within the permitted parameters that those changes would trigger a permit modification rather than a full permit revision. However, the language proposed in the bill requires clarification to accomplish this." (Sen. Com. on Environmental Quality, Analysis of Assem. Bill No. 341 (2011-2012 Reg. Sess.) as amended May 5, 2011, p. 6.)

12 Section 45030 states: "(a) A party to a hearing held pursuant to Chapter 4 (commencing with Section 44300) of Part 4 may appeal to the [B]oard to review the written decision of the hearing panel or hearing officer .... [¶] ... [¶] (b) An appellant shall commence an appeal to the [B]oard by filing a written request for a hearing together with a brief summary statement of the legal and factual basis for the appeal. [¶] ... [¶] (e) The [B]oard shall conduct the hearing on the appeal in accordance with the procedures specified in Article 10 (commencing with Section 11445.10) of Chapter 4.5 of Part 1 of the Government Code [i.e., informal hearings under the Administrative Procedure Act (APA)]."

13 We discuss the question of mootness, *post*.

14 Section 41770 provides: "(a) Each countywide or regional agency integrated waste management plan, and the elements thereof, shall be reviewed, revised, if necessary, and submitted to the board every five years in accordance with the schedule set forth under Chapter 7 (commencing with Section 41800 [Board approval].) [¶] (b) Any revisions to a countywide or regional agency integrated waste management plan, and the elements thereof, shall use a waste disposal characterization method that the board shall develop for the use of the city, county, city and county, or regional agency. The city, county, city and county, or regional agency shall conduct waste disposal characterization studies, as prescribed by the board, if it fails to meet the diversion requirements of Section 41780 [diverting from disposal to recycling], at the time of the five-year revision of the source reduction and recycling element. [¶] (c) The board may review and revise its regulations governing the contents of revised source reduction and recycling elements to reduce duplications in one or more components of these revised elements."

15 Regulations section 18788 provides in part: "Prior to the fifth anniversary of Board approval of the CIWMP ..., or its most recent revision, the LTF [local task force] shall complete a review ... to assure that the county's ... waste management practices remains consistent with [statutory] waste management practices .... [¶] ... [¶] (3) ... [The] Review Report ... shall address .... [¶] ... [¶] (B) changes in quantities of waste within the county ... [¶] ... [¶] (F) changes in permitted disposal capacity, and quantities of waste disposed of .... [¶] ... [¶] (4) ... [The Board shall review the Review Report and approve or disapprove it and identify areas needing revision]. [¶] (b) ... If a revision is necessary the county ... shall [revise and resubmit its CIWMP] ...."

16 As set forth in Potrero Hills' unopposed request for judicial notice granted by the trial court, Potrero Hills applied for this expansion (which is unrelated to the expanded operations at issue in this appeal) in 2002 and, after environmental review, received a new land use permit from the county in 2005. SPRAWLDEF and others filed a lawsuit in Solano County Superior Court, which in February 2007 found the environmental impact review (EIR) was deficient under the California Environmental Quality Act (CEQA, § 21000 et seq.). After EIR revisions, the Solano County Superior Court ultimately found the EIR adequate and discharged its writ in November 2009.

17 SPRAWLDEF's arguments at times imply that it is this initial, superseded proposal that is at issue.

18 Section 44009, subdivision (a)(3), provides: "If the [B]oard fails to concur or object in writing within the 60-day period specified in paragraph (1), the [B]oard shall be deemed to have concurred in the issuance of the permit as submitted to it."

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19 The first five issues listed were the following: "1. The LEA failed to reject or condition the landfill permit application due to repeated violations of state minimum operating standards relating to consistent and unabated litter from landfill operations which has significant aesthetic impact as well as impact on the surrounding marshlands and grassland ecology, and the natural life of the marshlands and grasslands. [¶] 2. The LEA failed to reject or condition the landfill permit application due to defective leachate discharge operations at the landfill, including but not limited to the destruction of pumps and outflow systems by the weight of landfill tonnage. [¶] 3. The LEA failed to reject or condition the landfill permit to prevent or limit the impact of noise and lighting from both the landfill operations and trucking to the landfill which would detrimentally impact the habitat and viability of marshland species. [¶] 4. The LEA failed to reject or condition the landfill permit application on the basis that it misstated, improperly counted, or otherwise misrepresented materials counted as alternative daily cover, recycling or beneficial use, in violation of state regulations, statutes or policies. The proposed permitted level of tonnage accepted for disposal is therefore inaccurate and fails to properly state the expected landfilled tonnages into the facility. [¶] 5. The LEA failed to reject or condition the landfill permit application for failing to properly provide and describe slopes stability standards and construction."

20 Tipping fees are the fees charged to those who want to dump waste at the landfill. On appeal, SPRAWLDEF agrees LEA has no authority to increase tipping fees. SPRAWLDEF says that, by arguing the inconsistency of the tipping fees with diversion goals of Solano County and other counties, its argument adequately raised the conformance issue it later raised to the Board, i.e., that the expanded operations had to be rejected because they did not conform with the siting element. As we discuss *post*, we disagree that SPRAWLDEF preserved this issue.

21 Waste collection fees are within the purview of county or a local governmental agency. (§ 40059.)

22 Section 44009, subdivision (a)(2), provides: "If the [B]oard determines that the permit is not consistent with the state minimum standards adopted pursuant to Section 43020 [i.e., the regulations], or is not consistent with Sections 43040, 43600, 44007, 44010 ["enforcement agency shall issue permit only if it finds that the proposed solid waste facilities permit is consistent with the standards adopted by the board"], 44017, 44150, and 44152 or Division 31 (commencing with Section 50000), the [B]oard shall object to provisions of the permit and shall submit those objections to the local enforcement agency for its consideration."

23 On appeal, the Board's successor, DRRR, says the Board decided "that because SPRAWLDEF's conformance argument was not exhausted below, it was not substantial." The County makes the same assertion. This assertion misreads the Board's written decision. The Board said the issue was insubstantial because it lacked merit. We observe that the Board's staff counsel told the Board that it had discretion to consider the new issue if the Board thought it substantial, even though the issue had not been raised at the county level. The County appears to argue the Board *must* decline to consider new issues. We need not go that far. We read the Board's decision as saying that, in determining whether the administrative appeal raised a substantial issue, the Board did not need to consider the new issue, and even if the Board were to consider it, it failed on the merits.

24 Section 45040 provides: "(a) Within 30 days from the date of service of a copy of a decision or order issued by the [B]oard pursuant to Section 45031 or 45032, any aggrieved party may file with the superior court a petition for a writ of mandate for review thereof. [¶] (b)(1) The filing of a petition for writ of mandate shall not stay any enforcement action taken or the accrual of any penalties assessed, pursuant to this part or Part 5 (commencing with Section 45000). [¶] (2) Paragraph (1) shall not prohibit the court from granting any appropriate relief within its jurisdiction."

25 SPRAWLDEF notes the Board did not promulgate any regulation on this point.

** See footnote *, *ante*.

30 Indeed, it is not a foregone conclusion that extending operation hours, as opposed to expanding physical area, is an expansion within the meaning section 50001. SPRAWDEF assumes that it is, but did not specifically address this issue in its briefing.

31 Section 45032 provides: "(a) In the [B]oard's hearing on the appeal, the evidence before the board shall consist of the record before the hearing panel or hearing officer, relevant facts as to any actions or inactions not subject to review by a hearing panel or hearing officer, the record before the [LEA], written and oral arguments submitted by the parties, and *any other relevant evidence that, in the judgment of the* [*B*]*oard, should be considered to effectuate and implement the policies of this division.* [¶] (b) The [B]oard may only overturn an enforcement action, and any administrative civil penalty, by a [LEA] if it finds, based on substantial evidence, that the action was inconsistent with this division. If the [B]oard overturns the decision of the [LEA], the hearing panel, or the hearing officer, or finds that the enforcement agency has failed to act as required, the board may do both of the following: [¶] (1) Direct that the appropriate action be taken by the [LEA]. [¶] (2) If the [LEA] fails to act by the date specified by the [B]oard, take the appropriate action itself." (Italics added.)

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32 Former section 45033 stated: “A failure to appeal to the hearing panel, the hearing officer, or the board for review, or the refusal of the [LEA], a hearing panel, the hearing officer, or the board to hear an appeal does not preclude a person from filing an action with the superior court to contest any action or inaction of the [LEA] or the board.” (Added by Stats. 1995, ch. 952, § 35, repealed by Stats. 2008, ch. 500, § 34, eff. Jan. 1, 2009.)

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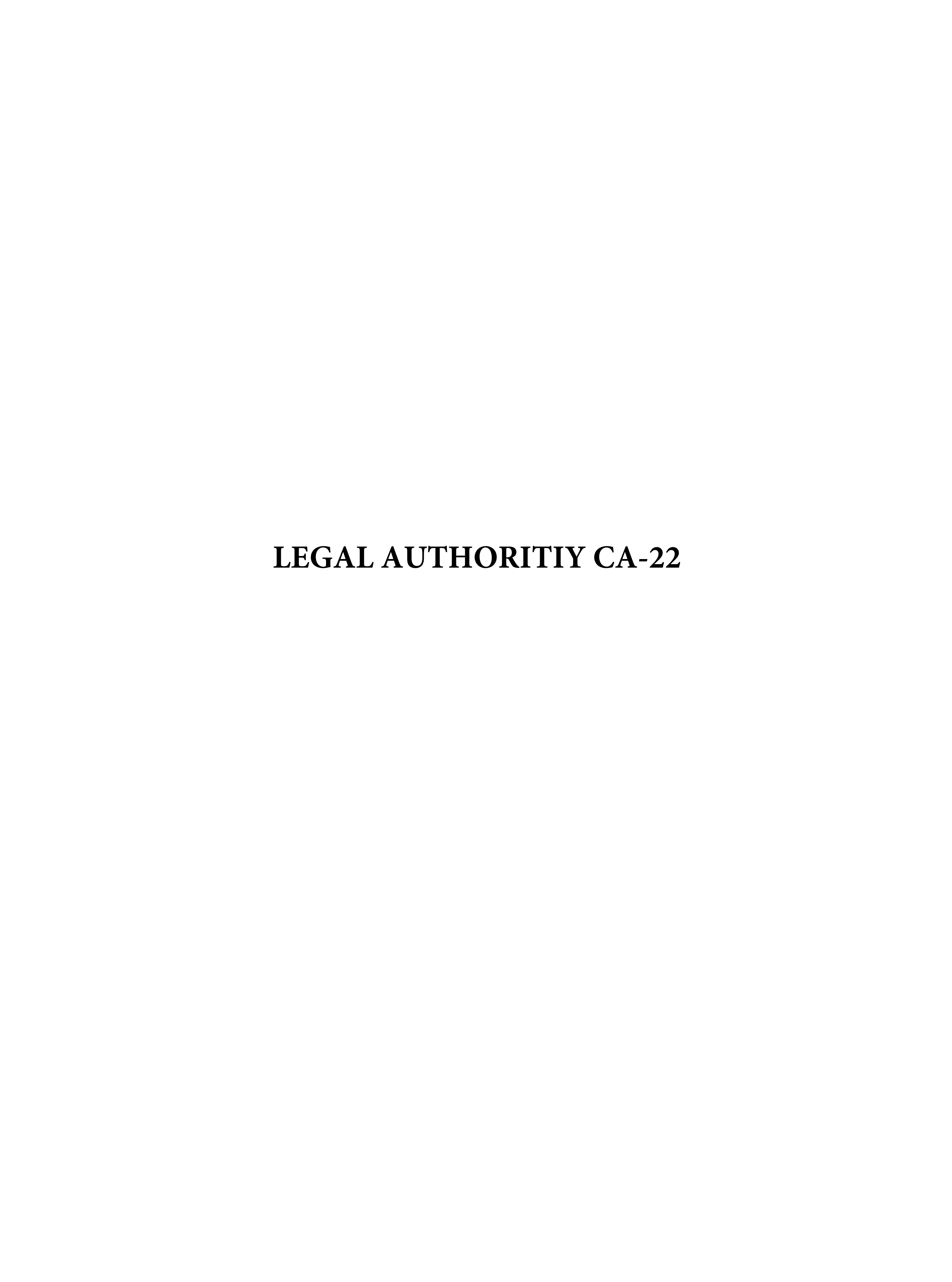

LEGAL AUTHORITIY CA-22

Ex. CA-22

No. 18232

MULTILATERAL

Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969

Authentic texts: English, French, Chinese, Russian and Spanish.
Registered ex officio *on 27 January 1980.*

MULTILATÉRAL

Convention de Vienne sur le droit des traités (avec annexe). Conclue à Vienne le 23 mai 1969

Textes authentiques : anglais, français, chinois, russe et espagnol.
Enregistrée d'office le 27 janvier 1980.

VIENNA CONVENTION[1] ON THE LAW OF TREATIES

The States Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

[1] Came into force on 27 January 1980, i.e., on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession with the Secretary-General of the United Nations, in accordance with article 84 (1):

State	*Date of deposit of the instrument of ratification or accession (a)*	
Argentina*	5 December	1972
Australia	13 June	1974 *a*
Austria	30 April	1979 *a*
Barbados	24 June	1971
Canada*	14 October	1970 *a*
Central African Republic	10 December	1971 *a*
Cyprus	28 December	1976 *a*
Denmark*	1 June	1976
Finland*	19 August	1977
Greece	30 October	1974 *a*
Holy See	25 February	1977
Honduras	20 September	1979
Italy	25 July	1974
Jamaica	28 July	1970
Kuwait*	11 November	1975 *a*
Lesotho	3 March	1972 *a*
Mauritius	18 January	1973 *a*
Mexico	25 September	1974
Morocco*	26 September	1972
Nauru	5 May	1978 *a*
New Zealand	4 August	1971
Niger	27 October	1971 *a*
Nigeria	31 July	1969
Paraguay	3 February	1972 *a*
Philippines	15 November	1972
Republic of Korea	27 April	1977
Spain	16 May	1972 *a*
Sweden	4 February	1975
Syrian Arab Republic*	2 October	1970 *a*
Togo	28 December	1979 *a*
Tunisia*	23 June	1971 *a*
United Kingdom of Great Britain and Northern Ireland*	25 June	1971
United Republic of Tanzania*	12 April	1976 *a*
Yugoslavia	27 August	1970
Zaire	25 July	1977 *a*

Subsequently, the Convention came into force for the following State on the thirtieth day following the date of deposit of its instrument of ratification or accession with the Secretary-General of the United Nations, in accordance with article 84 (2):

State	*Date of deposit of the instrument of accession (a)*
Rwanda	3 January 1980 *a*

(With effect from 2 February 1980.)

* For the texts of the reservations and declarations made upon ratification or accession, see p. 501 of this volume.

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

PART I. INTRODUCTION

Article 1. SCOPE OF THE PRESENT CONVENTION

The present Convention applies to treaties between States.

Article 2. USE OF TERMS

1. For the purposes of the present Convention:

(*a*) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) "Ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(*c*) "Full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(*d*) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(*e*) "Negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty;

(*f*) "Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(*g*) "Party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(*h*) "Third State" means a State not a party to the treaty;

(*i*) "International organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3. INTERNATIONAL AGREEMENTS NOT WITHIN THE SCOPE OF THE PRESENT CONVENTION

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(*a*) The legal force of such agreements;

(*b*) The application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(*c*) The application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Article 4. NON-RETROACTIVITY OF THE PRESENT CONVENTION

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Article 5. TREATIES CONSTITUTING INTERNATIONAL ORGANIZATIONS AND TREATIES ADOPTED WITHIN AN INTERNATIONAL ORGANIZATION

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

Article 6. CAPACITY OF STATES TO CONCLUDE TREATIES

Every State possesses capacity to conclude treaties.

Article 7. FULL POWERS

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(*a*) He produces appropriate full powers; or

(*b*) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(*b*) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(*c*) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Article 8. SUBSEQUENT CONFIRMATION OF AN ACT PERFORMED WITHOUT AUTHORIZATION

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Article 9. ADOPTION OF THE TEXT

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10. AUTHENTICATION OF THE TEXT

The text of a treaty is established as authentic and definitive:

(*a*) By such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(*b*) Failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11. MEANS OF EXPRESSING CONSENT TO BE BOUND BY A TREATY

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12. CONSENT TO BE BOUND BY A TREATY EXPRESSED BY SIGNATURE

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(*a*) The treaty provides that signature shall have that effect;

(*b*) It is otherwise established that the negotiating States were agreed that signature should have that effect; or

(*c*) The intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(*a*) The initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(*b*) The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Article 13. CONSENT TO BE BOUND BY A TREATY EXPRESSED BY AN EXCHANGE OF INSTRUMENTS CONSTITUTING A TREATY

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(*a*) The instruments provide that their exchange shall have that effect; or

(*b*) It is otherwise established that those States were agreed that the exchange of instruments shall have that effect.

