

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

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

**CLAIMANT’S MEMORIAL ON THE MERITS**

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

*Counsel for Claimant*

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## I. INTRODUCTION

1. As anyone can attest, the Internet is, more than ever, “a critical infrastructure and vital commercial, cultural and educational medium.”<sup>1</sup> Perhaps no organization is as important to the continued functioning of this crucially important resource as the Internet Corporation for Assigned Names and Numbers (“ICANN”). ICANN is a one-of-a-kind institution: a global, private, not-for-profit organization, exercising plenary control over one of the world’s most important resources: the Internet Domain Name System, or “DNS.”

2. The DNS is the gateway to the nearly infinite universe of names and numbers that allow the Internet to function. The body with oversight authority over the DNS therefore wields enormous power (both economic and political), as it controls the delegation of top-level domains (such as .COM or .EDU or .NET), which in turn affects all the lower layers of the naming and numbering hierarchy. Since 1998, that authority has been ICANN. As a result, ICANN has become perhaps the most powerful non-profit corporation in the world, creating and distributing billions of dollars of global property rights on the Internet.

3. Although ICANN is nominally a California non-profit corporation, its international authority and reach cannot be overstated. In the words of the current Chair of ICANN’s Board, “ICANN is a unique model supporting a global community. The model works because it stands for one global Internet . . . .”<sup>2</sup> In support of this global model, “ICANN is governed by an internationally diverse Board of Directors overseeing the policy development

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<sup>1</sup> Anne Rachel Inné and Giovanni Seppia, Regional Liaisons, ICANN: achievements and challenges of a multi-stakeholder, bottom up, transparent model, Presentation to ICANN (4 Apr. 2007), available at [http://www.icann.org/presentations/new\\_ClubofRomePresentation4April07.pdf](http://www.icann.org/presentations/new_ClubofRomePresentation4April07.pdf), Cl. Exh. 1.

<sup>2</sup> Domain Informer, New Chairman of ICANN Elected Unanimously (5 Nov. 2007), available at <http://www.domaininformer.com/news/press/071105ICANN.html>, Cl. Exh. 2.

process. ICANN's President directs an international staff, working from three continents."<sup>3</sup> The Articles of Incorporation, which establish ICANN and govern its operation, require that ICANN "operate for the benefit of the Internet community as a whole."<sup>4</sup> And the day-to-day functions of ICANN are further governed by its Bylaws, which give content to this goal by specifying principles such as openness, transparency, non-discrimination, fairness, and accountability.<sup>5</sup> ICANN is bound to comply with these principles in all of its actions.

4. ICANN is a unique experiment, perhaps as unique as the Internet itself. ICANN is meant to function as an international regulatory authority, exercising plenary control over one of the world's most important resources, yet independent from any government or group of governments. Rarely, if ever, has a private organization wielded so much public power with no official government oversight. The trust that has been placed in ICANN is immense. Accordingly, ICANN's adherence to the principles set forth in its Articles and Bylaws is of critical importance. And indeed, ICANN frequently boasts of the unique public trust that has been placed with it and its corresponding responsibility to the global Internet community.<sup>6</sup> ICANN's President and CEO has described ICANN as "one of the most transparent

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<sup>3</sup> ICANN: The global Internet community working together to promote the stability and integrity of the Internet, available at <http://www.icann.org/tr/english.html> (last visited 22 Jan. 2009) ("About ICANN"), Cl. Exh. 3.

<sup>4</sup> Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, Art. 3 (21 Nov. 1998), available at <http://www.icann.org/en/general/articles.htm> ("Articles of Incorporation"), Cl. Exh. 4.

<sup>5</sup> Bylaws for Internet Corporation for Assigned Names and Numbers (29 May 2008), available at <http://www.icann.org/en/general/bylaws.htm#I> ("Bylaws"), Cl. Exh. 5. Because the Bylaws continued to be amended throughout the events giving rise to this proceeding, we cite to the most recent iteration of the Bylaws (29 May 2008), unless otherwise noted.

<sup>6</sup> See, e.g., Jacob Malthouse, Liaison, The Global Internet, Presentation to ICANN (1 Sept. 2006), available at [http://www.icann.org/presentations/icann\\_antigua\\_0906.ppt](http://www.icann.org/presentations/icann_antigua_0906.ppt), Cl. Exh. 6.



organizations in the world,”<sup>7</sup> and has spoken of the need to ensure that ICANN is on “the leading edge of transparency and accountability.”<sup>8</sup> Taking a backseat to no one, ICANN expects to be seen as an international model of independent governance, subject only to the checks and balances included in its Articles and Bylaws.

5. Yet despite the lofty rhetoric, ICANN’s administration of the 2004 round of applications for new sponsored top-level domains (“sTLDs”), and in particular the administration of the application submitted by ICM Registry, LLC (“ICM”) for the .XXX sTLD, was characterized by a lack of openness and transparency, blatant discrimination, and gross unfairness. ICANN showed itself all too willing to abandon its foundational principles when faced with improper political pressure. As a result, ICANN’s conduct toward ICM was secretive, shifting, unpredictable, unfair, discriminatory, and in bad faith.

6. In sum, following a lengthy notice and comment period, ICANN in 2004 established a finite set of criteria and a clear two-step procedure for approving or denying applications. After an extensive evaluation period, in which the ICANN Board itself intervened, ICANN concluded that ICM’s application **met the stated criteria**, and should therefore proceed to contract negotiations. But following the announcement of ICANN’s decision to negotiate a contract with ICM—and almost certainly in response to undue and improper political pressure from certain governmental quarters—ICANN reversed course. With registry agreement negotiations underway, ICANN ultimately reneged on the criteria and procedures it had established for approving applications; engaged in bad faith negotiations by continually changing the terms of the contract and issuing new demands for ICM to meet, as well as delaying (at times

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<sup>7</sup> Paul Twomey, ICANN’s Role in the Domain Name System, Address before INTA/IP Australia Conference 2008 (23 Mar. 2008), available at [http://www.icann.org/presentations/07Twomey\[1\].pdf](http://www.icann.org/presentations/07Twomey[1].pdf), Cl. Exh. 7.

<sup>8</sup> Techworld.com, *ICANN To Address Lack of Accountability* (26 June 2007), available at <http://www.techworld.com/networking/news/index.cfm?newsid=9279>, Cl. Exh. 8.

over the course of many months) its response to ICM's efforts to meet those demands; rejected ICM's proposed contract on improper grounds; revisited ICM's application and reversed its earlier decision approving it; and then provided false and pretextual reasons for rejecting it. ICANN's misconduct was focused only on ICM. All of the other applications for sTLDs were assessed according to the original criteria and procedures established by ICANN. No other application was rejected after having been approved for contract negotiations. Only ICANN's application was subjected to **two** Board votes (the first finding that it met the proposal criteria, the second finding it did not).

7. In its defense in this Independent Review Process, ICANN has continued its retreat from the principles established in its governing documents. Having sacrificed openness, transparency, fairness, and non-discrimination to political expedience, ICANN appears equally ready to abandon the principle of accountability. Based on the plain language of its Bylaws, ICANN has in the past heralded its Independent Review Process as the “the final method of accountability” for ICANN.<sup>9</sup> Yet faced with an actual Independent Review Process, ICANN now argues to this Panel that its determination in this case will be non-binding and advisory, and that the Independent Review Process is not an arbitration, but merely a deferential review of a decision of a Board, which should be questioned only upon an affirmative showing of bad faith. Even then, according to ICANN, its Board will be entirely free to disregard whatever “advice” the Panel offers.<sup>10</sup> ICANN claims for itself the mantle of an international organization, acting in conformity with relevant principles of international law,<sup>11</sup> and referring disputes to “an

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<sup>9</sup> *ICANN Internet Governance: Is It Working?*, Hearing Before the H. Subcommittee on Commerce, Trade, and Consumer Protection and Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce, 109<sup>th</sup> Cong. 19 (2006) (statement of Dr. Paul Twomey), Cl. Exh. 9.

<sup>10</sup> ICANN's Response to Request For Independent Review, paras. 19, 90 (8 Sept. 2008) (“ICANN Response”).

<sup>11</sup> Articles of Incorporation, Art. 4, Cl. Exh. 4.

international arbitration provider with an appreciation for and understanding of applicable international laws,”<sup>12</sup> but then categorically denies the application of such law when it is invoked to challenge its actions.<sup>13</sup>

8. The procedures established by ICANN to govern this Independent Review, including the Bylaws, the International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR”),<sup>14</sup> and the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process,<sup>15</sup> all clearly establish that this process should be a full review of ICANN’s decision, resulting in a final, binding opinion from the Panel. Unless the current process involves complete and meaningful review of the Board’s actions as they relate to the standards established in the Articles of Incorporation, Bylaws, and relevant international law, and unless the Panel’s determination is final and binding, ICANN will have created the **appearance** of accountability and transparency, without the reality; the form without the substance. Ultimately, this case will test whether the ICANN experiment in self-governance can work, or whether ICANN in fact represents the worst of both worlds: a private company wielding governmental powers, supposedly independent but secretly acting at the direction of governments, and without any accountability. In short, the case will test whether the public trust to which ICANN claims it is entitled has been dangerously misplaced.

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<sup>12</sup> *Internet Operations Oversight, Subcommittee on Communications of the Senate Committee of Commerce*, 108<sup>th</sup> Cong. (2003) (statement of Dr. Paul Twomey), Cl. Exh. 10.

<sup>13</sup> ICANN Response, note 1.

<sup>14</sup> ICDR, International Arbitration Rules of the International Centre for Dispute Resolution (1 Mar. 2008), available at <http://www.adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES> (“ICDR Rules”), Cl. Exh. 11.

<sup>15</sup> ICDR, Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process, available at <http://www.adr.org/sp.asp?id=32197> (last visited 22 Jan. 2009) (“Supplementary Procedures”), Cl. Exh. 12.

9. ICM initiated this Independent Review Process on 6 June 2008.<sup>16</sup> The dispute, as detailed below, arises out of the improper actions of ICANN during its (1) administration of the 2004 application process for new, sponsored top-level domains (“sTLD”); and (2) rejection in March 2007 of ICM’s application to serve as the registry operator for the .XXX sTLD. ICANN’s administration of the RFP and its rejection of ICM’s application were, *inter alia*, lacking in transparency, unfair, discriminatory, and arbitrary and capricious. ICANN materially violated its Articles of Incorporation and Bylaws, as well as relevant principles of international law and local law.

10. ICM’s facts and arguments are fully supported by documentary evidence and testimony from fact and expert witnesses. Specifically, ICM submits with this Memorial the following fact witness declarations:

- **Mr. Stuart Lawley**, dated 14 January 2009 (“**Lawley Witness Statement**”). Mr. Lawley is the Chairman and President of ICM, and was throughout the 2004 round of applications. Mr. Lawley was involved in the creation of the application to meet the criteria established by ICANN, and in the subsequent negotiations over the terms of the registry agreement. In his statement, Mr. Lawley discusses his interest in a sponsored TLD for responsible providers of online adult entertainment; how he selected qualified individuals to participate in ICM’s management team and to serve as advisors; and how, even before preparing the application, ICM conducted outreach to the adult-entertainment community, as well as to child safety and free speech advocates, to ensure that the proposed sTLD would truly serve their respective needs and concerns. . Mr. Lawley then describes how ICM’s application met all of the selection criteria; and ICM’s clear understanding that the ICANN Board had voted to affirm that the application satisfied those criteria. Mr. Lawley also testifies about ICM’s willingness to comply with ICANN’s request for changes to the terms of the registry agreement, even when such changes imposed burdens, that no other applicant or registry operator had ever been required to assume; and ICM’s reliance on the

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<sup>16</sup> Request for Independent Review Process by ICM Registry, LLC, 6 June 2008 (“ICM Request”). ICANN opposed the Request on 8 Sept. 2008. *See* ICANN Response.

process established by ICANN and the statements of ICANN executives about the process. Mr. Lawley also describes how the process was continually stalled by ICANN, and his awareness that ICANN's treatment of the application deviated from the established criteria and process as a result of ICANN's excessive deference to vague governmental input. Finally, Mr. Lawley describes the expenses incurred by ICM during the long pendency of the application.

- **Ms. J. Beckwith (“Becky”) Burr**, dated 15 January 2009 (“**Burr Witness Statement**”). Ms. Burr is currently a partner at the Washington, D.C. law firm of Wilmer, Cutler, Pickering, Hale and Dorr, LLP. In that capacity, she served as outside counsel for ICM during the 2004 round of applications, from the submission of the application through the negotiations for the registry agreement and ICANN's ultimate rejection of the agreement. In her statement, Ms. Burr discusses the Board's approval of ICM's application, and the subsequent negotiations for the registry agreement, including ICM's willingness to provide assurances and guarantees never required of other contracting parties. Ms. Burr then describes the response of the U.S. government to ICANN's decision, including what she was told about the government's threat not to allow the TLD to be added to the root; ICANN's attempt to disguise the influence of the United States by soliciting input from the Governmental Advisory Committee, and ICM's subsequent efforts to address the belated questions, meet with anyone who expressed concerns, and cooperate with ICANN to demonstrate the benefits of ICM's proposal. Ms. Burr is a veteran of the U.S. Federal Trade Commission and the National Telecommunications and Information Administration (“NTIA”) of the U.S. Department of Commerce. While at the NTIA, Ms. Burr played a key role in the development and implementation of policy on Internet governance, including the establishment of ICANN, specifically the review of the original ICANN Bylaws, including the provisions about the importance of accountability and transparency, as well as the negotiation and creation of the Memorandum of Understanding between ICANN and the Department of Commerce.
- **Dr. Elizabeth Williams**, dated 16 January 2009 (“**Williams Witness Statement**”). Dr. Williams is an international affairs specialist and management consultant, with clients that include global regulatory agencies, national governments, and others. Dr. Williams was selected by ICANN to serve as the Chair of a team of independent evaluators which assessed whether applications had satisfied the selection criteria related to sponsorship and community value. In her statement, Dr. Williams discusses the independent evaluators'

recommendations regarding the ICM application and the nine others submitted, and explains why the ICANN Board's subsequent treatment of the ICM application was both inconsistent with the selection criteria and process established in the RFP and discriminatory when compared to the treatment of other applications. Dr. Williams testifies that ICANN's rejection of ICM was a result of political pressure from various governments, and was not based on the established criteria used by the evaluators during their consideration of the applications. Dr. Williams has held a variety of positions with ICANN in the previous five years, and is currently a member of ICANN's Nominating Committee.