Article 14. CONSENT TO BE BOUND BY A TREATY EXPRESSED BY RATIFICATION, ACCEPTANCE OR APPROVAL

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(*a*) The treaty provides for such consent to be expressed by means of ratification;

(*b*) It is otherwise established that the negotiating States were agreed that ratification should be required;

(*c*) The representative of the State has signed the treaty subject to ratification; or
(*d*) The intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 15. CONSENT TO BE BOUND BY A TREATY EXPRESSED BY ACCESSION

The consent of a State to be bound by a treaty is expressed by accession when:
(*a*) The treaty provides that such consent may be expressed by that State by means of accession;
(*b*) It is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
(*c*) All the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Article 16. EXCHANGE OR DEPOSIT OF INSTRUMENTS OF RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:
(*a*) Their exchange between the contracting States;
(*b*) Their deposit with the depositary; or
(*c*) Their notification to the contracting States or to the depositary, if so agreed.

Article 17. CONSENT TO BE BOUND BY PART OF A TREATY AND CHOICE OF DIFFERING PROVISIONS

1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18. OBLIGATION NOT TO DEFEAT THE OBJECT AND PURPOSE OF A TREATY PRIOR TO ITS ENTRY INTO FORCE

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
(*a*) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(*b*) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

Article 19. FORMULATION OF RESERVATIONS

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) In cases not falling under sub-paragraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

Article 20. ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(*a*) Acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(*b*) An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(*c*) An act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21. LEGAL EFFECTS OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(*a*) Modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(*b*) Modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22. WITHDRAWAL OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(*a*) The withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(*b*) The withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23. PROCEDURE REGARDING RESERVATIONS

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24. ENTRY INTO FORCE

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25. PROVISIONAL APPLICATION

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) The treaty itself so provides; or

(*b*) The negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III. OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

Article 26. "PACTA SUNT SERVANDA"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27. INTERNAL LAW AND OBSERVANCE OF TREATIES

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

SECTION 2. APPLICATION OF TREATIES

Article 28. NON-RETROACTIVITY OF TREATIES

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29. TERRITORIAL SCOPE OF TREATIES

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 30. APPLICATION OF SUCCESSIVE TREATIES RELATING TO THE SAME SUBJECT-MATTER

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any ques-

tion of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31. GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(*b*) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

Article 33. INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34. GENERAL RULE REGARDING THIRD STATES

A treaty does not create either obligations or rights for a third State without its consent.

Article 35. TREATIES PROVIDING FOR OBLIGATIONS FOR THIRD STATES

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36. TREATIES PROVIDING FOR RIGHTS FOR THIRD STATES

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37. REVOCATION OR MODIFICATION OF OBLIGATIONS OR RIGHTS OF THIRD STATES

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38. RULES IN A TREATY BECOMING BINDING ON THIRD STATES THROUGH INTERNATIONAL CUSTOM

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

PART IV. AMENDMENT AND MODIFICATION OF TREATIES

Article 39. GENERAL RULE REGARDING THE AMENDMENT OF TREATIES

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Article 40. AMENDMENT OF MULTILATERAL TREATIES

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(*a*) The decision as to the action to be taken in regard to such proposal;
(*b*) The negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(*b*), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
(*a*) be considered as a party to the treaty as amended; and
(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41. AGREEMENTS TO MODIFY MULTILATERAL TREATIES BETWEEN CERTAIN OF THE PARTIES ONLY

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
(*a*) The possibility of such a modification is provided for by the treaty; or
(*b*) The modification in question is not prohibited by the treaty and:
(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42. VALIDITY AND CONTINUANCE IN FORCE OF TREATIES

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43. OBLIGATIONS IMPOSED BY INTERNATIONAL LAW INDEPENDENTLY OF A TREATY

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 44. SEPARABILITY OF TREATY PROVISIONS

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) The said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) Continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45. LOSS OF A RIGHT TO INVOKE A GROUND FOR INVALIDATING, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE OPERATION OF A TREATY

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(*a*) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

SECTION 2. INVALIDITY OF TREATIES

Article 46. PROVISIONS OF INTERNAL LAW REGARDING COMPETENCE TO CONCLUDE TREATIES

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Article 47. SPECIFIC RESTRICTIONS ON AUTHORITY TO EXPRESS THE CONSENT OF A STATE

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to

observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 48. Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

Article 49. Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50. Corruption of a representative of a State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51. Coercion of a representative of a State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52. Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53. Treaties conflicting with a peremptory norm of general international law ("jus cogens")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Section 3. Termination and suspension of the operation of treaties

Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(*a*) In conformity with the provisions of the treaty; or

(*b*) At any time by consent of all the parties after consultation with the other contracting States.

Article 55. REDUCTION OF THE PARTIES TO A MULTILATERAL TREATY BELOW THE NUMBER NECESSARY FOR ITS ENTRY INTO FORCE

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56. DENUNCIATION OF OR WITHDRAWAL FROM A TREATY CONTAINING NO PROVISION REGARDING TERMINATION, DENUNCIATION OR WITHDRAWAL

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(*a*) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(*b*) A right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57. SUSPENSION OF THE OPERATION OF A TREATY UNDER ITS PROVISIONS OR BY CONSENT OF THE PARTIES

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) In conformity with the provisions of the treaty; or

(*b*) At any time by consent of all the parties after consultation with the other contracting States.

Article 58. SUSPENSION OF THE OPERATION OF A MULTILATERAL TREATY BY AGREEMENT BETWEEN CERTAIN OF THE PARTIES ONLY

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) The possibility of such a suspension is provided for by the treaty; or

(*b*) The suspension in question is not prohibited by the treaty and:

  (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

  (ii) Is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59. TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY IMPLIED BY CONCLUSION OF A LATER TREATY

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(*a*) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(*b*) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60. TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY AS A CONSEQUENCE OF ITS BREACH

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
- (i) In the relations between themselves and the defaulting State, or
- (ii) As between all the parties;

(*b*) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(*a*) A repudiation of the treaty not sanctioned by the present Convention; or

(*b*) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61. SUPERVENING IMPOSSIBILITY OF PERFORMANCE

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62. FUNDAMENTAL CHANGE OF CIRCUMSTANCES

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(*a*) If the treaty establishes a boundary; or

(*b*) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63. SEVERANCE OF DIPLOMATIC OR CONSULAR RELATIONS

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64. EMERGENCE OF A NEW PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65. PROCEDURE TO BE FOLLOWED WITH RESPECT TO INVALIDITY, TERMINATION, WITHDRAWAL FROM OR SUSPENSION OF THE OPERATION OF A TREATY

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66. PROCEDURES FOR JUDICIAL SETTLEMENT, ARBITRATION AND CONCILIATION

If, under paragraph 3 of article 65, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

(*a*) Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(*b*) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67. INSTRUMENTS FOR DECLARING INVALID, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE OPERATION OF A TREATY

1. The notification provided for under article 65, paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 68. REVOCATION OF NOTIFICATIONS AND INSTRUMENTS PROVIDED FOR IN ARTICLES 65 AND 67

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69. CONSEQUENCES OF THE INVALIDITY OF A TREATY

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(*a*) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(*b*) Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 70. CONSEQUENCES OF THE TERMINATION OF A TREATY

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71. CONSEQUENCES OF THE INVALIDITY OF A TREATY WHICH CONFLICTS WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW

1. In the case of a treaty which is void under article 53 the parties shall:

(*a*) Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(*b*) Bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72. CONSEQUENCES OF THE SUSPENSION OF THE OPERATION OF A TREATY

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(*a*) Releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(*b*) Does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI. MISCELLANEOUS PROVISIONS

Article 73. CASES OF STATE SUCCESSION, STATE RESPONSIBILITY AND OUTBREAK OF HOSTILITIES

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Article 74. DIPLOMATIC AND CONSULAR RELATIONS AND THE CONCLUSION OF TREATIES

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75. CASE OF AN AGGRESSOR STATE

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 76. DEPOSITARIES OF TREATIES

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77. FUNCTIONS OF DEPOSITARIES

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(*a*) Keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(*b*) Preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(*c*) Receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(*d*) Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(*e*) Informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(*f*) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
(*g*) Registering the treaty with the Secretariat of the United Nations;
(*h*) Performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

Article 78. NOTIFICATIONS AND COMMUNICATIONS

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:
(*a*) If there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;
(*b*) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;
(*c*) If transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1(*e*).

Article 79. CORRECTION OF ERRORS IN TEXTS OR IN CERTIFIED COPIES OF TREATIES

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:
(*a*) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;
(*b*) By executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or
(*c*) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:
(*a*) No objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;
(*b*) An objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

Article 80. REGISTRATION AND PUBLICATION OF TREATIES

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII. FINAL PROVISIONS

Article 81. SIGNATURE

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

Article 82. RATIFICATION

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 83. ACCESSION

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 84. ENTRY INTO FORCE

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 85. AUTHENTIC TEXTS

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this twenty-third day of May, one thousand nine hundred and sixty-nine.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

For Afghanistan:
Pour l'Afghanistan :
阿富汗：
За Афганистан:
Por el Afganistán:

Subject to the declaration attached[1]
ABDUL H. TABIBI[2]

For Albania:
Pour l'Albanie :
阿尔巴尼亚：
За Албанию:
Por Albania:

For Algeria:
Pour l'Algérie :
阿尔及利亚：
За Алжир:
Por Argelia:

For Argentina:
Pour l'Argentine :
阿根廷：
За Аргентину:
Por la Argentina:

E. DE LA GUARDIA

For Australia:
Pour l'Australie :
澳大利亚：
За Австралию:
Por Australia:

[1] Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

For Austria:
Pour l'Autriche :
奥地利:
За Австрию:
Por Austria:

For Barbados:
Pour la Barbade :
巴巴多斯:
За Барбадос:
Por Barbados:

GEORGE C. R. MOE

For Belgium:
Pour la Belgique :
比利时:
За Бельгию:
Por Bélgica:

For Bolivia:
Pour la Bolivie :
玻利维亚:
За Боливию:
Por Bolivia:

Sujeta a la declaración anexa[1]
J. ROMERO LOZA[2]

For Botswana:
Pour le Botswana :
博茨瓦纳:
За Ботсвану:
Por Botswana:

[1] Subject to the attached declaration — Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

For Brazil:
Pour le Brésil :
巴西:
За Бразилию:
Por el Brasil:

G. NASCIMENTO E SILVA

For Bulgaria:
Pour la Bulgarie :
保加利亚:
За Болгарию:
Por Bulgaria:

For Burma:
Pour la Birmanie :
缅甸:
За Бирму:
Por Birmania:

For Burundi:
Pour le Burundi :
布隆迪:
За Бурунди:
Por Burundi:

For the Byelorussian Soviet Socialist Republic:
Pour la République socialiste soviétique de Biélorussie :
白俄罗斯苏维埃社会主义共和国:
За Белорусскую Советскую Социалистическую Республику:
Por la República Socialista Soviética de Bielorrusia:

For Cambodia:
Pour le Cambodge :
柬埔寨：
За Камбоджу:
Por Camboya:

SARIN CHHAK

For Cameroon:
Pour le Cameroun :
喀麥隆：
За Камерун:
Por el Camerún:

For Canada:
Pour le Canada :
加拿大：
За Канаду:
Por el Canadá:

For the Central African Republic:
Pour la République centrafricaine :
中非共和国：
За Центральноафриканскую Республику:
Por la República Centroafricana:

For Ceylon:
Pour le Ceylan :
錫蘭：
За Цейлон:
Por Ceilán:

For Chad:
Pour le Tchad :
乍得:
За Чад:
Por el Chad:

For Chile:
Pour le Chili :
智利:
За Чили:
Por Chile:

PEDRO J. RODRÍGUEZ
EDMUNDO VARGAS

For China:
Pour la Chine :
中国:
За Китай:
Por China:

LIU CHIEH
April 27, 1970

For Colombia:
Pour la Colombie :
哥伦比亚:
За Колумбию:
Por Colombia:

ANTONIO BAYONA
HUMBERTO RUIZ
J. J. CAICEDO PERDOMO

For the Congo (Brazzaville):
Pour le Congo (Brazzaville) :
剛果 (布拉薩市):
За Конго (Браззавиль):
Por el Congo (Brazzaville):

Sous réserve de ratification par mon pays[1]
S. BIKOUTHA

For the Congo (Democratic Republic of):
Pour le Congo (République démocratique du) :
剛果 (民主共和國):
За Демократическую Республику Конго:
Por el Congo (República Democrática de):

For Costa Rica:
Pour le Costa Rica :
哥斯达黎加:
За Коста-Рику:
Por Costa Rica:

Ad referendum y sujeto a las reservas anexas[2]
J. L. REDONDO GÓMEZ[3]

For Cuba:
Pour Cuba :
古巴:
За Кубу:
Por Cuba:

[1] Subject to ratification by my country.
[2] *Ad referendum* and subject to the attached reservations — *Ad referendum* et soumise aux réserves, dont texte joint en annexe.
[3] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

For Cyprus:
Pour Chypre :
塞浦路斯:
За Кипр:
Por Chipre:

For Czechoslovakia:
Pour la Tchécoslovaquie :
捷克斯洛伐克:
За Чехословакию:
Por Checoslovaquia:

For Dahomey:
Pour le Dahomey :
达荷美:
За Дагомею:
Por el Dahomey:

For Denmark:
Pour le Danemark :
丹麦:
За Данию:
Por Dinamarca:

OTTO BORCH
April 18, 1970

For the Dominican Republic:
Pour la République Dominicaine :
多米尼加共和国:
За Доминиканскую Республику:
Por la República Dominicana:

For Ecuador:
Pour l'Equateur :
厄瓜多尔:
За Эквадор:
Por el Ecuador:

Con la declaración que se anexo[1]
Gonzalo Escudero Moscoso[2]

For El Salvador:
Pour El Salvador :
萨尔瓦多:
За Сальвадор:
Por El Salvador:

R. Galindo Pohl
16 de febrero de 1970

For Equatorial Guinea:
Pour la Guinée équatoriale :
赤道几内亚:
За Экваториальную Гвинею:
Por Guinea Ecuatorial:

For Ethiopia:
Pour l'Ethiopie :
埃塞俄比亚:
За Эфиопию:
Por Etiopía:

Kifle Wodajo
30 April 1970

[1] With the attached declaration — Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

For the Federal Republic of Germany:
Pour la République fédérale d'Allemagne :
德意志聯邦共和國：
За Федеративную Республику Германии:
Por la República Federal de Alemania:

ALEXANDER BÖKER
30th April 1970

For Finland:
Pour la Finlande :
芬兰:
За Финляндию:
Por Finlandia:

ERIK CASTRÉN

For France:
Pour la France :
法国:
За Францию:
Por Francia:

For Gabon:
Pour le Gabon :
加蓬:
За Габон:
Por el Gabón:

For Gambia:
Pour la Gambie :
冈比亚:
За Гамбию:
Por Gambia:

For Ghana:
Pour le Ghana :
加纳：
За Гану:
Por Ghana:

EMMANUEL K. DADZIE
G. O. LAMPTEY

For Greece:
Pour la Grèce :
希腊：
За Грецию:
Por Grecia:

For Guatemala:
Pour le Guatemala :
危地马拉：
За Гватемалу:
Por Guatemala:

Ad referendum y sujeto a las reservas que constan en documento anexo[1]
ADOLFO MOLINA ORANTES[2]

For Guinea:
Pour la Guinée :
几内亚：
За Гвинею:
Por Guinea:

[1] *Ad referendum* and subject to the reservations contained in the attached document — *Ad referendum* et soumise aux réserves contenues dans le document ci-joint.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

For Guyana:
Pour la Guyane :
圭亚那:
За Гайану:
Por Guyana:

JOHN CARTER

For Haiti:
Pour Haïti :
海地:
За Гаити:
Por Haití:

For the Holy See:
Pour le Saint-Siège :
教廷:
За Святейший Престол:
Por la Santa Sede:

OPILIO ROSSI
30 September 1969

For Honduras:
Pour le Honduras :
洪都拉斯:
За Гондурас:
Por Honduras:

MARIO CARÍAS ZAPATA

For Hungary:
Pour la Hongrie :
匈牙利:
За Венгрию:
Por Hungría:

For Iceland:
Pour l'Islande :
冰岛：
За Исландию:
Por Islandia:

For India:
Pour l'Inde :
印度：
За Индию:
Por la India:

For Indonesia:
Pour l'Indonésie :
印度尼西亚：
За Индонезию:
Por Indonesia:

For Iran:
Pour l'Iran :
伊朗：
За Иран:
Por el Irán:

A. MATINE-DAFTARY

For Iraq:
Pour l'Irak :
伊拉克：
За Ирак:
Por el Irak:

For Ireland:
Pour l'Irlande :
爱尔兰:
За Ирландию:
Por Irlanda:

For Israel:
Pour Israël :
以色列:
За Израиль:
Por Israel:

For Italy:
Pour l'Italie :
意大利:
За Италию:
Por Italia:

PIERO VINCI
22 April 1970

For the Ivory Coast:
Pour la Côte-d'Ivoire :
象牙海岸:
За Берег Слоновой Кости:
Por la Costa de Marfil:

LUCIEN YAPOBI
23 July 1969

For Jamaica:
Pour la Jamaïque :
牙买加:
За Ямайку:
Por Jamaica:

L. B. FRANCIS
K. RATTRAY

For Japan:
Pour le Japon :
日本：
За Японию:
Por el Japón:

For Jordan:
Pour la Jordanie :
约旦：
За Иорданию:
Por Jordania:

For Kenya:
Pour le Kenya :
肯尼亚:
За Кению:
Por Kenya:

I. S. Bhoi

For Kuwait:
Pour le Koweït :
科威特：
За Кувейт:
Por Kuwait:

For Laos:
Pour le Laos :
老挝：
За Лаос:
Por Laos:

For Lebanon:
Pour le Liban :
黎巴嫩:
За Ливан:
Por el Líbano:

For Lesotho:
Pour le Lesotho :
莱索托:
За Лесото:
Por Lesotho:

For Liberia:
Pour le Libéria :
利比里亚:
За Либерию:
Por Liberia:

NELSON BRODERICK

For Libya:
Pour la Libye :
利比亞:
За Ливию:
Por Libia:

For Liechtenstein:
Pour le Liechtenstein :
列支敦士登:
За Лихтенштейн:
Por Liechtenstein:

For Luxembourg:
Pour le Luxembourg :
卢森堡：
За Люксембург:
Por Luxemburgo:

GASTON THORN
4 septembre 1969

For Madagascar:
Pour Madagascar :
马达加斯加：
За Мадагаскар:
Por Madagascar:

Ad referendum
B. RAZAFINTSEHENO

For Malawi:
Pour le Malawi :
马拉维：
За Малави:
Por Malawi:

For Malaysia:
Pour la Malaisie :
马来西亚：
За Малайскую Федерацию:
Por Malasia:

For the Maldive Islands:
Pour les îles Maldives :
馬爾代夫羣島：
За Мальдивские острова:
Por las Islas Maldivas:

For Mali:
Pour le Mali :
马里：
За Мали:
Por Malí:

For Malta:
Pour Malte :
马耳他：
За Мальту:
Por Malta:

For Mauritania:
Pour la Mauritanie :
毛里塔尼亚：
За Мавританию:
Por Mauritania:

For Mauritius:
Pour Maurice :
毛里求斯：
За Маврикий:
Por Mauricio:

For Mexico:
Pour le Mexique :
墨西哥：
За Мексику:
Por México:

EDUARDO SUÁREZ

For Monaco:
Pour Monaco :
摩纳哥：
За Монако:
Por Mónaco:

For Mongolia:
Pour la Mongolie :
蒙古：
За Монголию:
Por Mongolia:

For Morocco:
Pour le Maroc :
摩洛哥：
За Марокко:
Por Marruecos:

Sous réserve de la déclaration ci-jointe[1]
TAOUFIQ KABBAJ[2]

For Nauru:
Pour Nauru :
瑙鲁：
За Науру:
Por Nauru:

For Nepal:
Pour le Népal :
尼泊尔：
За Непал:
Por Nepal:

PRADUMNA LAL RAJBHANDARY

[1] Subject to the attached declaration.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

For the Netherlands:
Pour les Pays-Bas :
荷兰:
За Нидерланды:
Por los Países Bajos:

For New Zealand:
Pour la Nouvelle-Zélande :
新西兰:
За Новую Зеландию:
Por Nueva Zelandia:

JOHN V. SCOTT
29 April 1970

For Nicaragua:
Pour le Nicaragua :
尼加拉瓜:
За Никарагуа:
Por Nicaragua:

For the Niger:
Pour le Niger :
尼日尔:
За Нигер:
Por el Níger:

For Nigeria:
Pour la Nigéria :
尼日利亚:
За Нигерию:
Por Nigeria:

T. O. ELIAS

For Norway:
Pour la Norvège :
挪威：
За Норвегию:
Por Noruega:

For Pakistan:
Pour le Pakistan :
巴基斯坦：
За Пакистан:
Por el Pakistán:

A. SHAHI
29 April, 1970

For Panama:
Pour le Panama :
巴拿马：
За Панаму:
Por Panamá:

For Paraguay:
Pour le Paraguay :
巴拉圭：
За Парагвай:
Por el Paraguay:

For Peru:
Pour le Pérou :
秘鲁：
За Перу:
Por el Perú:

LUIS ALVARADO GARRIDO
JUAN JOSÉ CALLE

For the Philippines:
Pour les Philippines :
菲律宾：
За Филиппины:
Por Filipinas:

ROBERTO CONCEPCIÓN

For Poland:
Pour la Pologne :
波兰：
За Польшу:
Por Polonia:

For Portugal:
Pour le Portugal :
葡萄牙：
За Португалию:
Por Portugal:

For the Republic of Korea:
Pour la République de Corée :
大韩民国：
За Корейскую Республику:
Por la República de Corea:

YANG SOO YU
27 November 1969

For the Republic of Viet-Nam:
Pour la République du Viet-Nam :
越南共和国：
За Республику Вьетнам:
Por la República de Viet-Nam:

For Romania:
Pour la Roumanie :
罗马尼亚:
За Румынию:
Por Rumania:

For Rwanda:
Pour le Rwanda :
卢旺达:
За Руанду:
Por Rwanda:

For San Marino:
Pour Saint-Marin :
圣马力诺:
За Сан-Марино:
Por San Marino:

For Saudi Arabia:
Pour l'Arabie Saoudite :
沙特阿拉伯:
За Саудовскую Аравию:
Por Arabia Saudita:

For Senegal:
Pour le Sénégal :
塞内加尔:
За Сенегал:
Por el Senegal:

For Sierra Leone:
Pour le Sierra Leone :
塞拉勒窝内:
За Сьерра-Леоне:
Por Sierra Leona:

For Singapore:
Pour Singapour :
新加坡:
За Сингапур:
Por Singapur:

For Somalia:
Pour la Somalie :
索马里:
За Сомали:
Por Somalia:

For South Africa:
Pour l'Afrique du Sud :
南非:
За Южную Африку:
Por Sudáfrica:

For Southern Yemen:
Pour le Yémen du Sud :
南也門:
За Южный Йемен:
Por el Yemen Meridional:

For Spain:
Pour l'Espagne :
西班牙：
За Испанию:
Por España:

For the Sudan:
Pour le Soudan :
苏丹：
За Судан:
Por el Sudán:

AHMED SALAH BUKHARI

For Swaziland:
Pour le Souaziland :
斯威士兰：
За Свазиленд:
Por Swazilandia:

For Sweden:
Pour la Suède :
瑞典：
За Швецию:
Por Suecia:

TORSTEN ÖRN
23 April 1970

For Switzerland:
Pour la Suisse :
瑞士：
За Швейцарию:
Por Suiza:

For Syria:
Pour la Syrie :
叙利亞:
За Сирию:
Por Siria:

For Thailand:
Pour la Thaïlande :
泰国:
За Таиланд:
Por Tailandia:

For Togo:
Pour le Togo :
多哥:
За Того:
Por el Togo:

For Trinidad and Tobago:
Pour la Trinité-et-Tobago :
特立尼达和多巴哥:
За Тринидад и Тобаго:
Por Trinidad y Tabago:

T. BADEN-SEMPER

For Tunisia:
Pour la Tunisie :
突尼斯:
За Тунис:
Por Túnez:

For Turkey:
Pour la Turquie :
土耳其:
За Турцию:
Por Turquía:

For Uganda:
Pour l'Ouganda :
乌干达:
За Уганду:
Por Uganda:

For the Ukrainian Soviet Socialist Republic:
Pour la République socialiste soviétique d'Ukraine :
乌克兰苏维埃社会主义共和国:
За Украинскую Советскую Социалистическую Республику:
Por la República Socialista Soviética de Ucrania:

For the Union of Soviet Socialist Republics:
Pour l'Union des Républiques socialistes soviétiques :
苏维埃社会主义共和国联盟:
За Союз Советских Социалистических Республик:
Por la Unión de Repúblicas Socialistas Soviéticas:

For the United Arab Republic:
Pour la République arabe unie :
阿拉伯聯合共和國:
За Объединенную Арабскую Республику:
Por la República Arabe Unida:

For the United Kingdom of Great Britain and Northern Ireland:
Pour le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord :
大不列颠及北爱尔兰联合王国:
За Соединенное Королевство Великобритании и Северной Ирландии:
Por el Reino Unido de Gran Bretaña e Irlanda del Norte:

Subject to the declaration, the text of which is attached[1]
CARADON[2]
20 April 1970

For the United Republic of Tanzania:
Pour la République-Unie de Tanzanie :
坦桑尼亚联合共和国:
За Объединенную Республику Танзания:
Por la República Unida de Tanzanía:

For the United States of America:
Pour les Etats-Unis d'Amérique :
美利坚合众国:
За Соединенные Штаты Америки:
Por los Estados Unidos de América:

RICHARD D. KEARNEY
24 April 1970

JOHN R. STEVENSON
24 April 1970

For the Upper Volta:
Pour la Haute-Volta :
上沃尔特:
За Верхнюю Вольту:
Por el Alto Volta:

[1] Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature – Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

For Uruguay:
Pour l'Uruguay :
乌拉圭:
За Уругвай:
Por el Uruguay:

EDUARDO JIMÉNEZ DE ARÉCHAGA
ALVARO ALVAREZ

For Venezuela:
Pour le Venezuela :
委内瑞拉:
За Венесуэлу:
Por Venezuela:

For Western Samoa:
Pour le Samoa-Occidental :
西萨摩亚:
За Западное Самоа:
Por Samoa Occidental:

For Yemen:
Pour le Yémen :
也门:
За Йемен:
Por el Yemen:

For Yugoslavia:
Pour la Yougoslavie :
南斯拉夫:
За Югославию:
Por Yugoslavia:

ALEKSANDAR JELIĆ

For Zambia:
Pour la Zambie :
赞比亚:
За Замбию:
Por Zambia:

LISHOMWA MUUKA

RESERVATIONS AND DECLARATIONS MADE UPON SIGNATURE

AFGHANISTAN

"Afghanistan's understanding of article 62 (fundamental change of circumstances) is as follows:

"Sub-paragraph 2 (*a*) of this article does not cover unequal and illegal treaties, or any treaties which were contrary to the principle of self-determination. This view was also supported by the Expert Consultant in his statement of 11 May 1968 in the Committee of the Whole and on 14 May 1969 (doc. A/CONF.39/L.40) to the Conference."

RÉSERVES ET DÉCLARATIONS FAITES LORS DE LA SIGNATURE

AFGHANISTAN

[TRADUCTION — TRANSLATION]

L'Afghanistan interprète l'article 62 (Changement fondamental de circonstances) de la manière suivante :

L'alinéa *a* du paragraphe 2 ne s'applique pas dans le cas de traités inégaux ou illégaux, ni dans le cas de tout autre traité contraire au principe de l'autodétermination. Cette interprétation est celle qui a été soutenue par l'Expert consultant dans sa déclaration du 11 mai 1968 devant la Commission plénière et dans la communication du 14 mai 1969 (A/CONF.39/L.40) qu'il a adressée à la Conférence.

BOLIVIA — *BOLIVIE*

[SPANISH TEXT — TEXTE ESPAGNOL]

"1. La imperfección de la Convención de Viena sobre el derecho de los tratados posterga la realización de las aspiraciones de la humanidad.

"2. No obstante lo anterior, los preceptos aprobados por la Convención constituyen avances significativos inspirados en principios de justicia internacional que Bolivia ha sostenido tradicionalmente."

[TRANSLATION]

1. The shortcomings of the Vienna Convention on the Law of Treaties are such as to postpone the realization of the aspirations of mankind.

2. Nevertheless, the rules endorsed by the Convention do represent significant advances, based on the principles of international justice which Bolivia has traditionally supported.

[TRADUCTION]

1. L'imperfection de la Convention de Vienne sur le droit des traités retarde la réalisation des aspirations de l'humanité.

2. Néanmoins, les normes que consacre la Convention marquent d'importants progrès fondés sur des principes de justice internationale que la Bolivie a traditionnellement défendus.

COSTA RICA *COSTA RICA*

[SPANISH TEXT — TEXTE ESPAGNOL]

"1. En relación a los artículos 11 y 12 la delegación de Costa Rica hace la reserva de que el sistema jurídico constitucional de ese país no autoriza ninguna forma de consentimiento que no esté sujeto a ratificación de la Asamblea Legislativa.

"2. En cuanto al artículo 25 hace la reserva de que la Constitución Política de dicho país tampoco admite la entrada en vigor provisional de los tratados.

"3. En cuanto al artículo 27 interpreta que se refiere al derecho secundario, no así a las disposiciones de la Constitución Política.

"4. En relación al artículo 38 interpreta que una norma consuetudinaria de derecho internacional general no privará sobre ninguna norma del sistema interamericano del cual considera supletoria la presente Convención."

[TRANSLATION]

1. With regard to articles 11 and 12, the delegation of Costa Rica wishes to make a reservation to the effect that the Costa Rican system of constitutional law does not authorize any form of consent which is not subject to ratification by the Legislative Assembly.

2. With regard to article 25, it wishes to make a reservation to the effect that the Political Constitution of Costa Rica does not permit the provisional application of treaties, either.

3. With regard to article 27, it interprets this article as referring to secondary law and not to the provisions of the Political Constitution.

4. With regard to article 38, its interpretation is that no customary rule of general international law shall take precedence over any rule of the Inter-American System to which, in its view, this Convention is supplementary.

[TRADUCTION]

1. En ce qui concerne les articles 11 et 12, la délégation du Costa Rica formule la réserve suivante : en matière constitutionnelle, le système juridique de ce pays n'autorise aucune forme de consentement qui ne soit sujette à ratification par l'Assemblée législative.

2. En ce qui concerne l'article 25, la délégation du Costa Rica formule la réserve suivante : la Constitution politique de ce pays n'admet pas non plus l'entrée en vigueur provisoire des traités.

3. La délégation du Costa Rica interprète l'article 27 comme visant les lois ordinaires mais non les dispositions de la Constitution politique.

4. La délégation du Costa Rica interprète l'article 38 de la manière suivante : une règle coutumière du droit international général ne prévaudra sur aucune règle du système interaméricain, au regard duquel la présente Convention revêt, à son avis, un caractère supplémentaire.

ECUADOR *ÉQUATEUR*

[SPANISH TEXT — TEXTE ESPAGNOL]

"El Ecuador, al firmar la presente Convención, no ha creído necesario formular reserva alguna al artículo 4 de este instrumento porque entiende que, entre las normas comprendidas en la primera parte del artículo 4, se encuentra el principio de solución

pacífica de controversias, establecido en el Artículo 2, párrafo 3, de la Carta de las Naciones Unidas, cuyo carácter de *jus cogens* confiere a esa norma valor imperativo universal.

"El Ecuador considera asimismo que la primera parte del artículo 4, por tanto, es aplicable a los tratados existentes.

"Deja en claro en esta forma que dicho artículo recoge el principio inconcuso de que, cuando la Convención codifica normas *lex lata*, éstas, siendo normas preexistentes, pueden invocarse y aplicarse a tratados suscritos antes de la vigencia de esta Convención, la cual constituye su instrumento codificador."

[TRANSLATION]

In signing this Convention, Ecuador has not considered it necessary to make any reservation in regard to article 4 of the Convention because it understands that the rules referred to in the first part of article 4 include the principle of the peaceful settlement of disputes, which is set forth in Article 2, paragraph 3, of the Charter of the United Nations and which, as *jus cogens*, has universal and mandatory force.

Ecuador also considers that the first part of article 4 is applicable to existing treaties.

It wishes to place on record, in this form, its view that the said article 4 incorporates the indisputable principle that, in cases where the Convention codifies rules of *lex lata*, these rules, as preexisting rules, may be invoked and applied to treaties signed before the entry into force of this Convention, which is the instrument codifying the rules.

[TRADUCTION]

En signant la présente Convention, l'Equateur n'a pas jugé nécessaire de formuler une réserve quelconque au sujet de l'article 4 de cet instrument, car il considère qu'au nombre des règles auxquelles se réfère la première partie de cet article figure le principe du règlement pacifique des différends, énoncé au paragraphe 3 de l'Article 2 de la Charte des Nations Unies, dont le caractère de *jus cogens* lui confère une valeur impérative universelle.

De même, l'Equateur considère également que la première partie de l'article 4 est applicable aux traités existants.