11. ICM also submits with this Memorial, and incorporates herein by reference, the following expert reports:

- **Dr. Milton Mueller**, dated 12 January 2009 (“**Mueller Expert Report**”). Dr. Mueller is a tenured professor at Syracuse University's School of Information Studies and a Professor on the Faculty of Technology, Policy and Management at the Technische Universiteit Delft, The Netherlands. He has extensive experience with ICANN and Internet governance-related issues, and is the author of numerous articles which have appeared in academic journals or as chapters in scholarly books, as well as an authoritative book on the history of the Internet and the formation of ICANN entitled *Ruling the Root: Internet Governance and the Taming of Cyberspace* (2004). Dr. Mueller's expert report explains how ICANN functions as an institution and, in particular, the circumscribed role of governments in ICANN's self-governance. Dr. Mueller then describes how the U.S. Government's surprising and untimely intervention “broke” the process that had been established by ICANN for the evaluation and approval of applications, leading to the unfair and discriminatory rejection of the ICM application because of political pressure. He then goes on to describe why the reasons given by ICANN's Board for its rejection of the .XXX registry application were arbitrary and discriminatory. Dr. Mueller also notes the importance of this IRP to ICANN's accountability and credibility.
- **Professor Jack Goldsmith**, dated 22 January 2009 (“**Goldsmith Expert Report**”). Professor Goldsmith is the Henry L. Shattuck Professor of Law at Harvard Law School. Previously, Professor Goldsmith served as United States Assistant Attorney General in the Office of Legal Counsel, as Special Counsel to the Department of Defense, and as a legal assistant to the Iran-U.S. Claims Tribunal. Professor Goldsmith's areas of expertise include public international law,

conflicts of law, and the law of the Internet. Professor Goldsmith is the author of numerous articles on these topics, and is the co-author of a number of books, including *Who Controls the Internet?: Illusions of a Borderless World* (2006) and *The Limits of International Law* (2005). Professor Goldsmith explains why both the ICANN Articles of Incorporation and choice of law analysis require the application of international law in these proceedings, what principles of international law are relevant, and the content of those principles. Professor Goldsmith then describes several ways in which ICANN's actions violated the applicable principles of international law.

12. Finally, ICM also submits herewith 218 exhibits in support of the facts presented herein.

## **II. ICANN AND THE INTERNET**

13. It would be difficult to overstate the importance of the Internet, or the extraordinary speed with which it has become both a principal means for global communication and a principal engine of global economic growth.<sup>17</sup> Indeed, the growth of the Internet has continued exponentially. During the period 2000-2008, the number of Internet users grew at a rate of 266% in Europe; 406% in Asia; 669% in Latin America and the Caribbean; 1031% in

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<sup>17</sup> The significance of the Internet has been widely celebrated. For instance, more than 10 years ago, in the landmark case of *Reno v. American Civil Liberties Union*, the United States Supreme Court recognized that “[t]he Internet is an international network of interconnected computers . . . ‘a unique and wholly new medium of worldwide human communication.’” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997) (quoting *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996) (three-judge panel) (“*ACLU v. Reno*”), Cl. Exh. 13. As the Court explained, the Internet “constitut[es] a unique medium—known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world.” *Id.* at 851. The Court recognized further that “cyberspace” contains “vast democratic fora” and that the “content on the Internet is as diverse as human thought” itself. *Id.* at 868, 870 (quoting *ACLU v. Reno*, 929 F. Supp. at 842). In *Reno*, the U.S. Supreme Court struck down two statutory provisions enacted by the U.S. Congress, which were intended to protect minors from “indecent” and “patently offensive” communications on the Internet. Although the Court recognized the “legitimacy and importance of the congressional goals of protecting children from harmful materials,” the Court concluded that the provisions impermissibly abridged the freedom of speech protected by the First Amendment of the U.S. Constitution. *Id.* at 849.

Africa; and 1177% in the Middle East.<sup>18</sup> By 2008, worldwide Internet usage was estimated at *nearly 1.5 billion people*.

14. Not surprisingly, as the number of people using the Internet has grown, so too has global commerce on the Internet. Thus, in 2000, global Internet commerce was estimated at about US\$ 433 billion (a 189% increase over 1999).<sup>19</sup> Although such estimates have become increasingly difficult to make given the astonishing range of business on the Internet (which extends from individuals in remote corners of the globe selling homemade products to the largest corporations), most recent estimates are well into the trillions of dollars.<sup>20</sup>

15. Yet while most of the world now knows about the Internet, ICANN remains a relatively obscure entity, known to very few of the Internet's nearly 1.5 billion users.<sup>21</sup> To understand ICANN's importance, how it came to wield its extraordinary power over the DNS, and why it is necessary that ICANN conduct its actions in strict accordance with the standards of transparency, fairness, non-discrimination and accountability as required by its own Articles of Incorporation and Bylaws, a brief overview of the Internet's history is warranted. That history also provides the foundational basis for understanding ICANN's governance structure and its unique status as an independent, international regulatory authority.

#### **A. Early History**

16. The Internet traces its origins to the 1960s. In 1965, researchers achieved a milestone when they used an ordinary telephone line to connect a computer at the Massachusetts

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<sup>18</sup> See, e.g., Internet World Stats, Usage and Population Statistics, *available at* <http://www.internetworldstats.com/stats.htm> (last visited 22 Jan. 2009) ("Internet World Stats"), Cl. Exh. 14.

<sup>19</sup> Worldwide B2B Internet Commerce to Reach \$8.5 Trillion in 2005, *available at* <http://www.highbeam.com/doc/1G1-77829585.html> (last visited 22 Jan. 2009), Cl. Exh. 15.

<sup>20</sup> Jason K. Levine, *Contesting the Incontestable: Reforming Trademark's Descriptive Mark Protection Scheme*, 41 GONZ. L. REV. 29, 63 (2005), Cl. Exh. 16.

<sup>21</sup> Internet World Stats, Cl. Exh. 14.



Institute of Technology (“MIT”) with another in California.<sup>22</sup> This allowed the two computers (and the researchers using them) to share programs and data across a substantial distance (literally, from one coast of the United States to the other).

17. It was not long before the U.S. Department of Defense recognized the military and national security potential in this type of communication network. The Department of Defense, through its Advanced Research Project Agency, or “ARPA,” provided the funding to create an experimental network called the “ARPANET.”<sup>23</sup> The ARPANET connected research scientists in university, military, and industry sites. In 1972, researchers using the ARPANET developed the first email program, which, for the first time ever, enabled computers to be used for long-distance person-to-person communication.<sup>24</sup>

18. Following the creation of the ARPANET, computer networks began “springing up wherever researchers could find someone to pay for them.”<sup>25</sup> The U.S. National Aeronautics and Space Administration—or NASA—established a network. The U.S. Department of Energy set up two. And the National Science Foundation provided the seed money for yet another.<sup>26</sup>

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<sup>22</sup> Reece Roman, *What if ICANN Can't?: Can the United Nations Really Save the Internet?*, 15 SYRACUSE SCI. & TECH. L. REP. 27 (2005) (“Roman”), Cl. Exh. 17.

<sup>23</sup> *Id.* at 1; *see also* Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L. J. 187, 192 (2000) (“Weinberg”), Cl. Exh. 18; MILTON L. MUELLER, *RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE* 74 (2002) (“RULING THE ROOT”), Cl. Exh. 19.

<sup>24</sup> Weinberg at 192, Cl. Exh. 18. The ARPANET, however, was not the Internet. As Professor Mueller explains in his book, *Ruling The Root: Internet Governance and the Taming of Cyberspace*:

The ARPANET was difficult to use and connected at most about 200 people at 21 nodes. The project did, however, bring together the *people* who played a continuous role in the Internet’s technical development and its governance for the next 30 years. ARPANET created the nucleus of an Internet technical community.

RULING THE ROOT at 74 (emphasis in original), Cl. Exh. 19.

<sup>25</sup> Weinberg at 193, Cl. Exh. 18.

<sup>26</sup> *Id.*

“In each case, far-flung researchers were able to use the network to communicate and share their work via e-mail.”<sup>27</sup>

19. As of the early 1970’s, computers within a given network had the capability to communicate with each another. Yet each network worked in isolation; a computer in one network could not communicate with a computer in another. Each of the networks used different, incompatible “protocols” for communication.<sup>28</sup>

20. Beginning in 1973, researchers at MIT, Stanford University, and University College London, worked to develop a “universal host protocol” to enable the separate networks to communicate with one another.<sup>29</sup> But it was not until September 1981 that they were able to present a finalized set of software protocols to the United States Department of Defense, the funders of the research.<sup>30</sup> Their new software protocol enabled the various existing networks to communicate among themselves, and with new networks as they came into existence.<sup>31</sup>

21. This “network of networks” included the local networks of several American universities, research organizations, and a few commercial carriers, as well as radio networks, satellite networks, and other ARPA-supported networks. It also included several non-U.S. entities, such as the British Post Office, the French Cyclades network, University College

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<sup>27</sup> *Id.*

<sup>28</sup> RULING THE ROOT at 75, Cl. Exh. 19.

<sup>29</sup> *Id.* at 76.

<sup>30</sup> Jon Postel, Request for Comments (RFC) 790: Assigned Numbers, Sept. 1981, *available at* <http://tools.ietf.org/rfc/rfc790.txt>, Cl. Exh. 20; Jon Postel, Request for Comments (RFC) 791: Internet Protocol, DARPA Internet Program Protocol Specification, Sept. 1981, *available at* <http://www.rfc-editor.org/rfc/rfc791.txt>, Cl. Exh. 21.

<sup>31</sup> RULING THE ROOT at 76, Cl. Exh. 19.

London, and the British Royal Signals and Radar Establishments.<sup>32</sup> Thus, from its very beginnings, the Internet (as it became known) was an *international* network.

## **B. Internet Addresses and the Invention of the Domain Name System**

22. In the early days of networks, the Internet address system by which one computer communicated with another was at once remarkably simple and remarkably cumbersome. To communicate on the Internet, a computer has to have a unique 32-digit number called an Internet Protocol (“IP”) address, so that it can transmit information to, and receive information from, other computers on the network.<sup>33</sup> To supplement these numerical, “computer-readable” addresses, computers can also be given more user-friendly, “human-readable” names, which typically consist of fewer numerical and/or other characters.<sup>34</sup>

23. Before the advent of the Domain Name System, all of the addresses—both the 32-digit numbers and the more user-friendly names associated with the each number—were placed on one master “host file,” which was maintained by the Stanford Research Institute<sup>35</sup> pursuant to a contract with the Department of Defense.<sup>36</sup> Each computer on the network had to have a copy of the host file in order to communicate with the other computers on the network. Thus, every time a new computer was added to the network, the host file had to be revised to include the new computer, and all of the computers on the network had to download the entire revised host file.<sup>37</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> Roman at 2, Cl. Exh. 17.

<sup>34</sup> *Id.*

<sup>35</sup> Stanford Research Institute, now known as SRI International, is a not-for-profit research institute. Originally part of Stanford University, it formally separated from the University in 1970.

<sup>36</sup> DAVID LINDSAY, INTERNATIONAL DOMAIN NAME LAW: ICANN AND THE UDRP § 1.4 (2007) (“LINDSAY”), Cl. Exh. 22.

<sup>37</sup> *Id.* at § 1.7.

As the network grew and more computers were added, its operation was increasingly affected by errors and slow machine speeds caused by the continual need to download the host file.<sup>38</sup>

24. In the mid-1980's, a group of researchers resolved these issues by creating the Domain Name System (previously defined as "DNS"). The DNS is a hierarchical name system that eliminates the need for each computer to download and store every other computer's human-readable name and corresponding computer-readable IP address.<sup>39</sup> The DNS database is distributed and formulated so that "any computer on the Internet can find the information it needs to map any name to its correct IP address."<sup>40</sup>

25. The DNS breaks down the "name space" into a hierarchy. The structure is often described as resembling an "upside-down tree," in that the so-called "root" is at the top. The "root," in essence, consists of: (1) the "root zone file;" and (2) the "root name servers."<sup>41</sup> The root zone file is the list of top-level domains ("TLDs"), with pointers to name servers for each TLD. The root name servers, the operational aspect of the root, are specialized computers that provide the connection between two or more physical networks.<sup>42</sup>

26. Under the root are the TLDs. TLDs appear in the human-readable addresses, or domain names, as the string of letters—such as ".COM," ".GOV," ".EDU," and so on—

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<sup>38</sup> *Id.* at § 1.4.

<sup>39</sup> As Professor Mueller has explained:

Although its implementation is complex, the concept behind [the DNS] is simple. The name space was divided into a hierarchy. The responsibility for assigning unique names, and for maintaining databases capable of mapping the names to specific IP addresses, was distributed down the levels of the hierarchy. The DNS is just a database—a protocol for storing and retrieving information that has been formatted in a specific way.

RULING THE ROOT at 41, Cl. Exh. 19.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 47.

<sup>42</sup> *Id.*; *see also* LINDSAY, §§ 1.16-1.17, Cl. Exh. 22.

following the rightmost “dot” in an Internet address.<sup>43</sup> Under the TLDs are the second-level domains (“2LDs”), such as “microsoft” (in microsoft.com), or “harvard” (in harvard.edu).<sup>44</sup> Connections between each level within the DNS structure are typically represented by a single dot (“.”).

27. There are several different types of TLDs: country code TLDs (“ccTLDs”), which “are two-letter codes (such as .de, .jp, and .uk) [that] are used to represent the names of countries and territories,”<sup>45</sup> generic TLDs (“gTLDs”), and “one special TLD, .ARPA, which is used for technical infrastructure purposes.”<sup>46</sup> Generic TLDs are further subdivided into sponsored TLDs (“sTLDs”) and unsponsored TLDs (sometimes referred to as “uTLDs,” but most often referred to as simply “gTLDs”).<sup>47</sup> According to ICANN, the major difference between sTLDs and gTLDs is:

Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated

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<sup>43</sup> The current TLDs and their registries are .AERO, operated by SITA Information Networking Computing BV; .ASIA, operated by DotAsia Organisation; .BIZ, operated by NeuLevel, Inc.; .CAT, operated by Fundació puntCat; .COM, operated by VeriSign, Inc.; .COOP, operated by DotCooperation LLC; .INFO, operated by Afilias Ltd.; .JOBS, operated by Employ Media LLC; .MOBI, operated by Mobile Top Level Domain Ltd.; .MUSEUM, operated by Museum Domain Management Association; .NAME, operated by VeriSign; .NET, operated by VeriSign, Inc.; .ORG, operated by Public Interest Registry; .PRO, operated by RegistryPro Ltd.; .TEL, operated by Telnic Ltd; and .TRAVEL, operated by Tralliance Corporation.

<sup>44</sup> The levels in the hierarchy below the root can also be referred to as parents and children, the parent being closer to the root than the child.

<sup>45</sup> ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains (13 June 2000), available at <http://www.icann.org/en/meetings/yokohama/new-tld-topic.htm> (“ICANN Yokohama Meeting”), Cl. Exh. 23.

<sup>46</sup> ICANN, Top-Level Domains (gTLDs), available at <http://www.icann.org/tlds/> (last visited 22 Jan. 2009), Cl. Exh. 24.