Il tient à préciser à cette occasion que ledit article s'appuie sur le principe incontestable selon lequel, lorsque la Convention codifie des règles relevant de la *lex lata*, ces règles, du fait qu'elles sont préexistantes, peuvent être invoquées et appliquées au regard de traités conclus avant l'entrée en vigueur de ladite Convention, laquelle constitue l'instrument les ayant codifiées.

GUATEMALA

GUATEMALA

[SPANISH TEXT — TEXTE ESPAGNOL]

"La delegación de Guatemala, al suscribir la Convención de Viena sobre el derecho de los tratados, formula las siguientes reservas:

"I. Guatemala no puede aceptar disposición alguna de la presente Convención que menoscabe sus derechos y su reclamación sobre el Territorio de Belice.

"II. Guatemala no aplicará los artículos 11, 12, 25 y 66 en lo que contravinieren preceptos de la Constitución de la República.

"III. Guatemala aplicará lo dispuesto en el artículo 38 solamente en aquellos casos en que lo considere conveniente para los intereses del país."

[TRANSLATION]

The delegation of Guatemala, in signing the Vienna Convention on the Law of Treaties, wishes to make the following reservations:

I. Guatemala cannot accept any provision of this Convention which would prejudice its rights and its claim to the Territory of Belize.

II. Guatemala will not apply articles 11, 12, 25 and 66 in so far as they are contrary to the provisions of the Constitution of the Republic.

III. Guatemala will apply the provision contained in article 38 only in cases where it considers that it is in the national interest to do so.

[TRADUCTION]

En signant la Convention de Vienne sur le droit des traités, la délégation du Guatemala formule les réserves suivantes :

I. Le Guatemala ne peut accepter aucune disposition de la présente Convention qui porte atteinte à ses droits et à sa revendication sur le territoire de Belize.

II. Le Guatemala n'appliquera pas les dispositions des articles 11, 12, 25 et 66, dans la mesure où elles contreviendraient aux principes consacrés dans la Constitution de la République.

III. Le Guatemala n'appliquera les dispositions de l'article 38 que dans le cas où il considérera que cela sert les intérêts du pays.

MOROCCO

MAROC

[ARABIC TEXT — TEXTE ARABE]

1) يفسر المغرب الفقرة الثانية أ) من الفصل
62 (تغيير أساسي في الظروف) بأنها لا تشمل
المعاهدات غير المشروعة وغير المتساوية
وكذا كل معاهدة مناوئة لمبدأ تقرير المصير.
2) يوضح أن توقيع المغرب على هذه الاتفاقية
لا يعني منه بأي وجه من الوجوه اعترافا بإسرائيل.

ولا يمكن بالبداهة أن تنشأ أية علاقة
بموجب اتفاقية بين المغرب واسرائيل.

[TRANSLATION — TRADUCTION]

1. Morocco interprets paragraph 2 (*a*) of article 62 (Fundamental change of circumstances) as not applying to unlawful or inequitable treaties, or to any treaty contrary to the principle of self-determination. Morocco's views on paragraph 2 (*a*) were supported by the Expert Consultant in his statements in the Committee of the Whole on 11 May 1968 and before the Conference in plenary on 14 May 1969 (see document A/CONF.39/L.40).

2. It shall be understood that Morocco's signature of this Convention does not in any way imply that it recognized Israel. Furthermore, no treaty relationships will be established between Morocco and Israel.

«1. Le Maroc interprète le paragraphe 2, *a*, de l'article 62 (Changement fondamental de circonstances) comme ne couvrant pas les traités illicites et inégaux ainsi que tout traité contraire au principe de l'autodétermination. Le point de vue du Maroc sur le paragraphe 2, *a*, a été soutenu par l'Expert consultant dans son intervention du 11 mai 1968 en Commission plénière ainsi que le 14 mai 1969 à la Conférence plénière (document A/CONF.39/L.40).

«2. Il est entendu que la signature par le Maroc de la présente Convention ne signifie en aucune façon qu'il reconnaisse Israël. En outre, aucune relation conventionnelle ne sera établie entre le Maroc et Israël.»

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"In signing the Vienna Convention on the Law of Treaties, the Government of the United Kingdom of Great Britain and Northern Ireland declare their understanding that nothing in article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes. In particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Jus-

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

[TRADUCTION — TRANSLATION]

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord déclare considérer qu'aucune disposition de l'article 66 de ladite Convention ne vise à écarter la juridiction de la Cour internationale de Justice lorsque cette juridiction découle de clauses en vigueur entre les parties, concernant le règlement des différends et ayant force obligatoire à leur égard. Le Gouvernement du Royaume-Uni déclare notamment, au regard des Etats parties à la Convention de Vienne qui acceptent comme obligatoire la juridiction de la

tice, the Government of the United Kingdom declare that they will not regard the provisions of sub-paragraph (*b*) of article 66 of the Vienna Convention as providing 'some other method of peaceful settlement' within the meaning of sub-paragraph (i) (*a*) of the Declaration of the Government of the United Kingdom accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on the 1st of January, 1969.[1]

"The Government of the United Kingdom, while reserving their position for the time being with regard to the other declarations and reservations made by various States on signing the Convention, consider it necessary to state that the United Kingdom does not accept that Guatemala has any rights or any valid claim in respect of the territory of British Honduras."

Cour internationale de Justice, qu'il ne considérera pas les dispositions de l'alinéa *b* de l'article 66 de la Convention de Vienne comme fournissant «un autre mode de règlement pacifique», au sens du paragraphe i, *a*, de la Déclaration, déposée auprès du Secrétaire général de l'Organisation des Nations Unies le 1er janvier 1969, par laquelle le Gouvernement du Royaume-Uni a accepté comme obligatoire la juridiction de la Cour internationale de Justice[1].

Le Gouvernement du Royaume-Uni, tout en réservant pour le moment sa position vis-à-vis des autres déclarations et réserves faites par divers Etats lors de la signature de la Convention par ces derniers, juge nécessaire de déclarer que le Royaume-Uni ne reconnaît au Guatemala aucun droit ni titre légitime de réclamation en ce qui concerne le territoire du Honduras britannique.

RESERVATIONS AND DECLARATIONS MADE UPON RATIFICATION OR ACCESSION (*a*)

RÉSERVES ET DÉCLARATIONS FAITES LORS DE LA RATIFICATION OU DE L'ADHÉSION (*a*)

ARGENTINA

ARGENTINE

[SPANISH TEXT — TEXTE ESPAGNOL]

"*a*) La República Argentina no considera aplicable a su respecto la norma contenida en el artículo 45, apartado *b*, por cuanto la misma consagra la renuncia anticipada de derechos".

"*b*) La República Argentina no acepta que un cambio fundamental en las circunstancias ocurrido con respecto a las existentes en el momento de la celebración de un tratado y que no fue previsto por las partes pueda alegarse como causa para dar por terminado el tratado o retirarse de él y, además, objeta las reservas formuladas por Afganistán, Marruecos y Siria al artículo 62, párrafo 2, apartado *a*, y todas las reservas del mismo alcance que la de los Estados mencionados que se presenten en el futuro sobre el artículo 62".

[TRANSLATION]

(*a*) The Argentine Republic does not regard the rule contained in article 45 (*b*) as applicable to it inasmuch as the rule in question provides for the renunciation of rights in advance.

[TRADUCTION]

a) La République argentine ne considère pas que la règle énoncée à l'article 45, *b*, lui est applicable dans la mesure où celle-ci prévoit la renonciation anticipée à certains droits.

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[1] United Nations, *Treaty Series*, vol. 654, p. 335.

[1] Nations Unies, *Recueil des Traités*, vol. 654, p. 335.

(*b*) The Argentine Republic does not accept the idea that a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may be invoked as a ground for terminating or withdrawing from the treaty; moreover, it objects to the reservations made by Afghanistan, Morocco and Syria with respect to article 62, paragraph 2 (*a*), and to any reservations to the same effect as those of the States referred to which may be made in the future with respect to article 62.

b) La République argentine n'admet pas qu'un changement fondamental de circonstances qui s'est produit par rapport à celles qui existaient au moment de la conclusion du traité et qui n'avait pas été prévu par les parties puisse être invoqué comme motif pour mettre fin au traité ou pour s'en retirer; de plus, elle s'élève contre les réserves formulées par l'Afghanistan, le Maroc et la Syrie au sujet du paragraphe 2, *a*, de l'article 62 et contre toutes autres réserves de même effet que celles des Etats susmentionnés qui pourraient être formulées à l'avenir au sujet de l'article 62.

[SPANISH TEXT — TEXTE ESPAGNOL]

"La aplicación de la presente Convención a territorios cuya soberanía fuera discutida entre dos o más Estados que sean parte o no de la misma, no podrá ser interpretada como alteración, renuncia o abandono de la posición que cada uno ha sostenido hasta el presente".

[TRANSLATION]

The application of this Convention to territories whose sovereignty is a subject of dispute between two or more States, whether or not they are parties to it, cannot be deemed to imply a modification, renunciation or abandonment of the position heretofore maintained by each of them.

[TRADUCTION]

L'application de la présente Convention dans des territoires sur lesquels deux ou plusieurs Etats, qu'ils soient ou non parties à ladite Convention, ont des prétentions adverses à exercer la souveraineté, ne pourra être interprétée comme signifiant que chacun d'eux modifie la position qu'il a maintenue jusqu'à présent, y renonce ou l'abandonne.

CANADA (a)

"In acceding to the Vienna Convention on the Law of Treaties, the government of Canada declares its understanding that nothing in article 66 of the Convention is intended to exclude the jurisdiction of the International Court of Justice where such jurisdiction exists under the provisions of any treaty in force binding the parties with regard to the settlement of disputes. In relation to states parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Jus-

CANADA (a)

«En adhérant à la Convention de Vienne sur le droit des traités, le Gouvernement du Canada déclare reconnaître qu'il n'y a rien dans l'article 66 de la Convention qui tende à exclure la compétence de la Cour internationale de Justice lorsque cette compétence est établie en vertu des dispositions d'un traité en vigueur dont les parties sont liées relativement au règlement des différends. En ce qui concerne les Etats parties à la Convention de Vienne qui acceptent que la compétence de la Cour internationale

tice, the government of Canada declares that it does not regard the provisions of article 66 of the Vienna Convention as providing 'some other method of peaceful settlement' within the meaning of paragraph 2 (*a*) of the declaration of the government of Canada accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on April 7, 1970."[1]

DENMARK

[TRANSLATION — TRADUCTION]

As between itself and any State which formulates, wholly or in part, a reservation relating to the provisions of article 66 of the Convention concerning the compulsory settlement of certain disputes, Denmark will not consider itself bound by those provisions of part V of the Convention, according to which the procedures for settlement set forth in article 66 are not to apply in the event of reservations formulated by other States.

FINLAND

"Finland declares its understanding that nothing in paragraph 2 of article 7 of the Convention is intended to modify any provisions of internal law in force in any Contracting State concerning competence to conclude treaties. Under the Constitution of Finland the competence to conclude treaties is given to the President of the Republic, who also decides on the issuance of full powers to the Head of Government and the Minister for Foreign Affairs.

[1] United Nations, *Treaty Series,* vol. 724, p. 63.

de Justice soit obligatoire, le Gouvernement du Canada déclare qu'il ne considère pas que les dispositions de l'article 66 de la Convention de Vienne proposent «un autre moyen de règlement pacifique», selon la teneur de l'alinéa *a* du paragraphe 2 de la déclaration que le Gouvernement du Canada a remise au Secrétaire général de l'Organisation des Nations Unies le 7 avril 1970, par laquelle il acceptait que la compétence de la Cour internationale de Justice soit obligatoire[1].»

DANEMARK

«Vis-à-vis de pays formulant entièrement ou partiellement des réserves en ce qui concerne les dispositions de l'article 66 de la Convention portant sur le règlement obligatoire de certains différends, le Danemark ne se considère pas lié par les dispositions de la partie V de la Convention, selon lesquelles les procédures de règlement indiquées à l'article 66 ne seront pas appliquées par suite de réserves formulées par d'autres pays.»

FINLANDE

[TRADUCTION — TRANSLATION]

La Finlande déclare qu'elle considère qu'aucune des dispositions du paragraphe 2 de l'article 7 de la Convention ne vise à modifier les dispositions de droit interne concernant la compétence pour conclure des traités en vigueur dans un Etat contractant. En vertu de la Constitution finlandaise, c'est le Président de la République qui est habilité à conclure des traités et c'est également lui qui décide de donner pleins pouvoirs au Chef du Gouvernement et au Ministre des affaires étrangères.

[1] Nations Unies, *Recueil des Traités,* vol. 724, p. 63.

"Finland also declares that as to its relation with any State which has made or makes a reservation to the effect that this State will not be bound by some or all of the provisions of article 66, Finland will consider itself bound neither by those procedural provisions nor by the substantive provisions of part V of the Convention to which the procedures provided for in article 66 do not apply as a result of the said reservation."

La Finlande déclare également qu'en ce qui concerne ses relations avec tout Etat qui a fait ou fait une réserve telle que cet Etat n'est pas lié par quelques-unes des dispositions de l'article 66 ou par toutes ces dispositions la Finlande ne se considérera liée ni par ces dispositions de procédure ni par les dispositions de fond de la partie V de la Convention auxquelles les procédures prévues à l'article 66 ne s'appliquent pas par suite de ladite réserve.

KUWAIT (a)

KOWEÏT (a)

[ARABIC TEXT — TEXTE ARABE]

مع التحفظ الخاص بأن الارتباط بهذه الاتفاقية لايحوى بأية حال معنى الاعتراف بأسرائيل ولايؤدى الى الدخول معها فى معاملات مما تنظمة هذه الاتفاقية ،كما نعد بمراعاتها والامر بمراعاتها دون أنتهاك حرمتها .

[TRANSLATION[1] — TRADUCTION[2]]

"The participation of Kuwait in this Convention does not mean in any way recognition of Israel by the Government of the State of Kuwait and that, furthermore, no treaty relations will arise between the State of Kuwait and Israel."

[TRADUCTION — TRANSLATION]

La participation du Koweït à ladite Convention ne signifie en aucune façon que le Gouvernement de l'Etat du Koweït reconnaisse Israël, et qu'en outre aucune relation conventionnelle ne sera établie entre l'Etat du Koweït et Israël.

MOROCCO

[For the text of the declaration, see p. 499 of this volume.]

MAROC

[Pour le texte de la déclaration, voir p. 499 du présent volume.]

SYRIAN ARAB REPUBLIC (a)

RÉPUBLIQUE ARABE SYRIENNE (a)

[ARABIC TEXT — TEXTE ARABE]

آ — ان قبول الجمهورية العربية السورية هذه الاتفاقية وابرام حكومتها لها لا يحوى بأية حال معنى الاعتراف باسرائيل ولا يؤدى الى دخولها معها في معاملات مما تنظمه أحكامها .

[1] Translation supplied by the Government of Kuwait.
[2] Traduction fournie par le Gouvernement du Koweït.

ب — ان الجمهورية العربية السورية تعتبر أن المادة الواحدة والثمانين من هذه الاتفاقية لا تتفق وأهداف الاتفاقية وغايتها اذ أنها لا تمكن جميع الدول بدون تفرقة أو تمييز من أن تصبح اطرافا فيها .

جـ — ان حكومة الجمهورية العربية السورية لا تقبل بحال من الاحوال عدم سريان مبدأ التغيير الجوهري للظروف على المعاهدات التي تنشيء حدودا في الفقرة ٢ (أ) من المادة الثانية والستين لان ذلك يعتبر خرقا واضحا لواحدة من القواعد الآمرة في القواعد العامة للقانون الدولي والقاضية بحق الشعوب في تقرير مصيرها .

د — ان حكومة الجمهورية العربية السورية تفهم حكم المادة الثانية والخمسين على النحو التالي :

" ان عبارة التهديد بالقوة واستخدامها الواردة في هذه المادة تنصرف ايضا الى ممارسة الضغوط الاقتصادية والسياسية والعسكرية والنفسية وسائر انواع الضغوط الاخرى التي من شأنها حمل الدولة على الدخول في معاهدة ضد رغبتها أو مصلحتها .

هـ — ان انضمام الجمهورية العربية السورية الى هذه الاتفاقية وابرام حكومتها لها لا يسري على الملحق بهذه الاتفاقية المتعلق بالتوفيق الالزامي .

[TRANSLATION — TRADUCTION]

A. Acceptance of this Convention by the Syrian Arab Republic and ratification of it by its Government shall in no way signify recognition of Israel and cannot have as a result the establishment with the latter of any contact governed by the provisions of this Convention.

B. The Syrian Arab Republic considers that article 81 is not in conformity with the aims and purposes of the Convention in that it does not allow all States, without distinction or discrimination, to become parties to it.

C. The Government of the Syrian Arab Republic does not in any case accept the non-applicability of the principle of a fundamental change of circumstances with regard to treaties establishing boundaries, referred to in article 62, paragraph 2 (*a*), inasmuch as it regards this as a flagrant violation of an obligatory norm which forms part of general in-

[TRADUCTION[1] — TRANSLATION[2]]

«A) L'acceptation de cette Convention par la République arabe syrienne et sa ratification par son Gouvernement ne peuvent comporter en aucune façon le sens d'une reconnaissance d'Israël et ne peuvent aboutir à entretenir avec lui aucun contact réglé par les dispositions de la Convention.

«B) La République arabe syrienne considère que l'article quatre-vingt-un de cette Convention ne s'accorde pas avec ses buts et ses desseins car il ne permet pas à tous les Etats sans discrimination ou distinction d'en devenir parties.

«C) Le Gouvernement de la République arabe syrienne n'accepte en aucun cas la non-application du principe du changement fondamental de circonstances sur les traités établissant des frontières au paragraphe 2, alinéa *a*, de l'article soixante-deux, car cela est considéré comme une violation flagrante de l'une des règles obligatoires parmi les règles

[1] Traduction fournie par le Gouvernement de la République arabe syrienne.
[2] Translation supplied by the Government of the Syrian Arab Republic.

ternational law and which recognizes the right of peoples to self-determination.

D. The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

> The expression "the threat or use of force" used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests.

E. The accession of the Syrian Arab Republic to this Convention and the ratification of it by its Government shall not apply to the Annex to the Convention, which concerns obligatory conciliation.

générales du Code international et qui prévoit le droit des peuples à l'autodétermination.

«D) Le Gouvernement de la République arabe syrienne comprend la disposition de l'article cinquante-deux, comme suit :

> «Le terme de la menace ou l'emploi de la force prévu par cet article s'applique également à l'exercice des contraintes économiques, politiques, militaires et psychologiques ainsi que tous les genres de contraintes qui entraînent l'obligation d'un Etat à conclure un traité contre son désir ou son intérêt.»

«E) L'adhésion de la République arabe syrienne à cette Convention et sa ratification par son Gouvernement ne s'appliquent pas à l'Annexe à la Convention relative à la conciliation obligatoire.»

TUNISIA (a)

[TRANSLATION — TRADUCTION]

The dispute referred to in article 66 (*a*) requires the consent of all parties thereto in order to be submitted to the International Court of Justice for a decision.

TUNISIE (a)

«Le différend prévu au paragraphe *a* de l'article 66 nécessite l'accord de toutes les parties à ce différend pour être soumis à la décision de la Cour internationale de Justice.»

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

It is [the United Kingdom's] understanding that nothing in article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes. In particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court, the

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

[TRADUCTION — TRANSLATION]

Le Royaume-Uni considère qu'aucune disposition de l'article 66 de la Convention ne vise à écarter la juridiction de la Cour internationale de Justice lorsque cette juridiction découle de clauses en vigueur entre les parties, concernant le règlement des différends et ayant force obligatoire à leur égard. Notamment, au regard des Etats parties à la Convention de Vienne qui acceptent comme obligatoire la juridiction de la Cour internatio-

United Kingdom will not regard the provisions of sub-paragraph (*b*) of article 66 of the Vienna Convention on the Law of Treaties as providing 'some other method of peaceful settlement' within the meaning of sub-paragraph (i) (*a*) of the Declaration of the Government of the United Kingdom which was deposited with the Secretary-General of the United Nations on the 1st of January 1969."

UNITED REPUBLIC OF TANZANIA (a)

"Article 66 of the Convention shall not be applied to the United Republic of Tanzania by any State which enters a reservation on any provision of part V or the whole of that part of the Convention."

OBJECTION[1] to the declaration made by the Government of Finland upon ratification[2]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Received on:
7 December 1977

"The Government of the United Kingdom of Great Britain and Northern Ireland note that the instrument of ratification of the Government of Finland, which was deposited with the Secretary-General on 19 August 1977, contains a declaration relating to paragraph 2 of article 7 of the Convention. The Government of the United Kingdom wish to inform the Secretary-General that they do not regard that declaration as in any way affecting the interpretation or application of article 7."

[1] Unless otherwise indicated, the texts of the objections were received at the time of ratification or accession.

[2] See p. 503 of this volume.

nale de Justice, le Royaume-Uni ne considérera pas les dispositions de l'alinéa *b* de l'article 66 de la Convention de Vienne sur le droit des traités comme fournissant «un autre moyen de règlement pacifique», au sens de l'alinéa i, *a*, de la Déclaration que le Gouvernement du Royaume-Uni a déposée auprès du Secrétaire général de l'Organisation des Nations Unies le 1er janvier 1969.

RÉPUBLIQUE-UNIE DE TANZANIE (a)

[TRADUCTION — TRANSLATION]

Aucun Etat formulant des réserves à propos d'une quelconque disposition de la partie V de la Convention, ou de l'ensemble de cette partie, ne pourra invoquer l'article 66 de la Convention vis-à-vis de la République-Unie de Tanzanie.

OBJECTION[1] à la déclaration faite par le Gouvernement finlandais lors de la ratification[2]

ROYAUME-UNI DE GRANDE BRETAGNE ET D'IRLANDE DU NORD

Reçue le :
7 décembre 1977

[TRADUCTION — TRANSLATION]

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord prend note que l'instrument de ratification du Gouvernement finlandais, déposé auprès du Secrétaire général le 19 août 1977, contient une déclaration relative au paragraphe 2 de l'article 7 de la Convention. Le Gouvernement du Royaume-Uni informe le Secrétaire général qu'il considère que cette déclaration ne modifie aucunement l'interprétation ou l'application de l'article 7.

[1] Sauf indication contraire, la date de réception est celle de la ratification ou de l'adhésion.

[2] Voir p. 503 du présent volume.

OBJECTION to the reservation made by the Government of Guatemala upon signature[1]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"With reference to a reservation in relation to the territory of British Honduras made by Guatemala on signing the Convention, the United Kingdom does not accept that Guatemala has any rights or any valid claim with respect to that territory;

"The United Kingdom fully reserves its position in other respects with regard to the declarations made by various States on signature, to some of which the United Kingdom would object, if they were to be confirmed on ratification."

OBJECTION à la réserve faite par le Gouvernement guatémaltèque lors de la signature[1]

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

[TRADUCTION — TRANSLATION]

S'agissant de la réserve relative au territoire du Honduras britannique qui a été formulée par le Guatemala lors de la signature de la Convention, le Royaume-Uni ne reconnaît au Guatemala aucun droit ni titre légitime de réclamation en ce qui concerne ce territoire.

Le Royaume-Uni réserve pleinement sa position sur d'autres points vis-à-vis des déclarations qui ont été faites par divers Etats lors de la signature de la Convention; si certaines d'entre elles venaient à être confirmées lors de la ratification, le Royaume-Uni formulerait des objections à leur encontre.

OBJECTIONS to the declaration made by the Government of the Syrian Arab Republic upon accession[2]

CANADA

Received on:
22 October 1971

". . . Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable."

OBJECTIONS à la réserve faite par le Gouvernement de la République arabe syrienne lors de l'adhésion[2]

CANADA

Reçue le :
22 octobre 1971

«Le Canada ne se considère pas comme lié par traité avec la République arabe syrienne à l'égard des dispositions de la Convention de Vienne sur le droit des traités auxquelles s'appliquent les procédures de conciliation obligatoire énoncées à l'annexe de ladite Convention.»

[1] See p. 498 of this volume.
[2] See p. 504 of this volume.

[1] Voir p. 498 du présent volume.
[2] Voir p. 504 du présent volume.

NEW ZEALAND

Received on:
14 October 1971

"... The New Zealand Government objects to the reservation entered by the Government of Syria to the obligatory conciliation procedures contained in the annex to the Vienna Convention on the Law of Treaties and does not accept the entry into force of the Convention as between New Zealand and Syria."

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"The United Kingdom does not accept that the interpretation of article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act.

"The United Kingdom objects to the reservation entered by the Government of Syria in respect of the annex to the Convention and does not accept the entry into force of the Convention as between the United Kingdom and Syria".

OBJECTION to the reservations made by the Government of the Syrian Arab Republic and by the Government of Tunisia, respectively, upon accession[1]

SWEDEN

Received on:

4 February 1975

"Article 66 of the Convention contains certain provisions regarding procedures

[1] See pp. 504 and 506 of this volume.

NOUVELLE-ZÉLANDE

Reçue le :
14 octobre 1971

[TRADUCTION — TRANSLATION]

Le Gouvernement néo-zélandais objecte à la réserve formulée par le Gouvernement syrien relative aux procédures de conciliation obligatoire prévues dans l'annexe à la Convention de Vienne sur le droit des traités et n'accepte pas l'entrée en vigueur de la Convention entre la Nouvelle-Zélande et la Syrie.

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

[TRADUCTION — TRANSLATION]

Le Royaume-Uni ne considère pas que l'interprétation de l'article 52 qui a été avancée par le Gouvernement syrien reflète avec exactitude les conclusions auxquelles la Conférence de Vienne est parvenue au sujet de la contrainte; la Conférence a réglé cette question en adoptant à son sujet une déclaration qui fait partie de l'Acte final.

Le Royaume-Uni formule une objection contre la réserve faite par le Gouvernement syrien au sujet de l'annexe à la Convention et ne reconnaît pas l'entrée en vigueur de cette dernière entre le Royaume-Uni et la Syrie.

OBJECTION aux réserves faites par le Gouvernement de la République arabe syrienne et par le Gouvernement de la Tunisie, respectivement, lors de l'adhésion[1]

SUÈDE

Reçue le :

4 février 1975

[TRADUCTION — TRANSLATION]

L'article 66 de la Convention contient certaines dispositions concernant les

[1] Voir p. 504 et p. 506 du présent volume.

for judicial settlement, arbitration and conciliation. According to these provisions a dispute concerning the application or the interpretation of article 53 or 64, which deal with the so-called *jus cogens*, may be submitted to the International Court of Justice. If the dispute concerns the application or the interpretation of any of the other articles in Part V of the Convention, the conciliation procedure specified in the Annex to the Convention may be set in motion.

"The Swedish Government considers that these provisions regarding the settlement of disputes are an important part of the Convention and that they cannot be separated from the substantive rules with which they are connected. Consequently, the Swedish Government considers it necessary to raise objections to any reservation which is made by another State and whose aim is to exclude the application, wholly or in part, of the provisions regarding the settlement of disputes. While not objecting to the entry into force of the Convention between Sweden and such a State, the Swedish Government considers that their treaty relations will not include either the procedural provision in respect of which a reservation has been made or the substantive provisions to which that procedural provision relates.

"For the reasons set out above, the Swedish Government objects to the reservation of the Syrian Arab Republic, according to which its accession to the Convention shall not include the Annex, and to the reservation of Tunisia, according to which the dispute referred to in article 66 (*a*) requires the consent of all parties thereto in order to be submitted to the International Court of Justice for a decision. In view of these reservations, the Swedish Government considers, firstly, that the treaty relations between Sweden and the Syrian Arab Republic will not include those provisions of Part V of the Convention to

procédures du règlement judiciaire, d'arbitrage et de conciliation. Aux termes de ces dispositions, un différend concernant l'application ou l'interprétation des articles 53 ou 64, qui traitent de ce que l'on appelle le *jus cogens*, peut être soumis à la décision de la Cour internationale de Justice. Si le différend concerne l'application ou l'interprétation de l'un quelconque des autres articles de la partie V de la Convention, la procédure de conciliation indiquée à l'annexe à la Convention peut être mise en œuvre.

Le Gouvernement suédois estime que ces dispositions relatives au règlement des différends constituent une partie importante de la Convention et qu'elles ne peuvent être dissociées des règles de fond auxquelles elles sont liées. Par conséquent, le Gouvernement suédois objecte à toutes les réserves qu'un autre Etat pourrait faire dans le but d'éviter, totalement ou partiellement, l'application des dispositions relatives au règlement des différends. Bien qu'il ne s'oppose pas à l'entrée en vigueur de la Convention entre la Suède et un tel Etat, le Gouvernement suédois estime que ni les dispositions de procédure faisant l'objet de réserves ni les dispositions de fond auxquelles ces dispositions de procédure se rapportent ne seront comprises dans leurs relations conventionnelles.

Pour les raisons évoquées ci-dessus, le Gouvernement suédois objecte à la réserve de la République arabe syrienne selon laquelle son adhésion à la Convention n'entraîne pas son adhésion à l'annexe à la Convention, et à la réserve de la Tunisie selon laquelle le différend dont il est question à l'article 66, *a*, ne peut être soumis à la décision de la Cour internationale de Justice qu'avec l'assentiment de toutes les parties à ce différend. Etant donné ces réserves, le Gouvernement suédois estime, premièrement, que les dispositions de la partie V de la Convention auxquelles se rapporte la procédure de conciliation indiquée à

which the conciliation procedure in the Annex applies and, secondly, that the treaty relations between Sweden and Tunisia will not include articles 53 and 64 of the Convention.

"The Swedish Government has also taken note of the declaration of the Syrian Arab Republic, according to which it interprets the expression 'the threat or use of force' as used in article 52 of the Convention so as to extend also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests. On this point, the Swedish Government observes that since article 52 refers to threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations, it should be interpreted in the light of the practice which has developed or will develop on the basis of the Charter."

OBJECTIONS to the reservation made by the Government of Tunisia upon accession[1]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Received on:

22 June 1972

"... The United Kingdom objects to the reservation entered by the Government of Tunisia in respect of article 66 (*a*) of the Convention and does not accept the entry into force of the Convention as between the United Kingdom and Tunisia."

[1] See p. 506 of this volume.

l'annexe ne seront pas comprises dans les relations conventionnelles entre la Suède et la République arabe syrienne et, deuxièmement, que les relations conventionnelles entre la Suède et la Tunisie n'engloberont pas les articles 53 et 64 de la Convention.

Le Gouvernement suédois a également pris note de la déclaration faite par la République arabe syrienne selon laquelle celle-ci interprète l'expression «la menace ou l'emploi de la force» utilisée à l'article 52 de la Convention comme s'appliquant également à l'emploi de contraintes économiques, politiques, militaires et psychologiques et les pressions de toute nature exercées en vue de contraindre un Etat à conclure un traité contre son gré ou contre ses intérêts. A ce propos, le Gouvernement suédois fait remarquer qu'étant donné que l'article 52 traite de la menace ou de l'emploi de la force en violation des principes du droit international incorporés dans la Charte des Nations Unies, il conviendrait de l'interpréter en tenant compte de la pratique qui s'est instaurée ou qui s'instaurera en ce qui concerne l'application des dispositions de la Charte.

OBJECTIONS à la réserve faite par le Gouvernement tunisien lors de l'adhésion[1]

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

Reçue le :

22 juin 1972

[TRADUCTION — TRANSLATION]

Le Royaume-Uni objecte à la réserve formulée par le Gouvernement tunisien au sujet de l'article 66, *a*, de la Convention et ne reconnaît pas l'entrée en vigueur de cette dernière entre le Royaume-Uni et la Tunisie.

[1] Voir p. 506 du présent volume.

NEW ZEALAND

Received on:

10 August 1972

"... The New Zealand Government objects to the reservation entered by the Government of Tunisia in respect of article 66 (*a*) of the Convention and does not consider New Zealand to be in treaty relations with Tunisia in respect of those provisions of the Convention to which the dispute settlement procedure provided for in article 66 (*a*) is applicable."

NOUVELLE-ZÉLANDE

Reçue le :

10 août 1972

[TRADUCTION — TRANSLATION]

Le Gouvernement néo-zélandais fait objection à la réserve émise par le Gouvernement tunisien à propos de l'article 66, *a*, de la Convention, et il considère que la Nouvelle-Zélande n'est pas liée par traité avec la Tunisie en ce qui concerne les dispositions de la Convention auxquelles la procédure de règlement des différends prévues à l'article 66, *a*, est applicable.

LEGAL AUTHORITIY CA-23

Ex. CA-23

United Nations Conference on the Law of Treaties

Vienna, Austria
Second session
9 April – 22 May 1969

Document:-
A/CONF.39/SR.13

Thirteenth plenary meeting

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, Second Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

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THIRTEENTH PLENARY MEETING

Tuesday, 6 May 1969, at 3.10 p.m.

President: Mr. AGO (Italy)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

New article proposed by Luxembourg (continued)

1. The PRESIDENT invited the Conference to continue its consideration of the new article proposed by Luxembourg (A/CONF.39/L.15).