<sup>47</sup> *Id.* For the sake of consistency, this document will use the common practice of referring to unsponsored TLDs as “gTLDs.”

policy-formulation responsibilities over many matters concerning the TLD.<sup>48</sup>

28. The levels of the DNS, and examples of each type of TLD, can be simplistically depicted as follows:

<b>ROOT</b>	
<b>TOP-LEVEL DOMAINS</b>	gTLDs: .com; .net; .info sTLDs: .aero; .coop; .museum ccTLDs: .de (Germany); .fr (France); .es (Spain)
<b>SECOND LEVEL DOMAINS</b>	Microsoft.com; Crowell.com; JonesDay.com bai.aero; thenews.coop; americanart.museum amazon.de; dassault.fr; casareal.es

29. When a computer is trying to locate another computer on the Internet, it queries a root name server, which directs the computer to the name server for the proper TLD; the name server for each TLD maintains the list of authoritative name servers for the 2LDs registered in the TLD. Thus, the TLD name server, in turn, directs the computer to the name server for the proper 2LD, and so forth down the hierarchy.<sup>49</sup> Instead of each computer needing to have the full list of addresses for every other computer, each computer needs only the address of an official root name server.<sup>50</sup>

30. The main purpose of the DNS is to decentralize the administration of naming and addressing on the Internet. The root, however, remains an essential point of centralization: because the root is the authoritative list of all official TLDs, whoever controls the root also

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<sup>48</sup> *Id.*

<sup>49</sup> Scott P. Sonbuchner, *Master of Your Domain: Should the U.S. Government Maintain Control over the Internet's Root?*, 17 MINN. J. INT'L L. 183, 185-86 (Winter 2008) ("Sonbuchner"), Cl. Exh. 25.

<sup>50</sup> RULING THE ROOT at 47, Cl. Exh. 19. There are currently 13 root name servers in the system. The so-called "A" root name server maintains the original root zone file; all of the others maintain copies. Although the root needs the physical root name servers to operate, as Professor Mueller explains, the real significance of the root lies in the *content* of the "root zone file" – which is the list of top-level domain name assignments, with pointers to primary and secondary name servers for each top-level domain. *Id.*

controls the administration of TLDs and ultimately determines which TLDs will be added or removed.<sup>51</sup> Professor Mueller has explained the importance of the root:

The root is the point of centralization in the Internet's otherwise thoroughly decentralized architecture. The root stands at the top of the hierarchical distribution of responsibility that makes the Internet work. It is the beginning point in a long chain of contracts and cooperation governing how Internet service providers and end users acquire and utilize the addresses and names that make it possible for data packets to find their destinations.<sup>52</sup>

31. Because of the hierarchical arrangement of the DNS, responsibility for assigning and managing names at the various levels under the root can be delegated to different entities. The manager of the root (presently ICANN) delegates authority to the operators of the TLDs, known as the "registry operators," or "registries." Each registry then controls which 2LDs are registered in the domain it operates, and who will distribute the names within those 2LDs. The entity distributing the 2LD is known as a "registrar." Thus, the registry operator sells 2LDs to registrars and maintains the authoritative list of those 2LDs; the registrars in turn sell the domain names to end users.<sup>53</sup> The hierarchy continues down the line in the same fashion.<sup>54</sup>

32. As Professor Mueller explains, the "DNS name space provides a virtually inexhaustible supply of unique addresses:"

A domain name label (the string of text identifying a specific level of the hierarchy) can be up to 63 characters long. With 37 different characters available to use, the number of possible names is close to 37—an inconceivably large number. Multiply that times the 127 levels of hierarchy possible under DNS and the vastness of the name space is evident.<sup>55</sup>

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<sup>51</sup> LINDSAY § 1.8, Cl. Exh. 22.

<sup>52</sup> RULING THE ROOT at 6, Cl. Exh. 19.

<sup>53</sup> Sonbuchner at 185-86, Cl. Exh. 25.

<sup>54</sup> RULING THE ROOT at 42, Cl. Exh. 19.

<sup>55</sup> *Id.* (internal citations omitted).

The gateway to that infinite universe of DNS names is located at the top of the hierarchy—the “authoritative root” or the “A root.” The authoritative root is the one place in the Internet where any centralized control can be exercised. It has been described as “a unique Internet chokepoint.”<sup>56</sup> The authority that controls the root therefore wields enormous power, as it controls the delegation of top-level domains, which then affects all the lower layers of the hierarchy. As discussed in greater detail below, ICANN effectively became that authority in 1998, and has remained in that position ever since.

### **C. The Growth of the Internet in the 1990s**

33. Although the U.S. Department of Defense provided most of the funding for the development of the Internet in the late 1960s through the much of the 1990s, Internet “governance” was informal and decentralized during that time period.<sup>57</sup> To a remarkable degree, the Internet was run by the academics, government researchers and other scientists who actually used it. Among these users, there was a general consensus to defer to the persons who, since the creation of the ARPANET, had developed the Internet and had effectively governed it since then—the persons, who, in the words of Professor Mueller, comprised the “nucleus of [the] Internet technical community.”<sup>58</sup> Among the leaders of that group was Dr. Jon Postel.

34. In 1997, Postel had been, “for as long as anyone could remember, the ultimate authority for assignment of the all-important Internet Protocol (IP) numbers that are the essential feature of Internet membership.”<sup>59</sup> Postel also headed the Internet Assigned Numbers Authority

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<sup>56</sup> A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 21 (2000) (“Froomkin”), Cl. Exh. 26.

<sup>57</sup> *Id.* at 54-57.

<sup>58</sup> RULING THE ROOT at 74, Cl. Exh. 19.

<sup>59</sup> JACK GOLDSMITH AND TIM WU, WHO CONTROLS THE INTERNET? 29 (2006) (“GOLDSMITH & WU”), Cl. Exh. 27. In 1984, Postel had proposed several of the first “general purpose” TLDs (which,

(continued...)



(“IANA”), which was essentially an informal collection of functions undertaken largely (if not exclusively) by Postel himself, under the auspices of Postel’s employer, the Information Sciences Institute at the University of Southern California. IANA had responsibility for IP address and protocol assignments under the new DNS system pursuant to a contract with the U.S. Department of Defense.<sup>60</sup> In a very general sense, IANA was the predecessor to ICANN, at least in terms of the basic responsibilities that IANA exercised over the assignment of names and numbers in the root. ICANN would ultimately take over these responsibilities from IANA.

35. In the early 1990s the character of the Internet began to change. The Internet was no longer limited to research and education. Several events led to that change, which in turn would have a dramatic impact on Internet governance.

36. Through the 1980s, the U.S. Department of Defense had funded the registration of domain names under the various TLDs then in place. At the end of 1990, however, the Department of Defense asked that civilian agencies pay to support nonmilitary registration activity.<sup>61</sup> The responsibility fell to the National Science Foundation, which ultimately awarded a contract to a firm called Network Solutions, Inc. to perform the work.<sup>62</sup> Network Solutions became the sole registry for the main nonmilitary domains (which by then included .COM, .EDU, .GOV, .ORG, and .NET). For the first time, administration of part of the Internet’s

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(continued ...)

when published later that year, included .COM, .EDU, .GOV, .MIL, and .ORG). LINDSAY at § 1.10, Cl. Exh. 22.

<sup>60</sup> According to Professors Goldsmith and Wu, the 1988 contract (with Postel’s employer, UCS’s Information Sciences Institute) gave “Postel the authority to continue doing what he had been doing for more than a decade: running the Internet’s naming and numbering system. It was common at this time to refer to Postel as ‘the’ naming and numbering system.” GOLDSMITH & WU at 34, Cl. Exh. 27.

<sup>61</sup> RULING THE ROOT at 100, Cl. Exh. 19.

<sup>62</sup> GOLDSMITH & WU at 35, Cl. Exh. 27.

naming system was in the hands of a for-profit company.<sup>63</sup> Nonetheless, Dr. Postel retained the power to decide the number and content of the top-level domains—at least in the short term.<sup>64</sup>

37. Another major development was the emergence of the World Wide Web between 1990 and 1995.<sup>65</sup> Combined with the advent of Internet “browsers” in 1994, the Internet quickly became an easy place for millions of ordinary users—as well as consumers and businesses—to navigate.<sup>66</sup>

38. In 1995, the National Science Foundation allowed Network Solutions to charge registration fees for domain name registrations in .COM, .NET, and .ORG. The ability to charge fees (US\$ 100 for an initial two-year period, and US\$ 50 per year thereafter) coincided with a surge in demand for domain name registrations. By the end of 1996, Network Solutions was receiving 75,000 to 85,000 registrations per month.<sup>67</sup> In 1997, Network Solutions’ initial public offering generated a market value of US\$ 350 million.<sup>68</sup> Three years later, in 2000, the company VeriSign, Inc. would purchase Network Solutions **for US\$ 20 billion**, in what was then the largest Internet acquisition in history.<sup>69</sup> The new, burgeoning Internet economy now included the business of registering and managing domain names.

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*; see also RULING THE ROOT at 100-101, Cl. Exh. 19.

<sup>65</sup> The World Wide Web is a “client-server software application that made the Internet easier to navigate and more fun to use by linking and displaying documents . . . by means of a graphical user interface.” RULING THE ROOT at 107, Cl. Exh. 19.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 114.

<sup>68</sup> *Network Solutions Nets Strong Trade*, CNET NEWS (26 Sept. 1997), available at <http://news.cnet.com/2100-1001-203626.html>, Cl. Exh 28.

<sup>69</sup> See Network Solutions Timeline, available at <http://about.networksolutions.com/site/network-solutions-is-a-remarkable-company/> (last visited 22 Jan. 2009), Cl. Exh. 29.

#### **D. The Battle To Control the Root**

39. As the Internet moved from being the near-exclusive province of a relatively small number of academics, scientists, and researchers to a powerful vehicle for global communication and business, a struggle for control over the Internet naturally followed. Professors Goldsmith and Wu have described the conflict as follows:

As private firms like Network Solutions began to enter the picture, some of the [Internet's] founders decided it was time to make their operational authority over the Internet more concrete. The immediate impetus was fighting the power of Network Solutions by providing alternatives. But there was much more at stake. In the early 1990s the founders undertook a course of action that would have formalized the control of Internet policy that they already assumed they had. But the plan led to direct conflict with the U.S. government, which assumed it had the final authority over Internet policy.<sup>70</sup>

40. An early leader of the founders' efforts was Dr. Vinton Cerf, another "father" of the Internet.<sup>71</sup> In January 1992, Dr. Cerf founded the Internet Society. The Internet Society (also known as "ISOC") was "an attempt to self-privatize Internet governance."<sup>72</sup> The Internet Society "was populated almost exclusively by Internet founders."<sup>73</sup> It was "designed to provide a governing structure, institutional home, and source of funding independent from the U.S. Defense Department and, more generally, the U.S. government."<sup>74</sup> The Internet Society also intended to assume, eventually, the authority over the top-level names and numbering that for years had been exercised by Jon Postel.

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<sup>70</sup> GOLDSMITH & WU at 36, Cl. Exh. 27.

<sup>71</sup> "Cerf was already famous by the 1980s as the co-designer of the . . . Internet network protocol" and "was also a close friend of Jon Postel." *Id.*

<sup>72</sup> RULING THE ROOT at 95-96, Cl. Exh. 19.

<sup>73</sup> GOLDSMITH & WU at 37, Cl. Exh. 27.

<sup>74</sup> *Id.*

41. The Internet Society’s “aspirations did not go unnoticed.”<sup>75</sup> In March 1995, Robert Aiken, an engineer working at the U.S. Department of Energy, wrote an email message to the Internet Society that put the question bluntly:

I would like a straightforward answer from the ISOC. Is ISOC claiming that it has jurisdiction and overall responsibility for the [Internet] top level address and name space—as some (see below) believe it does? If yes—how did ISOC obtain this responsibility”, —if NO then who does own it?<sup>76</sup>

In a response on behalf of the Internet Society, Dr. Cerf acknowledged the historical role that the U.S. government had played in the Internet, but also asserted that the growing importance of the Internet as a global resource demanded a governance structure unconnected to any national government: “It was recognized by many in the 1990s that the Internet had outgrown its original scope and had become an international phenomenon.”<sup>77</sup> He concluded: “My bias is to try to treat all of this as a global matter and to settle the responsibility on the Internet Society as a non-governmental agent serving the community.”<sup>78</sup>

42. In 1997, the Internet Society named an “International Ad Hoc Committee” to establish the structure for a naming and numbering authority that ISOC planned to create.<sup>79</sup> The Committee developed a plan that came to be known as the “Generic Top-Level Domain Memorandum of Understanding,” or “gTLD-MoU.”<sup>80</sup> The “spirit of the gTLD-MoU was to

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<sup>75</sup> *Id.*

<sup>76</sup> *See id.*

<sup>77</sup> *Id.* at 38.

<sup>78</sup> *See id.* at 37-38.

<sup>79</sup> *Id.* at 38.

<sup>80</sup> *Id.* at 38.

eliminate the Network Solutions monopoly and also create a general independence from the United States government.”<sup>81</sup>

43. The plan proposed to put much of the authority over Internet policy in the hands “of an organization named CORE (International Council of Registrars), a Swiss corporation, itself mainly under the control of the Internet Society.”<sup>82</sup> The International Telecommunications Union, an agency of the United Nations, “volunteered to serve as the official repository of the gTLD-MoU, lending a certain intergovernmental credibility.”<sup>83</sup>

44. At the same time, however, the growing reach and potential of the Internet—and the critical importance of the domain name space—had not escaped the notice of the U.S. government. Although the U.S. government “had long acted as an absentee custodian,” its interest in the Internet was significantly renewed in the mid to late 1990s.<sup>84</sup> In March 1997, Ira Magaziner, an influential policy advisor to President Bill Clinton, joined the Interagency Working Group on domain names.<sup>85</sup> “The Interagency Working Group was chaired by Brian Kahin of the White House Office of Science and Technology Policy. Kahin’s eventual co-chair was J. Beckwith Burr,” a lawyer who later became the Associate Administrator and Director of International Affairs at the U.S. Commerce Department’s National Telecommunications and Information and Administration (“NTIA”). The NTIA became the lead agency for U.S. policy

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 38-39.

<sup>83</sup> *Id.* at 39.

<sup>84</sup> GOLDSMITH & WU at 32 (“From the 1970s through much of the 1990s, the U.S. government was passive, happy to let the engineers do their thing.”), Cl. Exh. 27.