2. Mr. MARESCA (Italy) said that the Luxembourg proposal raised three questions. The first was wheter the proposed article had a rightful place in the structure of a convention on the law of treaties. The convention was a body of rules of international law which considered the State as a subject of international law. Nevertheless, those rules did not ignore internal law. A number of articles referred to the Head of State or the Head of Government, thereby establishing a link with internal law, since it was for that law to define the status of such persons. Article 43 precluded the State from invoking a provision of its internal law for the purpose of avoiding the observance of the provisions of a treaty. Paragraph 2, which the Conference had rejected, of the International Law Commission's draft of article 5, had also referred to municipal law. The all-important article 23, by requiring a State to perform treaties in good faith, clearly imposed on a State the obligation to adapt its internal law for the purpose of implementing a treaty to which it was a party. The Luxembourg proposal therefore fell within the framework of the convention on the law of treaties.

3. Secondly, the Luxembourg proposal would not create any disturbance in the relationship between international law and municipal law, because it did not attempt to settle doctrinal disputes on the subject. If the doctrine were accepted that international law became an integral part of municipal law, the Luxembourg proposal would not affect the position at all; if, however, the doctrine of the primacy of municipal law were accepted, the Luxembourg proposal would be both apposite and valuable.

4. Thirdly, the proposed rule would be useful in practice. It would help Foreign Ministry officials in their task of impressing on various national authorities the need to observe existing rules of international law. From his own experience, he could state with confidence that an explicit article in the convention on the law of treaties on the lines of the new article proposed by Luxembourg would be very helpful. To give just one example, on the occasion of an incognito visit to Italy by a foreign Head of State whose retinue had attracted excessive attention from press photographers, leading to incidents, a press photographer had claimed damages from a security guard in the retinue of the visiting Head of State, and he (Mr. Maresca) had had the greatest difficulty in convincing the Italian judge that the security guard was entitled to full immunity from judicial process under the rules of customary international law. It would have been much easier if he had been able to invoke a treaty provision, such as that contained in the Luxembourg proposal, to uphold the application of the rules of international law on the internal plane.

5. Mr. KEARNEY (United States of America) said that he wished to take the opportunity offered by the discussion on the Luxembourg proposal to explain at the same time his delegation's position on article 23 *bis*. There was a hierarchy of differing legal rules in the internal legislation of most States. Generally, constitutional provisions were given primacy. Statutes, resolutions and administrative provisions, all of which might be authoritative, might have different weights. Treaty provisions, when viewed as internal law, necessarily had to be fitted into that hierarchy.

6. Each State was entitled to determine which legal formulation had greater internal authority in case of conflict among internal enactments and article 23 *bis*, as approved by the Committee of the Whole in no way abridged that right. Nor did it affect internal procedures for determining the primacy of internal law, whether by a decision based on the relationship in time between various legislative measures, or by a court decision on constitutional issues. It merely provided that no party to a treaty might justify internationally its failure to perform an international treaty obligation by invoking provisions of its internal law. His delegation believed that that rule, which was consonant with international practice in general and with United States international practices in particular, merited adoption by the Conference, and it would therefore vote for article 23 *bis*.

7. The Luxembourg proposal, on the other hand, did not appear to add anything to article 23 *bis* and might well disturb the balance between the provisions of articles 23 and 23 *bis*. His delegation could not therefore support it.

8. Mr. BINDSCHEDLER (Switzerland) said that the Luxembourg proposal codified a long standing rule of customary international law. It was not strictly necessary from the legal point of view, because its substance was already covered by the requirement, expressed in article 23, that the parties to a treaty must perform its provisions in good faith.

9. On the other hand, it would be useful because of its educational value, particularly for parliaments. It was quite common for a country to ratify a convention and for the convention to enter into force, but for the responsible authorities of the country to neglect to take the necessary measures to give effect to the convention in the internal legal order. That situation was generally not the fault of the government, which was well aware of its international obligations, but of the legislature.

10. An example of that situation was provided by the 1949 Geneva Convention relative to the Treatment of Prisoners of War,[1] by article 129 of which the States Parties undertook " to enact any legislation necessary

[1] United Nations, *Treaty Series*, vol. 75, p. 135.

to provide effective penal sanctions " to punish certain grave breaches of the Convention. The article was not self-executing and the States Parties needed to enact amending legislation in order to carry it out. Many years after the Convention's entry into force a number of States had still not enacted the necessary legislation and Switzerland itself had taken ten years to amend its penal code accordingly.

11. Another example was provided by the International Labour Conventions; those responsible for supervising the implementation of those Conventions had often noted that countries which had ratified the convention were not applying them in all respects because the necessary implementing legislation had not been enacted.

12. Consequently, although he could not regard the proposed new article as absolutely necessary from the legal point of view, he would support it.

13. Mr. CARMONA (Venezuela) said that either the rule contained in article 23 *bis* and in the Luxembourg proposal was useless or it constituted a violation of State sovereignty. If a State ratified a treaty, it was under an obligation to perform it and he failed to see what useful purpose would be served by the provisions of the proposed new article.

14. There were two systems for implementing a ratified treaty. In many English-speaking countries, special legislation was needed for the purpose, but in other countries, such as Venezuela, the ratification of a treaty had the effect of incorporating its provisions in the municipal law of the country, and those provisions thereby became effective on a par with national legislation, provided they did not violate the Venezuelan Constitution, which had primacy over all other legislation.

15. If the purpose of the Luxembourg proposal was to oblige a State to apply a treaty without parliamentary approval having first been obtained for its ratification, the proposal conflicted with the fundamental principle of State sovereignty.

16. Mr. ESCUDERO (Ecuador) said that in Ecuador, a treaty which had been ratified became part of internal law. No treaty could be ratified without prior adoption of the necessary legislation by Parliament.

17. The Luxembourg proposal was not consistent with the principle of national sovereignty and seemed to be based on a distrust of States and a fear that they would not perform their treaty obligations in good faith. It did not take the form of a mere recommendation and could not therefore be approached purely from the educational standpoint, as the Swiss representative had suggested. The terms in which it was couched were clearly imperative in character; they specified that the parties to a treaty " shall take any measures of internal law that may be necessary to ensure " that it was fully applied. Under Article 2 (7) of the Charter, the United Nations was not authorized " to intervene in matters which are essentially within the domestic jurisdiction " of a State. That basic principle of the Charter applied to the realm of treaties also, and a rule such as that proposed by Luxembourg could not therefore be incorporated in the convention on the law of treaties. The matter should remain governed by the provisions of article 23 on performance in good faith; the implementation of treaties was a matter of State sovereignty and should be left to the legal conscience of States.

18. Sir Francis VALLAT (United Kingdom) said that the Luxembourg proposal must be viewed in the context of the convention as a whole and of article 23 and the existing article 23 *bis* in particular. As had been pointed out in paragraph (1) of the International Law Commission's commentary to article 23, the *pacta sunt servanda* rule was " the fundamental principle of the law of treaties ". Nothing should be done to weaken the force of that basic principle and his delegation therefore felt bound to express some hesitations about the Luxembourg proposal.

19. It was of course desirable to stress the link between international law and internal law so far as the observance of treaties was concerned. But article 23 *bis* already focused attention on the heart of the problem, which was not so much the manner in which States ensured that their treaty obligations were fulfilled, but rather that States should not be permitted to invoke the provisions of their own internal law as a justification for failure to perform a treaty.

20. He also had some doubts as to the substance and implications of the Luxembourg proposal. The article would touch on one aspect of the method by which States gave effect to treaties. At least to some extent that was a question of internal law depending on State constitutions. But the legal position varied in different countries. In some countries, the constitution provided that a treaty, once it had been ratified, became part of the law of the land; in others, the constitution might require the enactment of a general approving law, giving legal effect to the treaty in internal law, before an instrument of ratification could be deposited; in yet others, there was a mixed régime where the nature of the treaty determined what measures of internal law had to be taken.

21. In the United Kingdom, a variety of methods was employed to ensure that treaties were fully applied; the choice of method depended in part on the nature of the treaty and its impact upon existing internal law. There were many treaties to which full effect could be given in the United Kingdom simply by administrative measures. Other treaties required for their effective implementation the amendment or modification of existing internal legislation and, in those cases, the policy was to ensure that the necessary amending legislation was enacted by Parliament before the ratification. There again, however, a variety of legislative techniques were possible and the choice among them depended partly on the nature of the treaty. Thus, where it was clearly intended that certain provisions of a treaty were to have direct internal effect as part of the internal law of each of the parties to a treaty, it was possible to ensure by act of the United Kingdom Parliament that those provisions did have that effect. Other delegations would no doubt be confronted with different problems, depending on the provisions of the constitutions of their countries or the practices which their governments had

adopted to ensure that full effect was given to treaty obligations under their internal law.

22. His delegation fully understood and respected the motives underlying the Luxembourg proposal, but would not be able to support it for the reasons of presentation and substance which he had mentioned.

23. Mr. KOULICHEV (Bulgaria) said that his delegation was not convinced that the inclusion of the new article proposed by Luxembourg was really necessary in order to guarantee the observance of the *pacta sunt servanda* principle. The essence of that principle was that States must perform in good faith their obligations under treaties which were in force and had been lawfully concluded. International law, however, generally left to the parties complete freedom, within the framework of the provisions of the treaty, regarding the choice of the means to be used to carry out their treaty obligations. It was true that treaties such as the International Labour Conventions expressly laid on States parties an obligation to bring their internal law into line with the provisions of the conventions, but in the majority of cases international treaties did not contain any provisions on the steps to be taken in the internal legal order for the purpose of carrying out treaty obligations.

24. The Luxembourg proposal would not be very useful for the purposes of strengthening the *pacta sunt servanda* principle, since that principle, by definition, already covered the adoption of the necessary internal measures to which the proposal referred. On the other hand, it could become a source of unnecessary disputes. The smallest discrepancy between the internal law of a State and the provisions of a treaty could give rise to controversy, even in the absence of any concrete subject of dispute.

25. For those reasons, his delegation would oppose the Luxembourg proposal as being unnecessary.

26. Mr. NASCIMENTO E SILVA (Brazil) said that, in his delegation's opinion, article 23 as adopted at the previous meeting adequately covered all the problems that might arise. The Brazilian Constitution, like those of most Latin American countries, required that all treaties should be approved by Parliament and that only after such approval could the Executive ratify the treaty. Thus, the new article proposed by Luxembourg could apply only after the treaty had been ratified, and the problem of sovereignty would not arise.

27. The Luxembourg delegation had doubtless had excellent reasons for introducing its proposal, particularly considering the variety of constitutional systems represented at the Conference, but the proposal now seemed superfluous.

28. Mr. WERSHOF (Canada) said that, although his delegation appreciated the intentions of the Luxembourg delegation, it could not support its proposal, for the reasons given by earlier speakers, particularly by the United Kingdom representative. It was well known that a number of treaties, some of them multilateral, contained specific provisions requiring the contracting parties to enact internal legislation. Canada was a party to some such treaties, but considered it unnecessary to include a general rule to that effect in the convention.

29. Mr. HOSTERT (Luxembourg) said he was glad that so many representatives considered that the substance of the Luxembourg amendment was already embodied in article 23; indeed, his delegation had submitted its proposal largely because it had not been absolutely sure that that was the case. Since however a number of representatives believed that the addition of the new article would cause confusion, his delegation would withdraw its proposal, on the understanding that the substance of it was already covered in article 23.

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(resumed from the previous meeting)*

30. The PRESIDENT invited the Conference to resume its consideration of the articles approved by the Committee of the Whole.

Article 23 bis [2]

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 43.

31. Mr. SAMAD (Pakistan) said that, at the first session, his delegation had introduced an amendment to article 23 (A/CONF.39/C.1/L.181), the purpose of which had been to add to the principle *pacta sunt servanda* the additional principle that no party to a treaty might invoke the provisions of its constitution or its laws as an excuse for its failure to perform the international obligation it had undertaken. A number of delegations had agreed that that was a generally recognized principle in international law, and the Committee of the Whole at its 29th meeting had approved the Pakistan amendment by 55 votes to none and referred it to the Drafting Committee, together with the International Law Commission's text of article 23. The Drafting Committee had recommended that the Committee of the Whole adopt the International Law Commission's text of article 23 without any addition, but that the Pakistan amendment should be embodied in a new article immediately following article 23. The Committee of the Whole had approved articles 23 and 23 *bis* without a formal vote at its 72nd meeting, but no title had then been given to article 23 *bis;* his delegation was glad that the Drafting Committee had proposed a title which corresponded closely to the one that it had intended to propose itself. His delegation therefore commended article 23 *bis* to the Conference.

32. Mr. CARMONA (Venezuela) said that the International Law Commission had at different times taken different views on the important question of the relationship between international and municipal law.

[2] The principle contained in an amendment by Pakistan (A/CONF.39/C.1/L.181) to article 23 was approved at the 29th meeting of the Committee of the Whole. At the 72nd meeting the Drafting Committee recommended that the admendment should be embodied in a separate article numbered 23 *bis*.

Sir Hersch Lauterpacht's view had been that municipal law took precedence over international law. A reaction had subsequently taken place, when Sir Gerald Fitzmaurice had advanced the opposite thesis, that international law prevailed over municipal law. A third position, which might be regarded as a compromise, had later emerged in the Commission, which had agreed upon the formula set out in the present article 43; under that article, international law prevailed over internal law, unless the violation of internal law invoked as a ground for invalidating consent was manifest.

33. During the discussion of article 43 at the first session, that formula had been supplemented by two amendments. One, by Peru and the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.288 and Add.1) stated that violation of a provision of internal law must be of fundamental importance and manifest. The other, submitted by the United Kingdom delegation (A/CONF.39/C.1/L.274), went even further along the same lines. An amendment by Japan and Pakistan (A/CONF.39/C.1/L.184 and Add.1), which would have restored the original thesis that international law prevailed over internal law even when a violation of the internal law was manifest, had been rejected by 56 votes to 25, with 7 abstentions. The other two amendments to which he had referred had been approved and the compromise thus reached had seemed to provide a generally satisfactory solution to the problem of the relationship between the two branches of law.

34. The delegation of Pakistan had, however, submitted its amendment (A/CONF.39/C.1/L.181) to article 23 before article 43 had been discussed. Throughout its lengthy debate on article 23 the Committee of the Whole had naturally been preoccupied by the extremely important question of the principle of *pacta sunt servanda,* so that it would not be unfair to claim that insufficient attention had been devoted to the Pakistan amendment. Moreover, although the principle contained in that amendment had been approved by 55 votes to none, there had been 30 abstentions, and when the new article 23 *bis* had been approved, its wording had been left in abeyance until a decision had been taken on article 43. The Drafting Committee had brought article 23 *bis* into line with the wording of article 43.

35. The Conference now had before it two articles which repeated each other. In the opinion of the Venezuelan delegation, article 23 *bis* was at best redundant and in fact conflicted with article 43, since it introduced the idea of the precedence of municipal law over international law. The only solution seemed to be to delete article 23 *bis* and to retain article 43, which was a clear, well-considered provision, unanimously adopted by the International Law Commission.

36. Mr. DE LA GUARDIA (Argentina) said the Argentine delegation wished to make a brief statement similar to that it had made in the Committee of the Whole during the first session on the subject of article 23 *bis.* There was a type of treaty — and Argentina was a party to a number of such treaties in force — which contained the so-called " constitutional clause ", according to which certain matters governed exclusively by the constitution of the State remained outside the scope of the provisions of the treaty, under the terms of the treaty itself. In such cases, the relevant constitutional rules might be invoked with respect to the treaty. They could not of course be invoked by the State " as justification for its failure to perform the treaty ", to use the words of article 23 *bis;* it was the treaty itself which authorized a State to invoke the rule of internal law.

37. But since that possibility did not emerge clearly from the wording of article 23 *bis,* which could be wrongly interpreted, his delegation felt obliged to make that statement for inclusion in the summary record, and would abstain from voting on the article.

38. Mr. MATINE-DAFTARY (Iran) said that the Iranian Constitution provided that all treaties must be approved by Parliament. He could not vote for article 23 *bis,* because it conflicted with article 43.

39. The PRESIDENT said he was surprised that some representatives should consider that article 23 *bis* conflicted with article 43 because their constitutions required parliamentary approval of all treaties; they should remember that article 23 *bis* referred only to treaties already in force.

40. He invited the Conference to vote on article 23 *bis.*

Article 23 bis *was adopted by 73 votes to 2, with 24 abstentions.*

Article 24 [3]

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

41. Mr. ALVAREZ TABIO (Cuba) said that at the first session his delegation had submitted an amendment (A/CONF.39/C.1/L.146) to article 24, in order to bring the text more closely into line with the International Law Commission's commentary. Its amendment had been referred to the Drafting Committee, but had not been taken into account in the text before the Conference.

42. The Cuban delegation would not insist on its amendment, since it was satisfied by the explanations given by the Chairman of the Drafting Committee. However, since the situation had changed as a result of the introduction of the new article 77,[4] Cuba wished to make clear its position concerning the intertemporal law, because there was a clear contradiction between the two articles. In article 24 the convention had established a flexible and balanced rule to solve problems relating to the intertemporal law, whereas article 77 applied to the convention the principle of absolute non-retroactivity, by completely excluding from its temporal application the principles and rules of international law codified in the convention.