<sup>85</sup> RULING THE ROOT at 156 (“Magaziner headed an Interagency Task Force created in December 1995 to develop policy on Global Electronic Commerce on the Internet.”), Cl. Exh. 19.

intervention in Internet governance and regulation matters.<sup>86</sup> On 2 May 1997, the U.S. press reported that the Interagency Working Group would not support the gTLD-MoU.<sup>87</sup> Rather, the U.S. government would initiate a process to determine how the domain name space should be managed, with the involvement of the community of scientists, researchers, and academics engaged in the Internet Society.<sup>88</sup>

#### **E. The Green Paper, the White Paper, and the Birth of ICANN**

45. On 28 January 1998, the U.S. Department of Commerce published a Notice of Proposed Rulemaking, referred to in Internet governance circles as the Green Paper.<sup>89</sup> According to Professor Mueller,

In the Green Paper, the U.S. government asserted its authority over the name and address root but also indicated its intention to relinquish that authority in a way that involved Internet stakeholders internationally.<sup>90</sup>

The Green Paper called for the U.S. government gradually to transfer management of the Internet DNS to a new “private not-for-profit corporation (the new corporation)”<sup>91</sup> which people began to refer to as “NewCo.” The Department of Commerce was to participate in a “policy oversight” role to ensure that the transition occurred smoothly.<sup>92</sup> NewCo was to be incorporated under U.S. law but was to have a Board of Directors that was representative of the diverse stakeholders in

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<sup>86</sup> *Id.* As stated above, Ms. Burr would later return to private practice, where she represented ICM in its dealings with ICANN. She is a witness for ICM in these proceedings. *See generally* Burr Witness Statement.

<sup>87</sup> *Id.* at 157.

<sup>88</sup> *See id.* at 161; GOLDSMITH & WU at 42-43, Cl. Exh. 27.

<sup>89</sup> A Proposal to Improve Technical Management of Internet Names and Addresses, Discussion Draft, 63 Fed. Reg. 34, 8825 (30 Jan. 1998), *available at* <http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm> (“Green Paper”), Cl. Exh. 30.

<sup>90</sup> RULING THE ROOT at 160, Cl. Exh. 19.

<sup>91</sup> Green Paper, Cl. Exh. 30.

<sup>92</sup> *Id.*

the DNS. The Green Paper also provided for increased competition, starting with the introduction of up to five new gTLDs, which were to be managed by five new registries. Although the Green Paper envisioned that IANA would be given authority to establish the criteria for these five gTLDs, “[o]nce the new corporation [wa]s formed, it w[ould] assume authority over the terms and conditions for the admission of new top-level domains.”<sup>93</sup> NewCo’s policy for determining how to add new TLDs would have to be “based on objective criteria.”<sup>94</sup>

46. Notwithstanding the U.S. government’s asserted intention to involve stakeholders internationally, the international community responded harshly to the proscriptive elements of the Green Paper. The European Commission protested that “[t]he U.S. Green paper proposals appear not to recognise the need to implement an international approach. The current U.S. proposals could, in the name of the globalization and privatization of the Internet, consolidate permanent U.S. jurisdiction over the Internet as a whole . . . .”<sup>95</sup> Both European and Asian interests urged the U.S. government to defer all decisions “so that a new, internationally representative organization could make them.”<sup>96</sup>

47. On 3 June 1998, the U.S. government released its final plan, known as the White Paper, which both responded to comments made about the Green Paper and provided the U.S. government’s revised privatization plan.<sup>97</sup> The White Paper emphasized the international character of the entity that would oversee the domain name space, and downplayed the importance of the U.S. government, in part by transferring more of the important policy

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> RULING THE ROOT at 165-68 (quoting Council of the European Union, European Commission: “Internet Governance: Reply of the European Commission and Its Member States to the U.S. Green Paper” (16 March 1998)).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 173-174.

decisions to the new corporation, rather than the U.S. government (while, in response to Congressional concerns, still insisting that the entity be located in the United States).<sup>98</sup> As stated by Professor Mueller in his Expert Report, the U.S. government “adopted a strategy of *internationalization through privatization.*”<sup>99</sup>

48. The most important substantive recommendations of the White Paper were:

- The four principles guiding management and oversight of the DNS would be the same as those set forth in the Green Paper: **stability; private, bottom-up coordination; representation; and competition;**<sup>100</sup>
- Establishment of a new, private, non-profit corporation, based in the United States, to manage and coordinate the DNS. The White Paper anticipated the need for an interim or initial Board of Directors to expeditiously establish a system of electing the Board of Directors and to complete NewCo’s organization in accordance with the White Paper principles;<sup>101</sup>
- **National governments and international organizations acting as representatives should not participate in the management of Internet names and addresses;**<sup>102</sup>
- The introduction of competition through the creation of new TLDs, with the qualifications for domain name registries and registrars to be determined by the new corporation rather than the Department of Commerce;<sup>103</sup>
- The U.S. government’s commitment to undertake a review of the root server system to recommend ways to increase the security and management of the system; these recommendations were to be implemented as part of the DNS

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<sup>98</sup> United States Dept. of Commerce, Management of Internet Names and Addresses: Statement of Policy, 60 Fed. Reg. 111, 31741 (5 June 1998), available at <http://www.icann.org/en/general/white-paper-05jun98.htm> (“White Paper”), Cl. Exh. 31.

<sup>99</sup> Mueller Expert Report at 7 (emphasis added).

<sup>100</sup> White Paper, Cl. Exh. 31.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (emphasis added).

<sup>103</sup> *Id.*



transition process and the new corporation was to develop a comprehensive security strategy for DNS management.<sup>104</sup>

Additionally, the White Paper specifically affirmed that its principles were “not intended to displace other legal regimes,” including, *inter alia*, “**international law**,” and also noted the importance of international input, as the technical management of the Internet needed to “fully reflect the global diversity of Internet users.”<sup>105</sup> It further provided that the organizing documents for NewCo should ensure that it would be “governed on the basis of a sound and transparent decision-making process, which protects against capture by a self-interested faction,” and that NewCo’s “processes should be fair, open and pro-competitive.”<sup>106</sup>

49. The descriptions of NewCo in the Green and White Papers provided the basis for the formation of ICANN, as described in detail below. In accordance with the principles and policies in the Green and White Papers, ICANN was established to be a private, international standard-setting body, operated on the basis of transparent, open, fair, and non-discriminatory decision-making processes. These principles have thus been the cornerstone of ICANN since its foundation, and must provide the starting point for any evaluation of ICANN’s actions.

50. Following the publication of the White Paper, a series of international negotiations and consultations to further determine the nature and structure of NewCo were held among the U.S. government, a variety of foreign governments, Jon Postel, and representatives of the private sector, including Network Solutions and IBM.<sup>107</sup> Postel’s influence was considerable. Postel and his lawyer prepared many of the initial documents (including the initial draft articles of corporation and bylaws) for an organization to be called the Internet Corporation

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (emphasis added).

<sup>106</sup> *Id.*

<sup>107</sup> RULING THE ROOT at 175-84, Cl. Exh. 19; *see also* Weinberg at 209, Cl. Exh. 18.

for Assigned Names and Numbers (previously defined as “ICANN”). Indeed, at least initially, “ICANN was organized as a California nonprofit because Postel, who was slated to become the new organization’s chief technologist, wished to remain in California. ICANN’s headquarters are located in Marina del Ray because that is where Postel worked.”<sup>108</sup> ICANN’s founding documents continued to be negotiated and revised after Postel’s unexpected death in October 1998, but the basic characteristics of the organization had already been established.

51. On 25 November 1998, the Commerce Department and ICANN entered into a Memorandum of Understanding (“MOU”), which described itself as a transitional document.<sup>109</sup> The Memorandum stated that “[b]efore making a transition to private sector DNS management, the [Department of Commerce] requires assurances that the private sector has the capability and resources to assume the important responsibilities related to the technical management of the DNS.”<sup>110</sup> The MOU provided a list of tasks related to the development of policies and procedures to coordinate the domain name system that ICANN was supposed to perform, and set specific priorities and milestones for ICANN.<sup>111</sup> On 26 February 1999 the Commerce Department officially recognized ICANN as the private sector, not-for-profit entity contemplated by the White Paper.<sup>112</sup>

#### **F. The Commerce Department’s “Oversight” of ICANN and the Internet**

52. The U.S. government’s stated policy was to create a private, international body, with minimal governmental oversight, operated on the basis of bottom-up, consensus-based

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<sup>108</sup> Mueller Expert Report at 9-10.

<sup>109</sup> Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 November 1998), *available at* <http://www.icann.org/en/general/icann-mou-25nov98.htm> (“MOU”), Cl. Exh. 32.

<sup>110</sup> *Id.* at 1.

<sup>111</sup> *Id.* at 4-6.

<sup>112</sup> RULING THE ROOT at 184, Cl. Exh. 19.

decision-making processes, located in the United States. The policy was meant to strike a compromise among (1) the Internet’s founders, who wanted a nongovernmental, self-regulatory body entirely outside the control (and even the territory) of the United States; (2) the international community, which wanted the Internet to be controlled on an international basis; and (3) the U.S. government, which, in principal, supported the notion of a private, international entity—but which also wanted to retain some degree of oversight of the root.

53. Oversight of the root was critical to the United States. From October 1998 through the present, the U.S. Department of Commerce has continuously asserted authority over any modifications to the DNS root zone file (*i.e.*, the list of top-level domain name assignments, with pointers to primary and secondary name servers for each top-level domain).<sup>113</sup> According to the U.S. government, it serves a “stewardship” role with respect to the root, to ensure stability, security, and free market competition. It has never been meant to be content-driven in any respect.<sup>114</sup> The U.S. government has insisted on retaining “its authority over changes to the root in order to facilitate the creation of ICANN and a more competitive market for domain name registries and registrars. The main rationale for control of the DNS root zone file changes was to make the root administrator [*i.e.*, ICANN] a neutral and open facilitator of Internet coordination.”<sup>115</sup>

54. As described by Professors Goldsmith and Wu, the Interagency Working Group chaired by Brian Kahin and J. Beckwith Burr “did not believe that the kind of stability that the

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<sup>113</sup> Mueller Expert Report at 11.

<sup>114</sup> Mueller Expert Report at 51. As Professor Mueller states, “[c]ontent regulation is not within ICANN’s limited policy authority.” Nor could it have been, consistent with the requirements of the First Amendment of the U.S. Constitution. *See Reno v. American Civil Liberties Union*, 521 U.S. at 844, Cl. Exh. 17.

<sup>115</sup> Mueller Expert Report at 13.

U.S. government provided could be replicated by an uncertain and vague new governance structure” outside the United States:

Most importantly, they feared that unless the U.S. government asserted its authority over the Net, it might fall prey to overregulation. That may sound like a paradox—government action to prevent government action. But the involvement of the United Nations-affiliated International Telecommunications Union, an agency with a broad intergovernmental membership, led the group to fear that the Geneva process might lead to European or other countries using naming and numbering power to impose new and more invasive global controls on the Internet.<sup>116</sup>

Thus, in the view of the U.S. government, its oversight of ICANN and the Internet was intended to ensure the minimum of interference from *any* government, including the U.S. government itself.

55. In addition to the U.S. government’s asserted authority over the DNS root zone file, the U.S. Department of Commerce is also party to three agreements—the Memorandum of Understanding/Joint Project Agreement, the IANA Contracts, and the VeriSign Cooperative Agreement—by which it exercises oversight over ICANN and the root. As discussed in Professor Mueller’s Expert Report, a review of these agreements demonstrate that “U.S. oversight [of ICANN] is supposed to have a very limited function.”<sup>117</sup>

### **1. The Memorandum of Understanding/Joint Project Agreement**

56. As stated above, the Department of Commerce first entered into the MOU with ICANN on 25 November 1998. The Commerce Department revised the MOU six times between November 1998 and 30 September 2006. In September 2006, the MOU was replaced with a Joint Project Agreement (“JPA”). Like the MOUs, the JPA sets forth goals and tasks for ICANN to accomplish. But the JPA’s goals are less specific than those set forth in the MOU, “[i]n

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<sup>116</sup> GOLDSMITH & WU at 41-42, Cl. Exh. 27.

<sup>117</sup> Mueller Expert Report at 10.

keeping with the widely expressed desire to make ICANN more independent of the U.S. government.”<sup>118</sup> Like its predecessors, the JPA styles itself as providing transitional oversight. The JPA’s Preamble provides that its purpose is to facilitate the “joint development of the mechanisms, methods, and procedures necessary to effect the transition of the Internet domain name and addressing system (DNS) to the private sector.”<sup>119</sup> The JPA expires on 30 September 2009. There is a vigorous public debate presently underway on whether it should be renewed.<sup>120</sup>

## 2. The IANA Contract

57. The IANA Contract, originally dated 2 February 2000 and amended or replaced 5 times,<sup>121</sup> is a no-cost, sole-source contract between ICANN and the U.S. government authorizing ICANN to perform the largely technical functions that were being performed by IANA. These functions involve administrative tasks such as allocating IP address blocks, editing the root zone file, and coordinating the assignment of unique protocol numbers.<sup>122</sup> The IANA contract does not authorize ICANN to make any policy decisions. Rather, ICANN makes policy as provided for in the JPA and its Articles of Incorporation and Bylaws, as discussed below. However, without the IANA contract, ICANN would not have the ability to coordinate the Internet’s identifier systems. Under the IANA contract, any changes in the root zone file must be audited

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<sup>118</sup> *Id.* at 11.

<sup>119</sup> Joint Project Agreement between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers (29 Sept. 2006), *available at* [http://www.ntia.doc.gov/ntiahomepage/domainname/agreements/jpa/icannjpa\\_09292006.htm](http://www.ntia.doc.gov/ntiahomepage/domainname/agreements/jpa/icannjpa_09292006.htm) (“JPA”), Cl. Exh. 33.

<sup>120</sup> Mueller Expert Report at 13.

<sup>121</sup> ICANN/U.S. Government Contract for Performance of the IANA Function (14 August 2006), *available at* <http://www.icann.org/en/general/iana-contract-14aug06.pdf>, Cl. Exh. 34.

<sup>122</sup> Mueller Expert Report at 12.

and approved by the U.S. Department of Commerce.<sup>123</sup> But again, that oversight is meant purely to ensure the stability and security of the root.<sup>124</sup>

### 3. The VeriSign Cooperative Agreement

58. As mentioned above, VeriSign purchased Network Solutions, the original registry operator of the .COM and .NET TLDs.<sup>125</sup> VeriSign is now the largest registry operator in the world, with exclusive registry rights for .COM, .NET, .CC, .TV, and .NAME.<sup>126</sup> In addition to operating these registries, VeriSign has a Cooperative Agreement with the U.S. Department of Commerce that gives VeriSign operational responsibility for certain aspects of the physical (as opposed to the virtual) parts of the root.<sup>127</sup> Under the Cooperative Agreement, when a change to the root is approved by ICANN, the U.S. government then directs VeriSign to enact the change, and VeriSign performs the technical functions necessary to alter the root.

59. Thus, these three agreements—along with the U.S. government’s asserted authority over modifications to the root—represent the limits of governmental oversight of ICANN and the Internet. In all other respects, ICANN is intended to be the global coordinator

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<sup>123</sup> *Id.* The audit consists of a review “to ensure that the requested changes are technically correct and that the requestor is authorized to make the request,” that is, that the requestor is truly ICANN. *Id.*

<sup>124</sup> *Id.* at 11.

<sup>125</sup> See Network Solutions Timeline, Cl. Exh. 29.

<sup>126</sup> VeriSign, Domain Name Services, available at [www.versign.com/information-services/naming-services/index.html](http://www.versign.com/information-services/naming-services/index.html) (last visited 22 Jan. 2009), Cl. Exh. 35.

<sup>127</sup> As stated by Professor Mueller in his expert report:

whereas ICANN is responsible for making the *policies* that govern the root server, VeriSign has *operational* control of the authoritative root zone information and its dissemination. . . . The Cooperative Agreement is important for two reasons: (1) it was the instrument by which the U.S. government obtained and continues to exercise its authority to control changes to the root; and (2) it compelled VeriSign to conform to the ICANN regime’s regulations on registries and registrars.

Mueller Expert Report at 12-13 (emphasis in original; footnote omitted).

and manager of the domain name servers, including the root servers, acting according to the principles, rules, and guidelines set forth in its governance documents.

### **G. The Current Structure of the DNS**

60. One of ICANN's major functions in managing the root is overseeing contracts with the registry operators for the TLDs, including, as mentioned above, sTLDs, gTLDs, and ccTLDs. Frequently, the sponsor (often referred to as the sponsoring organization) for an sTLD, is a separate entity from the registry operator for the sTLD. In such cases, ICANN and the registry operator enter into a registry agreement by which ICANN delegates certain authority to the registry operator. The registry operator then enters into a contract with the sponsoring organization, by which the registry operator delegates to the sponsoring organization certain authority to develop policies governing matters such as who will be allowed to register website names within the domain.

61. When ICANN was first formed, there were seven TLDs<sup>128</sup> that had been in existence since the 1980s, various ccTLDs, and .ARPA, the one special TLD. One of the four specific functions that the White Paper envisioned for the new corporation was to “oversee policy for determining the circumstances under which new TLDs are added to the root system.”<sup>129</sup> The next seven new TLDs were added in 2000, as a result of a limited round of applications conducted by ICANN.<sup>130</sup> Applications for a second round of new TLDs were submitted in 2004; the result of which was the addition of six new sponsored TLDs to date. It is

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<sup>128</sup> These were .EDU, .COM, .NET, .ORG, .GOV, .MIL, and .INT. Jon Postel, Request for Comments (RFC) 1591: Domain Name System Structure and Delegation, Mar. 1994, ICANN/U.S. Government Contract for Performance of the IANA Function, *available at* <http://www.ietf.org/rfc/rfc1591.txt>, Cl. Exh. 36.

<sup>129</sup> White Paper, Cl. Exh. 31.

<sup>130</sup> These were .AERO, .BIZ, .COOP, .INFO, .MUSEUM, .NAME, and .PRO. ICANN, New TLD Program Application Process Archive, 2000, *available at* <http://www.icann.org/en/tlds/app-index.htm>, Cl. Exh. 37.

the administration of this 2004 round which is the subject of this Independent Review; specifically, whether the administration of the RFP for the 2004 round complied with ICANN's governing documents—the Bylaws and Articles of Incorporation—and relevant principles of international law which, per the Articles of Incorporation, apply to ICANN.

### **III. ICANN'S GOVERNING DOCUMENTS AND GOVERNANCE STRUCTURE**

62. Given the role that Jon Postel and other Internet founders had in the creation of ICANN, it is not surprising that their original vision—of an international, nongovernmental organization that would oversee the Domain Name System with fairness, neutrality, transparency, and accountability—is largely reflected in ICANN's Articles of Incorporation and Bylaws. The strong influence of the international community is also readily apparent.

#### **A. The Articles of Incorporation**

63. ICANN's Articles of Incorporation were finalized on 21 November 1998. The Articles describe ICANN's unique, global mission in sweeping terms:

[I]n recognition of the fact that *the Internet is an international network of networks, owned by no single nation, individual or organization*, the Corporation shall . . . pursue the charitable and public purposes of *lessening the burdens of government and promoting the global public interest in the operational stability of the Internet . . .*<sup>131</sup>

The Articles then set forth the five basic areas in which ICANN will further its purpose of “lessening the burdens of government and promoting the operational stability of the Internet.” Indeed, ICANN's responsibility to develop “the policies for determining the circumstances under which new top-level domains are added to the DNS root system” should be seen within the broader context of ICANN's overall responsibilities, which are largely technical or functional. Thus, under the Articles, ICANN is to further its purpose by:

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<sup>131</sup> Articles of Incorporation, Art. 3 (emphasis added), Cl. Exh. 4.



- (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet;
- (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space;
- (iii) performing and overseeing functions related to the coordination of the Internet domain name system (“DNS”), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system;
- (iv) overseeing operation of the authoritative Internet DNS root server system; and
- (v) engaging in any other related lawful activities in furtherance of items (i) through (iv).<sup>132</sup>

64. Article 4 of ICANN’s Articles of Incorporation sets forth the standard of conduct and the relevant principles of law under which ICANN is required to carry out its activities. It states:

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.<sup>133</sup>

## **B. The Bylaws**

65. ICANN’s Bylaws were first issued on 6 November 1998, and finalized on 21 November 1998, the same day as the Articles of Incorporation. The Bylaws have been amended

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*, Art. 4 (emphasis added).

on several occasions. Nonetheless, ICANN's mission and its guiding principles have remained essentially unchanged.<sup>134</sup>

66. ICANN's mission, as stated in its Bylaws, is a limited, technical one: "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identified systems."<sup>135</sup> As a technical body, ICANN's involvement in policy formulation is limited to "policy development reasonably and appropriately related to these technical functions."<sup>136</sup> The Bylaws stipulate that "[i]n carrying out its mission as set out in [the] Bylaws, ICANN should be accountably to the community for operating in a manner that is consistent with [the] Bylaws, and with due regard for the core values set forth in Article I of [the] Bylaws."<sup>137</sup>

67. The Bylaws set forth eleven "Core Values" which "should guide the decisions and actions of ICANN." The most relevant of the Core Values for present purposes are listed below:

[...]

2. Respecting the creativity, innovation, and flow of information made possible by the Internet by **limiting ICANN's activities to those matters within ICANN's mission** requiring or significantly benefiting from global coordination.

[...]

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

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<sup>134</sup> See generally ICANN Bylaws Archive, available at <http://www.icann.org/en/general/archive-bylaws> (last visited 22 Jan. 2009) ("Bylaws Archive"), Cl. Exh. 38.

<sup>135</sup> Bylaws, Art. I, § 1, Cl. Exh. 5.

<sup>136</sup> *Id.*; see also Mueller Expert Report at 18-20 (quoting Bylaws, Art. I, § 1).

<sup>137</sup> Bylaws, Art. IV, § 1, Cl. Exh. 5.

6. Introducing and **promoting competition** in the registration of domain names where practicable and beneficial **in the public interest**.
7. Employing **open and transparent policy development** mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by **applying documented policies neutrally and objectively, with integrity and fairness**.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, **obtaining informed input from those entities most affected**.
10. **Remaining accountable** to the Internet community through mechanisms that enhance ICANN's effectiveness.
11. While **remaining rooted in the private sector**, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities recommendations.<sup>138</sup>

68. The Bylaws include the following guidance with respect to the application of the

Core Values:

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

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<sup>138</sup> *Id.*, Art. I, § 2 (emphasis added).

69. In addition to the Core Values, the Bylaws set forth other principles that govern ICANN’s conduct.<sup>139</sup> For instance, Article II, Section 3 (titled “**NON-DISCRIMINATORY TREATMENT**”) prohibits discriminatory treatment:

**ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>140</sup>

As a further example, Article III (titled “**TRANSPARENCY**”), Section 1 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**.<sup>141</sup>

70. The actions of ICANN’s governing institutions, described in the next section, must therefore be taken in accordance with the above principles, among others.

### **C. ICANN’s Governance Structure**

71. ICANN’s governance structure, as described in the Bylaws, consists of the following institutions: a Board of Directors; three Supporting Organizations; and five Advisory Committees.

#### **1. Board of Directors**

72. ICANN is managed by a Board of Directors.<sup>142</sup> The Board is composed of 15 voting Directors, as follows:

- six representatives of the Supporting Organizations;
- eight independent representatives, who are selected through a Nominating Committee in which all the constituencies of ICANN are represented;<sup>143</sup>

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<sup>139</sup> Burr Witness Statement, para. 78.

<sup>140</sup> *Id.*, Art. II, § 3 (emphasis added).

<sup>141</sup> *Id.*, Art. III, § 1 (emphasis added).

<sup>142</sup> *See* About ICANN, Cl. Exh. 3.

- and the President/CEO, who is appointed by the rest of the Board.<sup>144</sup>

73. The terms of Board members are generally set at three years<sup>145</sup> and the President is elected annually by the Board upon the recommendation of the Board's Chairman.<sup>146</sup>

74. ICANN's day-to-day operations are overseen by its President and CEO, currently Dr. Paul Twomey, an Australian national. Dr. Twomey also held this position throughout most of the 2004 application process for new sTLDs. Dr. Twomey is generally present at all Board meetings, and is entitled to vote at those meetings. Other ICANN officials who were substantially involved in the 2004 application process include Mr. John Jeffrey, ICANN's General Counsel, Mr. Kurt Pritz, ICANN's Senior Vice President, and Dr. Vinton Cerf, the Chairman of the ICANN Board from 2000 through 2007.

## 2. Supporting Organizations

75. The Supporting Organizations are the Board's main source of policy recommendations.<sup>147</sup> There are currently three Supporting Organizations, each with a specific area of expertise. First, the Address Supporting Organization advises the Board "with respect to policy issues relating to the operation, assignment, and management of Internet Addresses."<sup>148</sup> Second, the Country Code Names Supporting Organization is responsible for "developing and

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(continued ...)

<sup>143</sup> The Nominating Committee selecting the eight independent representatives of the general public is to select individuals based on their diverse skills, understanding of ICANN's mission, and "a demonstrated capacity for thoughtful group decision-making." Bylaws, Article VI, § 3. The Nominating Committee is to consist of the following: a non-voting Chair and associate Chair, the immediately previous Chair, as a non-voting advisor, three non-voting liasons from various entities, and 17 voting delegates selected by a variety of constituency entities. *Id.*, Article VII, § 2.

<sup>144</sup> *Id.*, Article VI, § 2.

<sup>145</sup> *Id.*, Article VI, § 8.

<sup>146</sup> *Id.*, Article XIII, § 2.

<sup>147</sup> *See id.*, Article VIII, § 1; *see also* Bylaws, Article IX, § 1; Bylaws, Article X, § 1.

<sup>148</sup> *Id.*, Article VIII, § 1.

recommending to the Board global policies relating to country-code top-level domains”<sup>149</sup>—such as .UK or .FR. Third, the Generic Names Supporting Organization is “the policy-development body . . . responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.”<sup>150</sup>

### 3. The Advisory Committees

76. The Advisory Committees advise the Board on the interests and needs of stakeholders that do not directly participate in the Supporting Organizations. There are five Advisory Committees:

- the Governmental Advisory Committee (“GAC”), which is largely composed of representatives of a number of national governments from all around the world;<sup>151</sup>
- the At-Large Advisory Committee, which is composed of representatives of organizations of individual Internet users from all around the world;<sup>152</sup>
- the Root Server System Advisory Committee, which provides advice on the operation of the DNS root server system;<sup>153</sup> and
- the Security and Stability Advisory Committee, which is composed of Internet experts who study security issues pertaining to ICANN’s mandate;<sup>154</sup>
- and the Technical Liaison Group, which is composed of representatives of other international technical organizations of the Internet.<sup>155</sup>

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<sup>149</sup> *Id.*, Article IX, § 1.

<sup>150</sup> *Id.*, Article X, § 1.

<sup>151</sup> *Id.*, Article XI, § 2.

<sup>152</sup> *Id.*, Article XI, § 2.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *See generally id.*, Article XI.

77. Of these Committees, the GAC is the most relevant to this case. For this reason, the role of the GAC, and of governments in general, in the governance of ICANN is described in more detail below.

#### **D. The Role of Governments in ICANN**

78. At the outset, as Professor Mueller discusses in his expert report, it is important to recall that ICANN was established as a private organization in order “to avoid the influence of other governments and existing intergovernmental organizations.”<sup>156</sup> It is precisely for this reason that its Bylaws make it clear that “no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director” of ICANN.<sup>157</sup>

79. Nonetheless, national governments and other public sector bodies do participate in ICANN’s processes through the GAC. Membership in the GAC is open to all national governments, distinct economies, multinational governmental organizations and treaty organizations, and is drawn from all regions of the world.<sup>158</sup> The GAC currently includes representatives of more than 100 governments and nine observers.<sup>159</sup>

80. As stated in the GAC’s Operating Principles, “[t]he GAC is not a decision making body.”<sup>160</sup> Rather, it is an advisory body that “shall provide advice and communicate issues and

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<sup>156</sup> Mueller Expert Report at 7.

<sup>157</sup> Bylaws, Article VI, § 4.1, Cl. Exh. 5.

<sup>158</sup> *Id.*, Article XI, § 2(1)(b).

<sup>159</sup> ICANN Governmental Advisory Committee Homepage, available at <http://gac.icann.org/web/contact/rebs/index.shtml> (last visited 22 Jan. 2009), Cl. Exh. 39. The Internet Domain Name System and the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers, available at [http://gac.icann.org/web/about/gac-outreach\\_English.htm](http://gac.icann.org/web/about/gac-outreach_English.htm) (last visited 22 Jan. 2009) (“About GAC”), Cl. Exh. 40.

<sup>160</sup> Governmental Advisory Committee Operating Principles, Article 1, Principle 2 (April 2005), available at [http://gac.icann.org/web/home/GAC\\_Operating\\_Principles.pdf](http://gac.icann.org/web/home/GAC_Operating_Principles.pdf) (“GAC Operating Principles”), Cl. Exh. 41; see also Mueller Expert Report at 14-15.

views to the ICANN Board.”<sup>161</sup> This advisory role is further clarified in ICANN’s Bylaws, which specify that the GAC is to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.”<sup>162</sup> However, the GAC’s Operating Principles also specify that the GAC “may deliver advice on any matter within the functions and responsibilities of ICANN, at the request of the ICANN Board or on its own initiative.”<sup>163</sup>

81. From a process standpoint, the GAC “may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.”<sup>164</sup> Whatever advice is provided by the GAC to the Board should reflect the consensus view of all GAC members, “however, where consensus is not possible, the [GAC] Chair shall convey the full range of view[s] expressed by members to the ICANN Board.”<sup>165</sup> The GAC Operating Principles specify that “advice from the GAC to the ICANN Board shall be communicated through the [GAC] Chair.”<sup>166</sup>

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<sup>161</sup> Operating Principles, Article I, Principle 2, Cl. Exh. 41; *see also, id.* Article I, Principle 5 (“The GAC shall have no legal authority to act for ICANN.”)