[3] For the discussion of article 24 in the Committee of the Whole, see 30th and 72nd meetings.

[4] This article was approved by the Committee of the Whole at its 104th meeting.

43. In paragraph (3) of its commentary to article 24, the International Law Commission had stated: " If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date ".

44. That opinion provided a completely unambiguous solution to the problem of the intertemporal law, but it was contradicted by article 77, which precluded the application of the provisions of the convention, whatever their nature or authority, to treaties concluded before the entry into force of the convention. Thus the satisfactory rule laid down in article 24, which was in conformity with the International Law Commission's interpretation, was robbed of all its force by article 77.

45. True, article 77 included a general reservation relating to " any rules set forth in the present Convention to which treaties would be subject, in accordance with international law, independently of the Convention ", but those words indicated the real aim of the article, which was to restrict the codifying effect that all were agreed the convention should have. The effect of article 77 would be that the rules of international law laid down in the convention would have full authority in the future — which went without saying — but could only be applied to prior agreements if such agreements were subject to those rules independently of the convention. Article 77 deprived the convention of its inherent authority to govern continuing treaties, which as such was governed by the rules of international law consolidated in the convention. Furthermore, it did not settle the question whether a prior treaty was governed by those rules, when in fact the aim should be to ratify their immediate effect, since there was no doubt about their authority once the convention had entered into force.

46. The peremptory rules of the convention had full authority with respect to all treaties in force, whatever their date of entry into force, not only on purely logical grounds based on the principle of the hierarchy of rules, but also for reasons of substance directly related to the notion of what was just at a given moment for the international community, particularly with respect to the rules in articles 48, 49, 50 and 61. Any treaty conflicting with those peremptory rules was both illegal and inadmissible; it was not permissible to question whether those peremptory norms were or were not part of international law before the entry into force of the convention, from which they derived indisputable authority.

47. Article 24 itself did not fully resolve the problem of the intertemporal law; it laid down that the provisions of a treaty did not bind a party in relation to any act or fact which had taken place or any situation which had ceased to exist before the date of the entry into force of the treaty, but it said nothing about the rule to be applied to a treaty relationship which began before the entry into force of the treaty, but continued to exist after that event. Apparently it was implied, although that was not stated, that the principle of non-retroactivity was not violated by applying the provisions of the treaty to a prior situation which was not terminated. That was certainly the assumption made by the International Law Commission, as indicated by the commentary to which he had already referred. That was how the Cuban delegation interpreted the legal effect of article 24 and it would vote for it accordingly.

48. Mr. NETTEL (Austria) asked for a separate vote on the phrase " or is otherwise established " in the opening proviso of article 24.

The phrase " or is otherwise established " was adopted by 78 votes to 5, with 12 abstentions.

Article 24 was adopted by 97 votes to none, with 1 abstention.

Article 25 [5]

Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 25 was adopted by 97 votes to none.

49. Mr. BILOA TANG (Cameroon) said that his delegation approved of the content of article 25, but wished to state on behalf of its Government that Cameroon reserved the right, when necessary, to interpret for itself the term " territory ", which was rather loosely used in the article, in respect of so-called " overseas territories ".

Article 26 [6]

Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 56, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

[5] For the discussion of article 25 in the Committee of the Whole, see 30th, 31st and 72nd meetings.

[6] For the discussion of article 26 in the Committee of the Whole, see 31st and 91st meetings.

5. Paragraph 4 is without prejudice to article 37, or to any question of the termination or suspension of the operation of a treaty under article 57 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

50. Mr. PINTO (Ceylon) said that the terms " earlier treaty " and " later treaty " had been discussed briefly at the 85th meeting of the Committee of the Whole, when the United Kingdom representative had drawn attention to the lack of clarity in the use of those terms, and had asked which of the dates associated with the emergence of a treaty should be used to determine which was the earlier and which the later instrument. The Ceylonese delegation had concluded that the crucial date for that purpose should be the date when the text of the new treaty had been finally and formally established. The Expert Consultant had confirmed that view at the 91st meeting of the Committee of the Whole when he had explained that the relevant date should be that of the adoption of the treaty and not that of its entry into force and that the underlying notion was that, when the second treaty was adopted, a new legislative intention was formed, which should be taken as intended to prevail over the intention expressed in the earlier treaty.

51. His delegation concurred with that explanation and thought that it might have been desirable to clarify the position in the text of article 26, perhaps by adding a sentence to the effect that the date of the adoption of the text was relevant in determining which was the later treaty. That notion might be taken into account by the Drafting Committee, and later by the Conference, in considering the new article 77. His delegation would not, however, make any formal proposal to that effect.

52. Mr. KEARNEY (United States of America) said that in the Committee of the Whole his delegation had supported an amendment by Japan (A/CONF.39/C.1/L.207) to delete the words, " or that it is not to be considered as incompatible with," in paragraph 2. That was because the United States considered that, when a treaty contained a clause providing that it should be deemed not to be incompatible with another treaty, the first duty of the interpreter was to try to reconcile any conflicting provisions of the two treaties, rather than to give one precedence over the other. The United States had feared that the present wording of paragraph 2 might encourage interpreters to ignore or pass over lightly their primary duty of reconciling conflicting provisions.

53. His delegation now understood, from a discussion of the point with the Expert Consultant, that the International Law Commission had intended the text as a second line of defence, to be invoked when an interpreter had already tried, and failed, to reconcile two treaties, and was accordingly obliged to give one priority over the other. He wished to make it clear that his delegation would vote for article 26 on the understanding that that was the interpretation to be given to paragraph 2.

54. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that some of the provisions of article 26 were not sufficiently clear. For example, despite considerable discussion in the Drafting Committee and the Committee of the Whole, the term " provisions . . . compatible with those of the later treaty " in paragraph 3 was still open to different interpretations. Thus, if a bilateral agreement were concluded between two States which subsequently became parties to a general multilateral treaty relating to the same subject-matter, and the terms of the bilateral treaty were more advantageous to both States than those of the multilateral treaty, the question arose whether the provisions of the earlier treaty were compatible with those of the later one. The Soviet delegation understood the passage in question to mean that, if the earlier treaty was not terminated by the conclusion of the later treaty, the provisions of the earlier treaty, the effects of which were no less favourable than those of the later treaty, should continue to apply.

55. Furthermore, under paragraph 4 (*b*), situations might theoretically arise in which a State might assume certain obligations under one treaty and undertake conflicting obligations in concluding a treaty on the same subject with another State. The Soviet delegation's interpretation of paragraph 4 (*b*) was that nothing in that paragraph should be regarded as giving a State the right to conclude a treaty which conflicted with its obligations under an earlier treaty concluded with a State which was not a party to the later treaty.

56. In view of those imprecisions and difficulties of interpretation, his delegation would abstain in the vote on article 26.

57. Mr. BINDSCHEDLER (Switzerland) said that at the 31st meeting of the Committee of the Whole, his delegation had made a statement concerning the non-applicability of Article 103 of the United Nations Charter to non-members of the United Nations. Switzerland had no wish to dispute the importance and value of Article 103 of the Charter, but believed it was necessary to repeat, for inclusion in the summary record, that as it was not bound by the Charter, its signature of the convention being prepared would have to be made subject to a reservation concerning Article 103.

58. Mr. FUJISAKI (Japan) said he wished to refer, like the representative of the United States, to the words " or that it is not to be considered as incompatible with " in paragraph 2 and to remind the Conference that Japan had submitted an amendment (A/CONF.39/C.1/L.207) in the Committee of the Whole proposing the deletion of those words. Although the Drafting Committee had not accepted that amendment, the Japanese delegation still considered that, when treaty A specified that it was not to be considered as incompatible with treaty B, the intention of the parties was to set down a common understanding on the way in which the two treaties were to be interpreted as being compatible with each other, and that therefore the possibility of one of the treaties prevailing over the other should not, *prima facie,* arise. That was the primary meaning of the expression " not to be

considered as incompatible with " when it was employed in a treaty; it did not mean that one treaty was subject to another, as was obviously the case when the other expression in the article — " is subject to " — was used.

59. The PRESIDENT invited the Conference to vote on article 26.

Article 26 was adopted by 90 votes to none, with 14 abstentions.

Statement by the Chairman of the Drafting Committee on articles 27-29

60. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 27, 28 and 29 constituted section 3 of Part III.

61. The English title of article 29 had given rise to some difficulty. The title in the International Law Commission's draft, " Interpretation of treaties in two or more languages ", was somewhat ambiguous, since it was not clear whether the words " in two or more languages " applied to the treaties or to their interpretation. The Drafting Committee had solved the problem by inserting the word " authenticated " after the word " treaties " in the English version. Corresponding changes had been made in the French, Russian and Spanish versions.

62. With respect to the text of the articles, the Drafting Committee had noted that the Russian and Spanish versions of paragraph 1 of article 27 did not correspond exactly with the English and French versions, which brought out the meaning of the paragraph more clearly. It had therefore amended the Russian and Spanish versions accordingly.

63. The Committee had found the opening phrase of paragraph 4 of article 29 ambiguous. The words " Except in the case mentioned in paragraph 1 " could refer to either of the two possibilities mentioned in paragraph 1. The Committee had therefore amended the opening phrase to read " Except where a particular text prevails in accordance with paragraph 1 " in order to make it quite clear that the reference was to the second part, beginning with the words " unless the treaty provides . . . ".

Article 27 [7]

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(*b*) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

64. Mr. FLEISCHHAUER (Federal Republic of Germany) said that his delegation was basically in agreement with article 27 and would vote for it in its present form. It felt, however, that the term " agreement " as used in paragraph 2 might be open to divergent interpretations. In the view of his delegation, the term was to be interpreted as meaning written agreements approved by all the parties to the treaty in connexion with its conclusion. The bulk of the preparatory work, which, as correctly stated in article 28, was a supplementary means of interpretation, would otherwise come under the principal rules of interpretation. That would not only upset the systematic order between articles 27 and 28 but would also cause considerable uncertainty and difficulty in practice. However, the point was not one of substance, particularly since paragraph (13) of the International Law Commission's commentary to articles 27 and 28 spoke of " documents " in relation with paragraph 2, thus making it clear that the Commission had had written agreements in mind when it had adopted that paragraph. It was on that understanding that his delegation had refrained from submitting an amendment in that sense at the present stage of the Conference.

63. On the other hand, his delegation was of the opinion that subsequent agreements between the parties regarding the interpretation of a treaty, as mentioned in paragraph 3, did not have to be in written form. It was confirmed in that opinion not only by constant State practice but also by the fact that paragraph 3 treated subsequent agreements and subsequent pratice on an equal footing.

66. His delegation also considered that the " relevant rules of international law applicable in the relations between the parties " which, under paragraph 3, had to be taken into account in the interpretation of treaties, were to be understood as referring not only to the general rules of international law but also to treaty obligations existing for the various parties. Not only should treaties be interpreted, wherever possible, so as to be in conformity with international law, but that method of interpretation should be followed, wherever treaties could be interpreted so as to be consistent with the treaty obligations of parties to it, in order to avoid conflicting treaty obligations. It was in that sense that his delegation understood the reference in paragraph 3 (*c*) to any relevant rules of international law applicable in the relations between the parties.

Article 27 was adopted by 97 votes to none.

[7] For the discussion of articles 27 and 28 in the Committee of the Whole, see 31st, 32nd, 33rd and 74th meetings.

Article 28 [8]

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

67. Mr. NAHLIK (Poland) said that articles 27 and 28 were a successful combination of three possible approaches to the question of interpretation, namely the textual, the intentional and the functional approach. They thus constituted a coherent and well-balanced part of the convention. However, a useful change could perhaps be made in article 28, for the following reasons.

68. Recourse to the so-called " historical " interpretation, as suggested in the article, could certainly be made in any case in which the meaning conveyed by the text, even with the help of the other means mentioned in article 27, was either " ambiguous or obscure " or could lead to something " absurd or unreasonable ". But whenever recourse was had to such interpretation, it could not be known in advance whether or not the result would be to confirm the meaning conveyed by the application of the means indicated in article 27. In most cases it probably would, but it could not be presumed that such would be the case. At any rate, the " confirmation " of the meaning conveyed in application of article 27 and the " determination " of the meaning when it was left ambiguous or obscure, should not be considered as two different possibilities. If the meaning of the text was perfectly clear, it stood in no need of further confirmation and the work of the interpreter, in looking for such confirmation, would be juridically superfluous. It would therefore be more logical to delete the reference to "confirmation " and to amend the article to read:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to determine the meaning of the provision or provisions of that treaty when the interpretation according to article 27:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

69. He suggested that the point be referred to the Drafting Committee for further consideration.

70. Mr. YASSEEN, Chairman of the Drafting Committee, said that great care had been taken in drafting article 28 in the formulation approved by the Drafting Committee. The conditions for recourse to preparatory work had been laid down in the International Law Commission's text, provision having been made for confirmation, in specific cases, of the meaning resulting from the application of article 27. The suggestion put forward by the representative of Poland related to a point of substance and affected the balance achieved between the various positions taken on the question of interpretation. It was therefore for the Conference itself to take a decision on it.

71. The PRESIDENT said that it would be most unfortunate if the phrase " in order to confirm the meaning resulting from the application of article 27 " were deleted. Its retention could certainly do no harm. He hoped that the representative of Poland would not press his suggestion.

72. Mr. ROSENNE (Israel) said that although he felt some sympathy for the views expressed by the representative of Poland, he thought that the conclusions he had drawn were not correct and that the Polish position might be better met by an amalgamation of articles 27 and 28. However, that possibility had already been discussed in the International Law Commission, the Committee of the Whole and the Drafting Committee. The suggestion that the Drafting Committee should consider the Polish proposal was tantamount to asking for the whole question to be reopened, and he therefore associated his delegation with the President's suggestion.

73. Mr. REDONDO-GOMEZ (Costa Rica) said he agreed with the President and the representative of Israel. Article 28 should be left in its present form, which appeared to meet with general approval.

74. Mr. NAHLIK (Poland) said that he had merely suggested a possible change, but would not press the point.

Article 28 was adopted by 101 votes to none.

Article 29 [9]

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

75. Mr. HYERA (United Republic of Tanzania) said that, perhaps because of an oversight by the Drafting Committee, the last phrase in paragraph 2 read " or the parties so agree " instead of " or the parties in some other manner so agree ". The earlier phrase

[8] See footnote 7.

[9] For the discussion of article 29 in the Committee of the Whole, see 34th and 74th meetings.

" if the treaty so provides " implied that there was already an agreement, but the parties could have agreed in some manner other than in the treaty.

76. The PRESIDENT said that the point made by the representative of Tanzania would be considered by the Drafting Committee.[10]

Articles 29 was adopted by 101 votes to none.

77. The PRESIDENT said that the Conference had successfully disposed of the most controversial and difficult subject in the whole field of the law of treaties, the question of the interpretation of treaties. The section on interpretation had been condensed into a few formulas which had been adopted unanimously by the Conference. When the section had first come before the International Law Commission, many had felt that it might be unwise for the Commission to embark on a codification of so difficult a subject. He himself had taken a more optimistic view and was most grateful to the Conference for having proved him right. He wished to pay a particular tribute to the Expert Consultant whose patience and hard work had contributed so much to the gratifying result achieved.

The meeting rose at 5.20 p.m.

[10] No change was made by the Drafting Committee.

FOURTEENTH PLENARY MEETING

Wednesday, 7 May 1969, at 10.45 a.m.

President: Mr. AGO (Italy)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

Statement by the Chairman of the Drafting Committee on articles 30-37

1. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 30 to 34 constituted Part III, section 4, of the draft convention (Treaties and third States) and articles 35 to 37 Part IV (Amendment and modification of treaties). Part IV had contained an article 38, entitled " Modification of treaties by subsequent practice ", which had been deleted by the Committee of the Whole. [1] The Drafting Committee had made only a few changes in the titles and texts of articles 30-37.

2. In the text of article 31, the Drafting Committee, in the light of an observation in the Committee of the Whole, had deleted the word " third " before the word " State ". It had also put the verb " accept " in the present tense in the concluding part of the sentence.

[1] See 38th meeting of the Committee of the Whole, para. 60.

3. The Drafting Committee had slightly altered the text of article 34, as approved by the Committee of the Whole following the adoption of the amendments submitted by Syria (A/CONF.39/C.1/L.106) and Mexico (A/CONF.39/C.1/L.226). In that text, the words " recognized as such " qualified only " a customary rule of international law ", but the Drafting Committee had found, when considering the Mexican amendment, that the intention had been to mention in article 34 the sources of law specified in Article 38 of the Statute of the International Court of Justice, and to apply the word " recognized " not only to customary rules but also to the general principles of law. The words " recognized as such " had therefore been placed at the end of the sentence. The title of the International Law Commission's text no longer fitted the wording approved by the Committee of the Whole, which referred both to international custom and to general principles of law. The Drafting Committee had therefore amended the title to read: " Rules set forth in a treaty becoming binding on third States as rules of general international law. "

4. The PRESIDENT invited the Conference to consider articles 30 to 37, as approved by the Committee of the Whole and reviewed by the Drafting Committee.