<sup>162</sup> Bylaws, Article XI, § 2(1)(a), Cl. Exh. 5; *see also* GAC Operating Principles, Preamble, Cl. Exh. 41 (“The Governmental Advisory Committee should consider and provide advice on the activities of ICANN as they relate to concerns of governments and where they may affect public policy issues.”); *id.* Article 1, Principle 1 (“The [GAC] shall consider and provide advice on the activities of ICANN as they relate to concerns of governments, multinational governmental organizations and treaty organizations, and distinct economies as recognized in international fora, including matters where there may be an interaction between ICANN’s policies and various laws and international agreements and public policy objectives.”).

<sup>163</sup> GAC Operating Principles, Article XII, Principle 48, Cl. Exh. 41.

<sup>164</sup> Bylaws, Article XI, Section 2(1)(i), Cl. Exh. 5.

<sup>165</sup> GAC Operating Principles, Article XII, Principle 47, Cl. Exh. 41.

<sup>166</sup> *Id.*, Article XII, Principle 46.



82. GAC meetings are generally held in private, but, following the meeting, the GAC may choose to make its views publicly known through a Communiqué, the contents of which are approved by the GAC beforehand.<sup>167</sup> Such communiqués are thus another means through which the GAC conveys its advice and opinions to the ICANN Board.

83. The GAC's Operating Principles emphasize the GAC's commitment "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."<sup>168</sup> As discussed below, the requirement of timely input by the GAC is also underscored in connection with GAC advice to the Board in connection with public policy issues.

84. The ICANN Board is required to consider any advice from the GAC prior to taking action,<sup>169</sup> but is by no means obligated to follow such advice. This is made clear in the special provisions included in the Bylaws and GAC Operating Principles relating to public policy issues.

85. Article XI, Section 2(1)(h) of the Bylaws requires the ICANN Board "to notify the Chair of the [GAC] in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment." The same provision specifies that the Board "shall take duly into account any timely response to that notification prior to taking action."<sup>170</sup> Assuming that the GAC has provided timely input,

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<sup>167</sup> *Id.*, Principles 50-51.

<sup>168</sup> *See generally id.*, Preamble, para. 6; *see also id.* Article II, Principle 3 ("The GAC shall report its findings and recommendations in a timely manner to the ICANN Board through the Chair of the GAC.")

<sup>169</sup> *Id.*, Article XII, Principle 48.

<sup>170</sup> Bylaws, Article XI, Section 2(1)(h), Cl. Exh. 5.

the Bylaws stipulate that “the advice of the [GAC] on public policy issues shall be duly taken into account, both in the formulation and adoption of policies.”<sup>171</sup>

86. However, the Bylaws specifically contemplate that action by the Board may be taken over the objections of or contrary to the advice of the GAC, by providing that “[i]n the event that the ICANN Board determines to take an action that is not consistent with the [GAC] advice,” the Board is required to inform the GAC and “state the reasons why it decided not to follow that advice. The [GAC] and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”<sup>172</sup> However, if no solution can be found, the Board may still act, and need only “state in its final decision the reasons why the [GAC’s] advice was not followed.”<sup>173</sup> Furthermore, ICANN has no authority to take or refrain from taking an action at the request of the GAC (or members of the GAC) where such action or failure to act would otherwise violate the ICANN Bylaws.<sup>174</sup> Conversely, of course, actions by the ICANN Board do not impinge on the rights of sovereign governments to act in accordance with prevailing laws in their respective jurisdictions.<sup>175</sup> Consistent with ICANN’s design as a private, non-governmental entity, the GAC is not a vehicle for governmental regulation of the DNS. Individual governments remain fully capable of, and regularly engage in, the regulation of

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<sup>171</sup> *Id.*, Article XI, Section 2(1)(j).

<sup>172</sup> *Id.*, Article XI, § 2(1)(j).

<sup>173</sup> *Id.*, Article XI, § 2(1)(k).

<sup>174</sup> Mueller Expert Report at 16-17.

<sup>175</sup> Accordingly, the ICANN Board’s explanation for any departure from GAC advice is “without prejudice to the rights or obligations of [GAC] members with regard to public policy issues falling within their responsibilities.” Bylaws, Article XI, § 2(1)(k), Cl. Exh. 5; *see also* Burr Witness Statement, paras. 36-37; Mueller Expert Report at 51-52.

online activities within their jurisdictional reach.<sup>176</sup> They do so within the confines of their own legal systems—not through ICANN.<sup>177</sup>

87. Finally, the GAC’s Operating Principles also identify “the range of public policy objectives that should be taken into account in ICANN’s decision making,”<sup>178</sup> including:

1. The Internet naming and addressing system is a public resource that must be managed in the interests of the global Internet community;
2. The management of Internet names and addresses must be facilitated by organizations that are global in character;
3. ICANN’s decision making should take into account public policy objectives, including, among other things:
  - Secure, reliable and affordable functioning of the Internet, including uninterrupted service and universal connectivity;
  - The robust development of the Internet, in the interest of the public good, for government, private, educational, and commercial purposes, world wide;
  - **Transparency and non-discriminatory practices** in ICANN’s role in the allocation of Internet names and address;
  - Effective competition at all appropriate levels of activity and conditions for fair competition, which will bring benefits to all categories of users including, greater choice, lower prices, and better services;
  - Fair information practices, including respect for personal privacy and issues of consumer concern; and
  - **Freedom of expression.**<sup>179</sup>

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<sup>176</sup> See Burr Witness Statement at 57-58; Goldsmith Expert Report at 39.

<sup>177</sup> Goldsmith Expert Report at 39.

<sup>178</sup> The ICANN Governmental Advisory Committee, 1999-2004: GAC Chairman’s Report for the Information of the United Nations’ Working Group on Internet Governance (“WGIG”), (Feb. 2005) (“GAC Chairman's Report to WGIG”), Cl. Exh. 42.

<sup>179</sup> GAC Operating Principles, Preamble (emphasis added), Cl. Exh. 41.

#### **IV. ICM REGISTRY, LLC AND IFFOR**

88. As described above, ICANN's management of the authoritative root includes the authority to develop policies governing the creation of new TLDs and to select new TLDs in accordance with those policies.<sup>180</sup> ICANN is authorized to delegate authority for the management of TLDs to various registry operators. This is achieved through registry agreements between ICANN and the registry operator for each domain. In 2000 and again in 2004, ICANN initiated an application process for new TLDs. A variety of organizations, including ICM Registry, proposed new TLDs, for which they would then serve as the registry operator.

##### **A. ICM Registry, LLC**

89. ICM Registry, LLC is a privately owned technology company with its principal place of business in Jupiter, Florida.<sup>181</sup> The company does not create, supply, market, disseminate, or otherwise trade in adult content. ICM's owners and management team have significant experience and expertise in building companies in the online business world.<sup>182</sup>

90. Stuart Lawley, the current Chairman and President of ICM, is an entrepreneur who has developed and successfully managed businesses in the office technology and Internet industries.<sup>183</sup> Mr. Lawley's business history is one of innovation and early adaptation; his businesses are designed to take advantage of new trends and technological developments before

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<sup>180</sup> Technically speaking, ICANN informs the U.S. Department of Commerce of the new TLDs to be created, and the U.S. Department of Commerce then authorizes VeriSign, as the entity responsible for the technical operation of the root, to add the TLDs to the authoritative root.

<sup>181</sup> ICM Registry was incorporated in the State of Delaware on 28 June 1999; its principal place of business is in Jupiter, Florida. Delaware, Department of State, Division of Corporations, ICM Registry Entity Details, available at <https://sos-res.state.de.us/tin/GINameSearch.jsp> (search for "ICM Registry"; then follow "ICM Registry LLC" hyperlink) (last visited on 11 Jan. 2009), Cl. Exh. 43. Although originally formed as a corporation, ICM Registry was reorganized into a limited liability company in 2005. Attached as Appendix C is a chronology of key dates.

<sup>182</sup> Lawley Witness Statement, paras. 2-7, 19-24.

<sup>183</sup> *Id.*, para. 1.

others recognize the potential. These businesses, located in Great Britain and the United States, have included significant public and private companies with hundreds of employees.<sup>184</sup>

91. Mr. Lawley became interested in ICM Registry because he saw the potential benefits of a *sponsored* TLD for responsible providers of online adult entertainment.<sup>185</sup> His official involvement in ICM began in mid-2003. When he joined ICM, Mr. Lawley took great care to assemble a management team that would complement the individuals already in place to ensure that ICM would be a stable, solid, and well-managed technology business.<sup>186</sup>

92. Prior to Mr. Lawley's involvement, Mr. Jason Handeles and Mr. Len Bayles, who were both well-known in the Internet community, served as ICM's management team; under their management, ICM applied for two new TLDs (.KIDS and .XXX) in ICANN's 2000 "proof of concept" round for new gTLDs (see below).<sup>187</sup>

93. When Mr. Lawley became involved, he also expanded and enhanced the management team by recruiting Mr. Stuart Duncan, who had been extremely successful in a previous collaboration in a technology company with Mr. Lawley, to serve as the Chief Operating Officer.<sup>188</sup>

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<sup>184</sup> *Id.*, paras. 2-7.

<sup>185</sup> *Id.*, para. 11. As noted in paragraph 56, ICANN has distinguished between "unsponsored" and "sponsored" top level domains ("TLDs") in the following manner: "Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD." ICANN, Top-Level Domains (gTLDs), Cl. Exh. 24.

<sup>186</sup> Lawley Witness Statement, paras. 19-24.

<sup>187</sup> Neither application was successful. ICM Registry, A General Description of the 2000 Application, available at <http://www.icann.org/tlds/report/kids3.html> (last visited 22 Jan. 2009), Cl. Exh. 44.

<sup>188</sup> Lawley Witness Statement, para. 20.

94. Mr. Lawley also secured top lawyers J. Beckwith Burr (who, as noted above, had been involved in the U.S. government's negotiations with and recognition of ICANN while at the U.S. Department of Commerce) and Robert Corn-Revere (a respected free speech advocate), and well-known child safety advocate Parry Aftab to serve as outside advisors and to ensure that ICM's application in the 2004 round for new sTLDs would be thorough and complete.<sup>189</sup> Advice and input was also sought from a number of individuals, including Stephen Balkam, another well-known child safety advocate.

95. As noted above, while ICM has twice applied to serve as the registry operator for the proposed .XXX sTLD, the company has no formal affiliation with the adult entertainment industry.<sup>190</sup> It is not involved, and has committed that it will not become involved, in the creation or provision of adult entertainment.<sup>191</sup> Instead, as a registry operator, its functions will be largely technical, and will include providing the supporting infrastructure and back-end functionality necessary to operate the proposed .XXX domain.<sup>192</sup> As a well-funded, financially stable corporation with a skilled management team, ICM has all the qualifications required to provide the administrative, financial, and technical expertise needed to run a successful domain. Indeed, ICANN has already determined as much.<sup>193</sup>

96. As discussed in further detail below, it is ICM's intention to serve as the registry operator for the .XXX TLD, which will serve as a domain for members of the responsible online adult entertainment community who support and believe in the benefits of a system of self-

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<sup>189</sup> *Id.*, paras. 22-24.

<sup>190</sup> Nor has any member of ICM's ownership or management team participated, financially or otherwise, in any adult entertainment business. *Id.*, para. 8.

<sup>191</sup> *Id.*, para. 8.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at paras. 32, 40, 49; *see also* New sTLD Applications: Independent Evaluation Report at 10 (27 Aug. 2004) ("Confidential Independent Evaluation Report"), Cl. Confid. Exh. A.

identification and self-regulation. Websites located in the .XXX domain will be clearly designated as containing adult content, thus empowering those individuals who wish to select, avoid, or prevent their children from accessing such websites to do so easily. Additionally, by registering in the proposed .XXX domain, adult content website operators will voluntarily commit to follow best practices to be developed in conjunction with the other impacted stakeholders (most notably child safety and free speech advocates). Among other benefits, such best practices would include requirements that all sites be labeled with machine-readable meta-tags to allow the effective use of filters, and prohibitions on all child pornography. By promoting best practices through voluntary registration, responsible providers of online adult entertainment will be engaging in voluntary self-regulation, as opposed to more onerous and problematic government imposed regulation.

97. There is substantial industry support for the .XXX domain, as evidenced by the letters of support submitted with ICM's application and the large number of providers that have participated in ICM's pre-reservation program, which allows for applicants to reserve domain names in advance of the approval of the sTLD application for .XXX.<sup>194</sup> To date, over 100,000 such pre-reservations have been made.<sup>195</sup>

#### **B. The International Foundation for Online Responsibility**

98. Because .XXX is to be a sponsored top-level domain, it needs a sponsoring organization to develop the policies for the sTLD.<sup>196</sup> The sponsoring organization for the proposed .XXX domain is The International Foundation for Online Responsibility ("IFFOR"), which will be responsible for overseeing the policy formulation for the proposed sTLD. In short,

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<sup>194</sup> See Lawley Witness Statement, para. 43.

<sup>195</sup> *Id.*

<sup>196</sup> ICANN, Request for Proposals for New Sponsored Top-Level Domains, 15 Dec. 2003 ("sTLD RFP"), Cl. Exh. 45; Lawley Witness Statement, para. 33.

IFFOR will develop the rules that each website operator will agree to follow in order to maintain a presence in the .XXX domain.

99. IFFOR is a non-profit Canadian entity, with its principal place of business in Washington, D.C.<sup>197</sup> IFFOR's incorporation was the product of a "four-year outreach campaign to educate and mobilize the responsible online adult-entertainment community."<sup>198</sup> IFFOR is independent from ICM and is to be operated by a board of seven directors representing all stakeholders in the .XXX domain, including leaders of the responsible online adult entertainment industry, child safety representatives, and members of the free speech community.<sup>199</sup>

100. IFFOR's mission also includes contributing funding towards developing programs and tools to combat child pornography and to promote child protection and parental awareness of online dangers, establishing a forum for the online adult entertainment community to communicate and proactively respond to the needs and concerns of the broader Internet community, and promoting freedom of expression online.<sup>200</sup> Funding to carry out IFFOR's mission will come from the registration fees collected for each individual domain name registered in the proposed .XXX domain. IFFOR has committed to contributing several million dollars per year (depending on actual registration levels) to child protection and free expression initiatives.<sup>201</sup>

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<sup>197</sup> ICM Registry, Confidential New sTLD RFP Application at 3 (16 Mar. 2004) ("ICM Confidential Application"), Cl. Confid. Exh B; *see also* IFFOR Charter, available at [www.iffor.org](http://www.iffor.org) (last visited 22 Jan. 2009), Cl. Exh. 46.

<sup>198</sup> ICM Confidential Application at 3, Cl. Confid. Exh. B.

<sup>199</sup> Lawley Witness Statement, para. 33; *see also* ICM Registry, The Voluntary Adult Top-Level Domain (TLD)-.XXX, available at [www.icmregistry.com](http://www.icmregistry.com) (last visited 22 Jan. 2009), Cl. Exh. 47.

<sup>200</sup> ICM Confidential Application at 5-6, Cl. Confid. Exh. B.

<sup>201</sup> *Id.* at 26. Specifically, ICM agreed to contribute US\$ 10 per domain name registered per year to IFFOR.



101. As noted above, it was an earlier incarnation of ICM, without the involvement of IFFOR, that applied in ICANN's 2000 round for new TLDs; it was the expanded and enhanced ICM, with the collaboration of IFFOR, that applied in 2004, and it is that round which is the subject of this dispute. Nevertheless, it is helpful to have some knowledge of the 2000 round in order to understand the facts of the current dispute.

## V. ICANN'S 2000 "PROOF OF CONCEPT" ROUND FOR NEW GTLDS

### A. An Abbreviated Process

102. In 1998, when ICANN assumed responsibility over the DNS consistent with the White Paper, it began to explore the possibility of adding more TLDs to the name space in order to expand the number of domain names available for registration by the public. ICANN first asked one of its supporting organizations to formulate recommendations on how to add new gTLDs.<sup>202</sup> The supporting organization submitted a proposal whereby ICANN would initially add six to ten new gTLDs, followed by an evaluation period in which the Board was to consider the success of the strings introduced during the initial round.<sup>203</sup>

103. The proposal left it to ICANN staff to determine the methods of TLD selection,<sup>204</sup> and ICANN staff accordingly decided that new TLDs should be introduced on a small scale as a "proof of concept" round.<sup>205</sup> This "proof of concept round" was to be highly selective, as the procedure was untried and these were to be the first new TLDs added to the DNS in its

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<sup>202</sup> ICANN, Minutes, Meeting of the Initial Board (27 May 1999), *available at* <http://www.icann.org/en/minutes/minutes-27may99.htm>, Cl. Exh. 48.

<sup>203</sup> ICANN, Report of Working Group C (21 Mar. 2000), *available at* <http://www.icann.org/dns/wgc-report-21mar00.htm>, Cl. Exh. 49.

<sup>204</sup> *Id.*

<sup>205</sup> ICANN Yokohama Meeting, Cl. Exh. 23.

history.<sup>206</sup> ICANN intended to select only a limited number of new TLDs—those that represented the best overall combination of TLD string, TLD charter, business plan, capitalization, and the characteristics of the proposed TLD. The application form was published in August 2000, and was accompanied by a document describing nine broad values that staff would consider in examining the proposals.<sup>207</sup> The nine broad values were to evaluate whether each proposal: (1) maintained stability; (2) provided a good test case for the “proof of concept” round; (3) enhanced competition; (4) enhanced the utility of the DNS; (5) met previously unmet needs; (6) enhanced diversity; (7) aided in the evaluation of the delegation of policy formation functions; (8) provided the appropriate protections for the rights of others; and (9) described realistic business, financial, technical, and operational plans.<sup>208</sup>

104. A total of 47 applications were received by ICANN, and were evaluated by ICANN over a six week period.<sup>209</sup> Their evaluation report incorporated assessments from outside technical advisors, an accounting firm, and ICANN’s outside legal counsel. The report contained a brief summary of each application, including any public comments that had been received on the application, and ultimately selected 15 applicants as potential candidates for moving forward.<sup>210</sup>

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<sup>206</sup> ICANN, Report on TLD Applications (9 Nov. 2000), *available at* <http://www.icann.org/en/tlds/report> (“Report on TLD Applications”), Cl. Exh. 50.

<sup>207</sup> The application window ran from 15 August 2000 to 2 October 2000. *See* ICANN, New TLD Application Instructions (15 August 2000), *available at* <http://www.icann.org/en/tlds/new-tld-application-instructions-15aug00.htm>, Cl. Exh. 51.

<sup>208</sup> ICANN, Criteria for Assessing TLD Proposals (15 August 2000), *available at* <http://www.icann.org/en/tlds/tld-criteria-15aug00.htm>, Cl. Exh. 52; *see also* ICANN, TLD Application Review Update (13 October 2000), *available at* <http://www.icann.org/en/tlds/tld-review-update-23oct00.htm>, Cl. Exh. 53.

<sup>209</sup> *See* TLD Application Review Update, Cl. Exh. 53.

<sup>210</sup> *See* Report on TLD Application, Cl. Exh. 50.

105. On 16 November 2000, the ICANN Board selected seven new TLDs to enter into contract negotiations.<sup>211</sup> Registry agreements were eventually approved for all seven new TLDs—four unsponsored: .BIZ, .NAME, .INFO, and .PRO; and three sponsored: .AERO, .COOP, and .MUSEUM.

#### **B. ICM Registry’s Application**

106. One of the 47 applicants was ICM Registry, Inc.,<sup>212</sup> which submitted an application to register the .KIDS and .XXX TLDs “as an integrated solution for improving child safety on the Internet.”<sup>213</sup> ICANN received 40 public comments about ICM’s application.<sup>214</sup> The evaluators praised the ICM application for its “well-developed marketing strategy . . . strong financial support, intellectual property expertise, and technical partnerships with leaders in the registry/registrar business.”<sup>215</sup>

107. Due to the highly selective nature of the “proof of concept” round, however, and ICANN’s decision not to select all of the qualified applications, the evaluators concluded that “other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs.”<sup>216</sup> Upon learning its application had not been selected,

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<sup>211</sup> ICANN, Top Level Domains (gTLDs), Cl. Exh. 24.

<sup>212</sup> At the time ICM was still organized as a corporation, rather than a limited liability company. ICM’s current leadership had not yet joined the organizations ownership and management structure. *See* Lawley Witness Statement, para. 53.

<sup>213</sup> ICM Registry, A General Description of the 2000 Application, Cl. Exh. 44. Three other applicants also applied for adult content TLDs; Name.Space Incorporated applied for .SEX, Rathbawn Computers Limited applied for .SEX and .XXX, and Abacus America Inc. applied for .XXX. ICANN, TLD Applications Lodged, 10 Oct. 2000, *available at* <http://www.icann.org/en/tlds/tld-applications-logged-02oct00.htm>, Cl. Exh. 54.

<sup>214</sup> ICM Registry, A General Description of the 2000 Application, Cl. Exh. 44; *see also* Letter of Support from Bruce Watson, President at Enough is Enough (3 Nov. 2000), *available at* <http://www.icann.org/en/tlds/kids3/letters/let1.html>, Cl. Exh. 55.

<sup>215</sup> ICM Registry, A General Description of the 2000 Application, Cl. Exh. 44; *see also* Letter from Stuart Lawley to Dr. Peter Zangl, 8 November 2005, Cl. Exh. 56.

<sup>216</sup> Report on New TLD Applications, Part III, B.1.C, Cl. Exh. 50.

ICM, like several other applicants, submitted a Request for Reconsideration to the Board’s Committee on Reconsideration.<sup>217</sup> The report of the Committee on Reconsideration made it clear that “no new TLD proposal ha[d] been rejected by ICANN.”<sup>218</sup> Instead, because of the experimental nature of the “proof of concept” round, the Committee clarified that the fact that a new TLD proposal had not been selected under the circumstances “should not be interpreted as a negative reflection on the proposal or its sponsor.”<sup>219</sup>

108. Notably, on 16 November 2000, after ICM’s application for the .XXX TLD had been submitted and publicly posted on ICANN’s website, the GAC issued a statement on new gTLDs in order to “express its opinion on the objectives of creating new gTLDs, advise ICANN on necessary provisions to be included in the new registry agreements with the new gTLDs, and address public policy considerations.”<sup>220</sup> While this document addressed a variety of issues—described by the GAC as touching upon public policy—including the “promot[ion of] multilingual access [and] . . . the protection of personal data and intellectual property,” it made no mention of morality, adult content, or content of any sort.<sup>221</sup>

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<sup>217</sup> Reconsideration Request 00-15 (15 Dec. 2000), *available at* <http://www.icann.org/en/committees/reconsideration/icm-request-16dec00.htm>, Cl. Exh. 57.

<sup>218</sup> Reconsideration Request 00-15: Recommendations of the Committee (Revised), *available at* <http://www.icann.org/en/committees/reconsideration/rc00-15-1.htm> (last visited 22 Jan. 2009), Cl. Exh. 58.

<sup>219</sup> *Id.* (emphasis added).

<sup>220</sup> ICANN Response, referencing Opinion of the Governmental Advisory Committee on New Generic Top Level Domains (16 Nov. 2000), *available at* <http://www.icann.org/en/committees/gac/new-tld-opinion-16nov00.htm> (“Opinion of the GAC on New gTLDs”), Cl. Exh. 59.

<sup>221</sup> *Id.*

## **VI. ICANN'S 2004 ROUND OF APPLICATIONS FOR NEW SPONSORED TOP LEVEL DOMAINS**

### **A. ICANN Develops the RFP**

#### **1. The Plan for Action for New TLDs**

109. Following the completion of the 2000 “proof of concept” round of TLD applications and the addition of the new TLDs to the root, the ICANN Board began considering the timing and procedures for accepting proposals for new TLDs.

110. In November 2002, Stuart Lynn, then ICANN President and CEO, presented his “Plan for Action on New TLDs” during the ICANN meetings in Shanghai, China.<sup>222</sup> Shortly thereafter, the Plan was posted for public comment,<sup>223</sup> and was also presented to the GAC, in accordance with the Board’s obligations under the Bylaws. From the very beginning of the development of the process for approving new TLDs, therefore, the GAC was kept informed and given opportunities above and beyond those available to the general public to ask questions, make comments, or provide advice regarding the process and criteria for the 2004 round of sTLD applications.<sup>224</sup>

111. Mr. Lynn’s Plan recommended that ICANN consider an immediate “new round of proposals for up to three sponsored TLDs,” to be “launched as an extension of the [2000] Proof

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<sup>222</sup> Stuart Lynn, “A Plan for Action Regarding New gTLDs” (18 Oct. 2002), *available at* <http://www.icann.org/en/committees/ntepptf/new-gtld-action-plan-18oct02.htm>, Cl. Exh. 60; ICANN Public Forum—Afternoon Session, Shanghai, China (30 Oct. 2002), *available at* <http://www.icann.org/en/meetings/shanghai/captioning-afternoon-30oct02.htm#EvaluationPlanforNewTLDs>, Cl. Exh. 61.

<sup>223</sup> *See* General Comments Regarding A Plan for Action Regarding New gTLDs (10 Nov.- 22 Dec. 2002), *available at* <http://forum.icann.org/gtld-plan-comments/general/>, Cl. Exh. 62. Later, in preparation for ICANN’s Amsterdam meetings in December 2002, Mr. Lynn posted his responses to some of the comments received. *See* ICANN, Amsterdam Meeting Topic: A Plan for Action Regarding New gTLDs (10 Dec. 2002), *available at* <http://www.icann.org/en/meetings/amsterdam/gtld-action-plan-topic.htm>, Cl. Exh. 63.

<sup>224</sup> Executive Minutes, XIV GAC Meeting, Shanghai, China (27-29 Oct. 2002), *available at* [http://gac.icann.org/web/meetings/mtg14/GAC\\_XIV\\_Shanghai\\_Executive\\_Minutes.doc](http://gac.icann.org/web/meetings/mtg14/GAC_XIV_Shanghai_Executive_Minutes.doc), Cl. Exh. 64.

of Concept” round, and separately recommended that ICANN investigate “how to proceed with the gTLD namespace, in particular considering whether to rationalize the namespace according to some taxonomy as a basis for expansion, whether to continue to respond piecemeal to justified market demand, or whether according to some other alternative.”<sup>225</sup> Ultimately, however, the 2004 round of TLD applications was neither the limited extension of the 2000 “proof of concept” round nor the full-blown development of a comprehensive policy, but rather something in between.

112. The ICANN Board resumed the discussion of the Plan at its Amsterdam meeting in December 2002. It proceeded to direct “the President to develop a draft Request for Proposals for the Board’s consideration.”<sup>226</sup> Proposed criteria for the selection of new TLDs were posted for public comment in March 2003, and subsequently discussed during the public forum at ICANN’s Rio de Janeiro, Brazil meeting that same month.<sup>227</sup> There were six main proposed criteria for selection of new TLDs: (1) the ability of the applicant to “ensure stable registry operation,” (2) the ability of the applicant to “conform to the requirements of a sponsored TLD,” (3) whether the application would “add new value to the DNS,” (4) whether the application would “reach and enrich broad global communities,” (5) the ability of the applicant to “protect the rights of others,” and (6) whether the proposal was “complete and well-structured.”<sup>228</sup> Notably, particularly in light of the fact that applications for adult content TLDs had been

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<sup>225</sup> Stuart Lynn, “A Plan for Action Regarding New gTLDs” (18 Oct. 2002), Cl. Exh. 60.

<sup>226</sup> ICANN, Minutes, Fourth Annual Meeting of the Board, Amsterdam, Netherlands (15 Dec. 2002), available at <http://www.icann.org/en/minutes/minutes-annual-meeting-15dec02.htm>, Cl. Exh. 65.

<sup>227</sup> ICANN Rio de Janeiro Meeting Topic: Criteria to Be Used in the Selection of New Sponsored TLDs (25 Mar. 2003), available at <http://www.icann.org/en/meetings/riodejaneiro/stld-rfp-topic.htm>, Cl. Exh. 66; ICANN Meetings in Rio de Janeiro, Brazil—Schedule and Agenda (23-27 March 2003), available at <http://www.icann.org/en/meetings/riodejaneiro/index.html>, Cl. Exh. 67.

<sup>228</sup> ICANN Rio de Janeiro Meeting Topic: Criteria to Be Used in the Selection of New Sponsored TLDs, Cl. Exh. 66. These criteria also appear in the draft RFP, but, although many of the same ideas appear in the final RFP, the criteria themselves were substantially revised before the RFP was finalized.

submitted in the 2000 round and that ICM's application from that round had been identified as potentially controversial, none of these proposed criteria addressed "morality" issues or the content of websites to be registered in the new sponsored domains.

113. Mr. Lynn also directly informed the GAC, during its meetings in Rio de Janeiro, in March 2003 that these criteria had been posted and that a draft RFP would likely be submitted to the Board within four to six weeks.<sup>229</sup> During the GAC's discussion of the topic, it was "noted that the issue of new gTLDs raised matters of public interest," however, the GAC's Rio de Janeiro Communiqué made no mention of the proposed criteria or the new TLD process.<sup>230</sup>

## 2. The Draft Request for Proposals

114. A draft Request for Proposals ("RFP") for new sTLDs was posted for public comment on 24 June 2003.<sup>231</sup> The draft RFP stated that the Board had preliminarily decided "to limit applications to those applicants (or their affiliates or successors . . .) who submitted applications for sponsored TLDs in the original Fall 2000 round of applications."<sup>232</sup> The draft

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<sup>229</sup> Executive Minutes, Governmental Advisory Committee Meeting, Rio de Janeiro, Brazil (16 June 2003), available at [http://gac.icann.org/web/meetings/mtg15/Rio\\_Executive\\_minutes.doc](http://gac.icann.org/web/meetings/mtg15/Rio_Executive_minutes.doc), Cl. Exh. 68; Stuart Lynn, sTLD RFP: Status, Powerpoint (24 March 2003), available at <http://www.icann.org/presentations/lynn-stlds-rio-26mar03.pdf>, Cl. Exh. 69.