Article 30 [2]

General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 30 was adopted by 97 votes to none.

Article 31 [2]

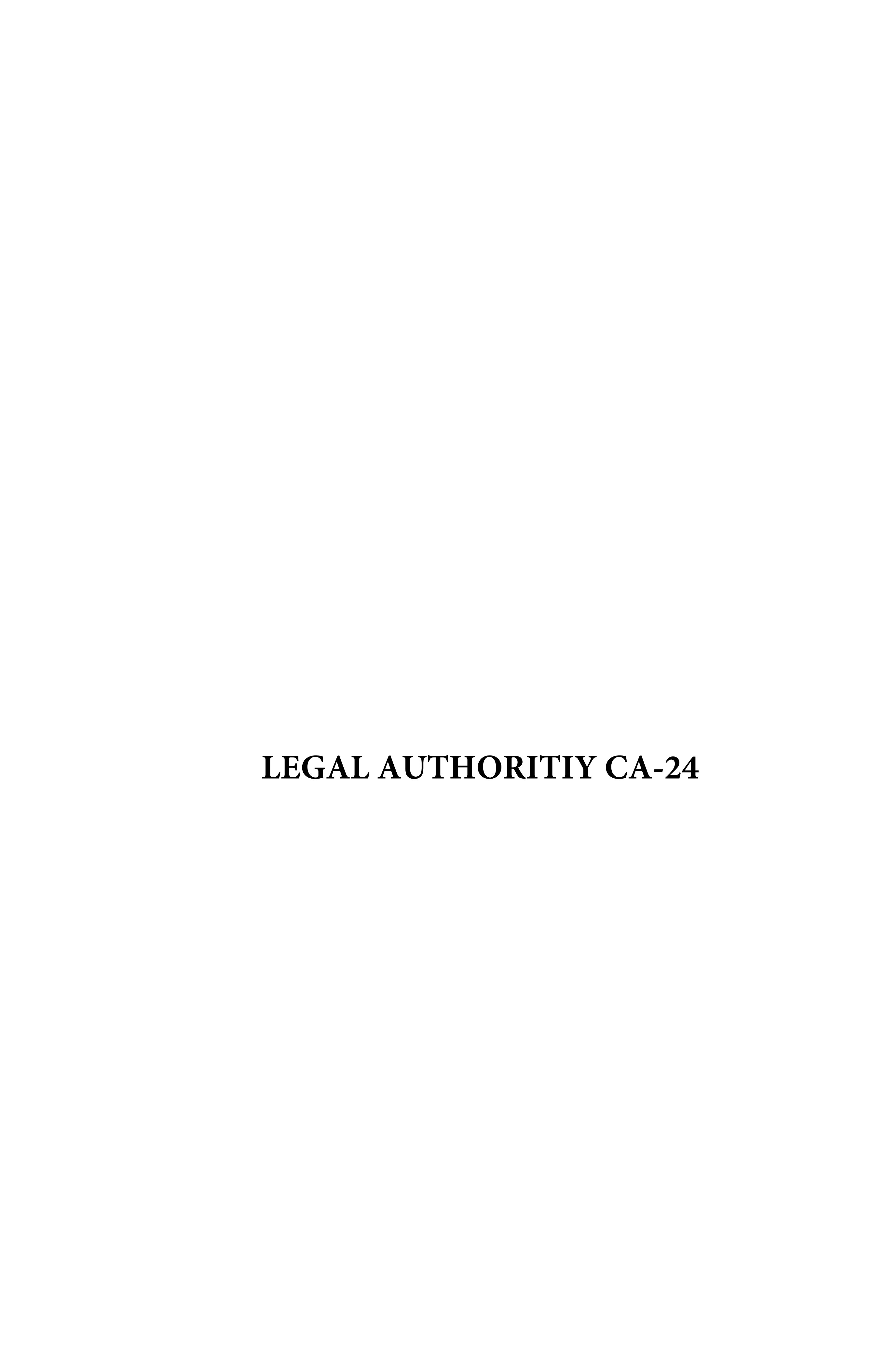
Treaties providing for obligations for third States

An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing the obligation and the State expressly accepts that obligation.

5. Mr. PHAM-HUY-TY (Republic of Viet-Nam), introducing his delegation's amendment (A/CONF.39/L.25), said that the establishment of an obligation for a State which was not a party to a treaty was an important matter. Because of its importance, the obligation must be accepted by the third State in a form which could not give rise to any misunderstanding and which involved no risk of tendentious interpretation. The words " expressly accepts " could be understood in the widest sense as embracing acceptance by solemn declaration or any other form of oral acceptance which did not provide the necessary safeguards. It was therefore desirable that third States, and particularly developing countries, should express their willingness to accept an international obligation in writing only. His delegation regarded

[2] For the discussion of articles 30 and 31 in the Committee of the Whole, see 35th and 74th meetings.

An amendment to article 31 was submitted to the plenary Conference by the Republic of Viet-Nam (A/CONF.39/L.25).



LEGAL AUTHORITIY CA-24

Ex. CA-24

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES PÊCHERIES

(ROYAUME-UNI c. NORVÈGE)

ARRÊT DU 18 DÉCEMBRE 1951

1951

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

FISHERIES CASE

(UNITED KINGDOM *v.* NORWAY)

JUDGMENT OF DECEMBER 18th, 1951

LEYDE
SOCIÉTÉ D'ÉDITIONS
A. W. SIJTHOFF

LEYDEN
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Le présent arrêt doit être cité comme suit :

« *Affaire des pêcheries, Arrêt du 18 décembre 1951 : C. I. J. Recueil 1951, p. 116.* »

This Judgment should be cited as follows :

"*Fisheries case, Judgment of December 18th, 1951 : I.C. J. Reports 1951, p. 116.*"

Nº de vente : Sales number 74

INTERNATIONAL COURT OF JUSTICE

YEAR 1951

December 18th, 1951

1951
December 18th
General List:
No. 5

FISHERIES CASE

(UNITED KINGDOM *v.* NORWAY)

Validity in international law of Royal Norwegian Decree of 1935 delimiting Norwegian fisheries zone.—Fisheries zone; territorial sea. —Special characteristics of Norwegian coast; "skjærgaard".—Base-line for measuring breadth of territorial sea; low-water mark.—Outer coast line of "skjærgaard".—Internal waters; territorial waters.—Tracé parallèle method; envelopes of arcs of circles method; straight base-lines method.—Length of straight base-lines; 10-mile rule for bays; historic waters.—Straits; Indreleia.—International interest in delimitation of maritime areas.—General criteria for such delimitation; general direction of the coast; relationship between sea areas and land formations.—Norwegian system of delimitation regarded as adaptation of general international law.—Consistency in application of this system.—Absence of opposition or reservations by foreign States.—Notoriety.—Conformity of base-lines adopted by 1935 Decree with principles of international law applicable to delimitation of the territorial sea.

JUDGMENT

Present: *President* BASDEVANT; *Vice-President* GUERRERO; *Judges* ALVAREZ, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir Arnold MCNAIR, KLAESTAD, BADAWI PASHA, READ, HSU MO; *Registrar* HAMBRO.

The Conclusions of the United Kingdom, points 5 and 9 to 11, refer to waters situated between the base-lines and the Norwegian mainland. The Court is asked to hold that on historic grounds these waters belong to Norway, but that they are divided into two categories: territorial and internal waters, in accordance with two criteria which the Conclusions regard as well founded in international law, the waters falling within the conception of a bay being deemed to be internal waters, and those having the character of legal straits being deemed to be territorial waters.

As has been conceded by the United Kingdom, the "skjærgaard" constitutes a whole with the Norwegian mainland; the waters between the base-lines of the belt of territorial waters and the mainland are internal waters. However, according to the argument of the United Kingdom a portion of these waters constitutes territorial waters. These are *inter alia* the waters followed by the navigational route known as the Indreleia. It is contended that since these waters have this character, certain consequences arise with regard to the determination of the territorial waters at the end of this water-way considered as a maritime strait.

The Court is bound to observe that the Indreleia is not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway. In these circumstances the Court is unable to accept the view that the Indreleia, for the purposes of the present case, has a status different from that of the other waters included in the "skjærgaard".

Thus the Court, confining itself for the moment to the Conclusions of the United Kingdom, finds that the Norwegian Government in fixing the base-lines for the delimitation of the Norwegian fisheries zone by the 1935 Decree has not violated international law.

* * *

It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

LEGAL AUTHORITIY CA-25

Ex. CA-25

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE NOTTEBOHM

(LIECHTENSTEIN c. GUATEMALA)

EXCEPTION PRÉLIMINAIRE

ARRÊT DU 18 NOVEMBRE 1953

1953

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

NOTTEBOHM CASE

(LIECHTENSTEIN *v.* GUATEMALA)

PRELIMINARY OBJECTION

JUDGMENT OF NOVEMBER 18th, 1953

LEYDE
SOCIÉTÉ D'ÉDITIONS
A. W. SIJTHOFF

LEYDEN
A. W. SIJTHOFF'S
PUBLISHING COMPANY

Le présent arrêt doit être cité comme suit :
« *Affaire Nottebohm (exception préliminaire), Arrêt du 18 novembre 1953 : C. I. J. Recueil 1953, p. 111.* »

This Judgment should be cited as follows :
"Nottebohm case (Preliminary Objection), Judgment of November 18th, 1953: I.C.J. Reports 1953, p. 111."

N° de vente : Sales number 111

INTERNATIONAL COURT OF JUSTICE

YEAR 1953

1953
November 18th
General List:
No. 18

November 18th, 1953

NOTTEBOHM CASE

(LIECHTENSTEIN *v.* GUATEMALA)

PRELIMINARY OBJECTION

Jurisdiction of the Court.—Compulsory jurisdiction accepted by Respondent State by Declaration valid for fixed period.—Effect of expiry of this period after filing of Application.—Court competent to adjudicate upon challenge to its jurisdiction in accordance with general international law and by virtue of Article 36 (6) of Statute.—Statutory power not confined to question whether the dispute is within categories enumerated in Article 36 (2).—Lapse of Declaration after Court has been properly seised does not affect jurisdiction of Court.

JUDGMENT

Present: *President* Sir ARNOLD MCNAIR; *Vice-President* GUERRERO; *Judges* ALVAREZ, BASDEVANT, HACKWORTH, WINIARSKI, KLAESTAD, BADAWI, READ, HSU MO, LEVI CARNEIRO, ARMAND-UGON; *Deputy-Registrar* GARNIER-COIGNET.

invalidate the Application if the latter was regular : consequently, the lapse of the Declaration cannot deprive the Court of the jurisdiction which resulted from the combined application of Article 36 of the Statute and the two Declarations.

When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court —which was the case between Guatemala and Liechtenstein on December 17th, 1951—the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim ; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established.

* * *

On the point here examined, the Government of Guatemala has referred in its communication of September 9th, 1952, to certain provisions in the laws of that country. The Government of Liechtenstein has made use of this in order to contend that the laws of Guatemala cannot take precedence over the rules of international law which are applicable to this case.

The Court does not consider that Liechtenstein in this connection has given a correct interpretation of the view of Guatemala on this point. In the opinion of the Court, the Government of Guatemala, on the premise that the Court lacked jurisdiction in an absolute manner, meant that, by reason of the Court's lack of jurisdiction, the laws of Guatemala did not authorize that Government to be represented before a court which had no power to adjudicate. The Court does not consider it necessary to ascertain what the laws of Guatemala provide in this connection. It will confine itself to stating that, once its jurisdiction has been established by the present Judgment with binding force on the Parties, the difficulty, in which the Government of Guatemala considered that it had been placed, will be removed and there will be nothing to prevent that Government from being represented before the Court in accordance with the provisions of the Statute and Rules. This is, moreover, what that Government appears to have admitted in its communication of September 9th, 1952, No. 22, III, where the Minister for Foreign Affairs stated :

> "That in the present circumstances, since the jurisdiction of the Court in relation to Guatemala has terminated and because it would be contrary to the domestic laws of that country, my Government is unable to appear and to contest the claim which has been made."

LEGAL AUTHORITY CA-26

Ex. CA-26

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

APPLICABILITÉ DE L'OBLIGATION D'ARBITRAGE EN VERTU DE LA SECTION 21 DE L'ACCORD DU 26 JUIN 1947 RELATIF AU SIÈGE DE L'ORGANISATION DES NATIONS UNIES

AVIS CONSULTATIF DU 26 AVRIL 1988

1988

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

APPLICABILITY OF THE OBLIGATION TO ARBITRATE UNDER SECTION 21 OF THE UNITED NATIONS HEADQUARTERS AGREEMENT OF 26 JUNE 1947

ADVISORY OPINION OF 26 APRIL 1988

Mode officiel de citation :
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APPLICABILITY OF THE OBLIGATION TO ARBITRATE UNDER SECTION 21 OF THE UNITED NATIONS HEADQUARTERS AGREEMENT OF 26 JUNE 1947

Headquarters Agreement between the United Nations and the United States of America — Dispute settlement clause — Existence of a dispute — Alleged breach of treaty — Significance of behaviour or decision of party in absence of any argument by that party to justify its conduct under international law — Implementation of contested decision and existence of a dispute — Whether dispute concerns "the interpretation or application" of the Agreement — Whether dispute one "not settled by negotiation or other agreed mode of settlement" — Principle that international law prevails over national law.

ADVISORY OPINION

Present: *President* RUDA; *Vice-President* MBAYE; *Judges* LACHS, NAGENDRA SINGH, ELIAS, ODA, AGO, SCHWEBEL, Sir Robert JENNINGS, BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN; *Registrar* VALENCIA-OSPINA.

Concerning the applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947,

THE COURT,

composed as above,

after deliberation,

gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been asked was contained in resolution 42/229 B of the United Nations General Assembly, adopted on 2 March 1988. On the same day, the text of that resolution

> at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*" (*P.C.I.J., Series A, No. 2,* p. 13).

When in the case concerning *United States Diplomatic and Consular Staff in Tehran* the attempts of the United States to negotiate with Iran "had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter", the Court concluded that "In consequence, there existed at that date not only a dispute but, beyond any doubt, a 'dispute . . . not satisfactorily adjusted by diplomacy' within the meaning of" the relevant jurisdictional text (*I.C.J. Reports 1980,* p. 27, para. 51). In the present case, the Court regards it as similarly beyond any doubt that the dispute between the United Nations and the United States is one "not settled by negotiation" within the meaning of section 21, paragraph *(a),* of the Headquarters Agreement.

56. Nor was any "other agreed mode of settlement" of their dispute contemplated by the United Nations and the United States. In this connection the Court should observe that current proceedings brought by the United States Attorney General before the United States courts cannot be an "agreed mode of settlement" within the meaning of section 21 of the Headquarters Agreement. The purpose of these proceedings is to enforce the Anti-Terrorism Act of 1987; it is not directed to settling the dispute, concerning the application of the Headquarters Agreement, which has come into existence between the United Nations and the United States. Furthermore, the United Nations has never agreed to settlement of the dispute in the American courts; it has taken care to make it clear that it wishes to be admitted only as *amicus curiae* before the District Court for the Southern District of New York.

*

57. The Court must therefore conclude that the United States is bound to respect the obligation to have recourse to arbitration under section 21 of the Headquarters Agreement. The fact remains however that, as the Court has already observed, the United States has declared (letter from the Permanent Representative, 11 March 1988) that its measures against the PLO Observer Mission were taken "irrespective of any obligations the United States may have under the [Headquarters] Agreement". If it were necessary to interpret that statement as intended to refer not only to the substantive obligations laid down in, for example, sections 11, 12 and 13, but also to the obligation to arbitrate provided for in section 21, this conclusion would remain intact. It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since, for example in the case concerning the *Greco-Bulgarian*

"Communities" in which the Permanent Court of International Justice laid it down that

> "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty" (*P.C.I.J., Series B, No. 17,* p. 32).

* * *

58. For these reasons,

THE COURT,

Unanimously,

Is of the opinion that the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 26 June 1947, is under an obligation, in accordance with section 21 of that Agreement, to enter into arbitration for the settlement of the dispute between itself and the United Nations.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of April, one thousand nine hundred and eighty-eight, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) José Maria RUDA,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge ELIAS appends a declaration to the Advisory Opinion of the Court.

Judges ODA, SCHWEBEL and SHAHABUDDEEN append separate opinions to the Advisory Opinion of the Court.

(Initialled) J.M.R.
(Initialled) E.V.O.