<sup>230</sup> Executive Minutes, ICANN Governmental Advisory Committee Meeting, Rio de Janeiro, Brazil, Cl. Exh. 67; Stuart Lynn, sTLD RFP: Status (24 March 2003), Cl. Exh. 69; GAC Communiqué, Rio de Janeiro, Brazil (25 March 2003), available at <http://gac.icann.org/web/communiques/gac15com.htm>, Cl. Exh. 70. The only specific matters of "public interest" discussed were the need for "identifiers with international meaning," an application system "based on the demand from the community and which show[s] transparency, professionalism and independence in the evaluation process," and "neutral mechanism[s] to evaluate how to charge the registry." Executive Minutes, ICANN Governmental Advisory Committee Meeting, Rio de Janeiro, Brazil, Cl. Exh. 68.

<sup>231</sup> ICANN GNSO Council gTLDs Committee—new gTLDs, conclusions v.7 (12 June 2003), available at <http://www.dns0.org/dns0/notes/20030612.gTLDs-committee-conclusions-v7.html>, Cl. Exh. 71; ICANN, Establishment of new sTLDs: Requests for Proposals (Draft for Public Comment) (24 June 2003), available at <http://www.icann.org/tlds/new-stld-rfp/new-stld-rfp-24jun03.htm> ("Draft sTLD RFP"), Cl. Exh. 72.

<sup>232</sup> Draft sTLD RFP, Cl. Exh. 72. The draft RFP also included a description of the process to be followed in selecting new TLDs. Notably, although the structure of the evaluation process was more complex than what ICANN eventually adopted in the final RFP, the draft RFP described a clearly

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RFP described five characteristics that an sTLD should possess: (1) “a well-defined and limited community;” (2) “a clear charter;” (3) “a hierarchical policy environment . . . clearly defin[ing] which policy responsibilities are delegated from ICANN;” (4) “open and transparent structures...that allow for orderly policy development;” and (5) willingness “to adhere to ICANN policies as they may change” over time.<sup>233</sup> The draft RFP also included “Evaluation Methodology and Selection Criteria” to be used by the evaluators of the sTLD applications.<sup>234</sup> These criteria mirrored the proposed criteria discussed at the Rio de Janeiro ICANN meetings. Again, none of the criteria proposed at Rio or subsequently added to the draft RFP related to “morality” or the content of websites in the new TLDs.

115. ICANN also explained in the draft RFP that:

It is ICANN’s intention to engage the services of one or more external consultants to provide an objective and independent evaluation of the applications with reference to the requirements stated in the RFP and following the selection criteria and evaluation methodology described in this document.<sup>235</sup>

116. The Board discussed the draft RFP at the ICANN meetings in June 2003 in Montreal, Canada. Public comments were invited on the draft, specifically on the issue of whether the process should be limited to applicants from the 2000 “proof of concept” round.<sup>236</sup> The draft RFP was also a significant topic of conversation at the GAC’s concurrently held meetings in Montreal. ICANN’s President and CEO, Paul Twomey, informed the GAC that the

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demarcated two-step process of (1) evaluation and approval, followed by (2) registry agreement negotiations and execution.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> ICANN, Minutes of the Regular Meeting of the Board - Montreal (26 June 2003), *available at* <http://www.icann.org/en/minutes/minutes-26jun03.htm>, Cl. Exh. 73.



draft RFP had been posted and that the Board was expecting to begin evaluating public feedback during its next meeting. The GAC also received a report from the gTLD working group that had been established at the GAC's Rio de Janeiro meetings. The working group reported that it was preparing documents "to identify [the] main public policy issues related to the introduction of new gTLDs."<sup>237</sup>

117. Following these discussions, the GAC decided to "continue to follow gTLD issues and prepare advice for ICANN on public policy implications."<sup>238</sup> As it had done at the Rio de Janeiro meeting, the GAC did not provide any specific advice to ICANN regarding new TLDs following the Montreal meeting. The GAC Montreal Communiqué that was subsequently issued was accordingly silent on the issue of new TLDs.<sup>239</sup> So also was the Communiqué from the next GAC meeting in Carthage, Tunisia, in October 2003, by which time the GAC had benefitted from an additional four months to review the draft RFP and consider whether there was a need to provide advice regarding any public policy concerns.<sup>240</sup>

118. The Board continued to discuss the development of new TLDs at subsequent meetings.<sup>241</sup> In October of 2003, the Board decided that the RFP would not be limited to those

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<sup>237</sup> Executive Minutes, Governmental Advisory Committee Meeting XVI Minutes, Montreal, Canada (29 Sept. 2003), *available at* [http://gac.icann.org/web/meetings/mtg16/Montreal\\_Executive\\_minutes.doc](http://gac.icann.org/web/meetings/mtg16/Montreal_Executive_minutes.doc), Cl. Exh. 74. In February 2005, the GAC Chairman issued a document describing GAC policy advice to the ICANN Board from 1999 to 2004. Notably, this document, while mentioning public policy issues such as "competition, consumer choice, network stability and security, and internationalization issues," does not mention any advice relating to content or morality. *See* GAC Chairman's Report to WGIG, Cl. Exh. 42.

<sup>238</sup> Governmental Advisory Committee Meeting XVI Minutes, Montreal, Canada, Cl. Exh. 74.

<sup>239</sup> GAC Communiqué # 16—Montreal, Canada (24 June 2003), *available at* <http://gac.icann.org/web/communiques/gac16com.doc>, Cl. Exh. 75.

<sup>240</sup> GAC Communiqué # 17—Carthage, Tunisia (28 Oct. 2003), *available at* <http://gac.icann.org/web/communiques/gac17com.htm>, Cl. Exh. 76.

<sup>241</sup> ICANN, Special Meeting of the Board, Minutes (9 Sept. 2003), *available at* <http://www.icann.org/en/minutes/minutes-09sep03.htm>, Cl. Exh. 77. In one such discussion, in

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applicants that had applied during the 2000 round, and directed the President to finalize the RFP. Importantly, the Board also resolved that “upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms shall be negotiated.”<sup>242</sup> ICANN proceeded to formally announce that it was initiating an “*expedited process* for a round of new [sTLDs], which will result in new sTLD’s [sic] in 2004.”<sup>243</sup>

### **3. The Final Request for Proposals for the 2004 Round of sTLD Applications**

119. Following the Board’s direction, the final version of the RFP was posted on 15 December 2003.<sup>244</sup> By that date, the process of developing the RFP had lasted for over a year, and had included extensive opportunities for input from various ICANN constituencies, including the GAC, and the public at large. Indeed, ICANN itself has stated in this proceeding that, even before the RFP was finalized, “[t]he draft RFP received significant input via ICANN’s online public forum.”<sup>245</sup>

#### **a. The RFP Does Not Mention Morality, Content or General “Public Policy” Concerns**

120. The final RFP established a specifically defined universe of criteria according to which each application was to be evaluated. None of the defined criteria related to the content, adult or otherwise, of websites to be registered in the domain. Nor was there any discussion of

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September 2003, the Board specifically discussed “the importance of the establishment of and adherence to objective criteria for review.”

<sup>242</sup> ICANN Board Resolution on Finalization of New sTLDs RFP, Carthage, Tunisia (31 Oct. 2003), available at <http://www.icann.org/en/announcements/advisory-31oct03.htm>, (“Board Resolution Finalizing New sTLD RFP”), Cl. Exh. 78.

<sup>243</sup> ICANN Announcement, ICANN Launches Broad Strategic Initiative for New Generic Top-Level Domains (31 Oct. 2003), available at <http://www.icann.org/announcements/announcement-31oct03.htm>, Cl. Exh. 79.

<sup>244</sup> sTLD RFP, Cl. Exh. 45.

<sup>245</sup> ICANN Response, note 46.

“public policy” concerns other than those specifically articulated by the selection criteria. The process of developing the RFP had provided ample opportunity for ICANN to weigh the public policy issues involved in the selection of new sTLDs, and the criteria included in the RFP represented ICANN’s conclusions about what public policy issues it would consider in evaluating applications. Certainly none of the documents created by ICANN, or comments made by those in charge during the process, raised the possibility that the approval of an application would, in any way, be based on the content of a website in the proposed TLD or other, previously non-articulated, non-specific public policy issues.

121. The absence of any reference to controversial website content, morality issues, or other non-specified public policy considerations in the final published RFP is not without significance. ICANN was well aware that applications could be forthcoming for adult-content TLDs, and such applications could raise concerns among certain constituencies.<sup>246</sup> After all, ICANN itself had raised the possibility of an adult content TLD in early documents leading to the 2000 “proof of concept” round,<sup>247</sup> and ICM Registry, Inc. and other applicants had subsequently applied for adult content TLDs in that round.<sup>248</sup> ICANN also knew that ICM was still interested in applying for an adult content TLD, as representatives of ICM had attended nearly every ICANN meeting since 1999 and asked questions about the process during the development of the RFP. ICANN also knew in advance of the 2004 round that an adult content application had the potential to be controversial, as the possibility of controversy was one reason why ICANN had not approved ICM’s application in the 2000 round.<sup>249</sup> Additionally, the

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<sup>246</sup> Williams Witness Statement, paras. 6-7.

<sup>247</sup> ICANN Yokohama Meeting, Cl. Exh. 23.

<sup>248</sup> ICANN, TLD Applications Lodged, Cl. Exh. 54.

<sup>249</sup> Report on New TLD Applications, § III.B.1.c, Cl. Exh. 50.

possibility of an adult-content TLD application in the 2004 round had been raised in public comments.<sup>250</sup> Accordingly, ICANN could have—and should have—anticipated the possibility that an application for an adult-content sTLD would be submitted, and, regardless of the true merits of such an application, might be viewed by some as raising concerns.<sup>251</sup> In the opinion of Dr. Elizabeth Williams, an ICANN consultant who was involved in the creation of the application process, ICANN “had an opportunity to create criteria or procedures to address and resolve [the concerns that might be raised by an application for an adult content TLD] . . . . Nonetheless, the final criteria were completely silent on the subject of adult content, or morality or offensive content generally, and the related public relations controversy.”<sup>252</sup>

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<sup>250</sup> See, e.g., General Comments Regarding A Plan for Action Regarding New gTLDs, Cl. Exh. 62; Submissions to the stld-rfp-comments Forum, available at <http://forum.icann.org/mtg-cmts/stld-rfp-comments/general/index.html> (last visited 22 Jan. 2009), Cl. Exh. 80. If ICANN felt that these were reasons for rejecting an application, ICANN could easily have written them into the criteria.

<sup>251</sup> In fact, future TLD application rounds may well include some criteria related to general public policy or morality concerns. ICANN is currently in the process of developing a new set of processes and criteria for a new round of TLD applications, expected to begin later in 2009. Some elements of the process for this round “were developed in an attempt to avoid repeating the mistakes made in the handling of the .XXX application. For instance, under the current draft of the RFP for a forthcoming application round, there is a much more detailed and extensive process for filing and resolving objections to an application, including provisions that objections may be filed if the ‘string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law.’” Williams Witness Statement, para. 32 (quoting ICANN, *New gTLD Program Explanatory Memorandum: Morality and Public Order Objection Considerations in New gTLDs* (29 Oct. 2008), available at <http://www.icann.org/en/topics/new-gtld-morality-public-order-draft-29oct08-en.pdf> (“New gTLD Program Explanatory Memorandum”), Cl. Exh. 81. The methodology for objections based on such concerns has not yet been fully developed, beyond the broad suggestion that legitimate reasons for limiting freedom of expression include “[i]ncitement to violent lawless action[,]...[i]ncitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin[,]...and [i]ncitement to or promotion of child pornography or other sexual abuse of children.” *Id.* The applicants for the 2009 round will thus have sufficient notice of the potential objections to their applications. If ICANN had wanted to develop procedures relating to morality or public policy for the 2003 RFP it could have done so. Including such procedures or criteria aimed at limiting or precluding certain TLDs relating to content or other vague public policy considerations may have raised different issues, including whether ICANN was exceeding its mission in focusing on content rather than technical criteria; but the fact is that ICANN did not chose to include any such criteria.

<sup>252</sup> See Williams Witness Statement, para. 7. In particular, Dr. Williams believes that Dr. Twomey’s previous experiences as Chairman of the GAC and a Chief Executive of Australia’s National Office for the Information Economy would have made him aware of the potential for unfavorable reactions from  
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122. Despite the GAC's frequent statements that it was aware that the solicitation of proposals for new TLDs could implicate public policy matters, it did not offer any advice regarding how the RFP process or criteria should address such matters. As mentioned above, its previous statement, from the 2000 "proof of concept" round, on public policy issues related to new gTLDs had made no mention of morality, adult content, or content of any sort.<sup>253</sup> From the very beginning of the extensive, comprehensive process that took place in the development of the final RFP for the 2004 round, the GAC was kept fully informed of the status of the process and the substance of the criteria as they were developed. Not only did the GAC have full access to the documents available to the public, Stuart Lynn had personally appeared before the GAC in order to provide representatives the opportunity to ask questions, make comments, and provide advice, either at the meetings or in subsequent Communiqués. From the time the Board first authorized Mr. Lynn to create a plan for new sTLDs in October 2002 until the final RFP was adopted in December 2003, the GAC met four times and issued four Communiqués, and could have used any of those opportunities to address public policy matters associated with the new TLDs. Additionally, as was the case with all Board activities, the GAC was provided with briefing papers on the topics before the Board, including the RFP for new sTLDs, and the GAC liaison to the Board was invited to all Board meetings, and actually attended the September and October 2003 meetings where the Board's final discussions of the RFP took place. If the GAC or any of the member governments had wished to see specific rules applied to applications

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some governments (and, in particular, the Australian government) to any proposal for an adult content TLD.

<sup>253</sup> ICANN Response paras. 29-30, referencing Opinion of the Governmental Advisory Committee on New Generic Top Level Domains (16 Nov. 2000), *available at* <http://www.icann.org/en/committees/gac/new-tld-opinion-16nov00.htm> ("Opinion of the GAC on New gTLDs"), Cl. Exh. 59.

potentially raising controversial content or public policy matters, the GAC had plenty of opportunity to make such a recommendation before the RFP criteria were finalized. It, however, remained silent.

**b. The RFP Criteria**

123. The criteria in the RFP were meant to be applied objectively to all applications, regardless of the content of the websites which were to be registered in the domain.<sup>254</sup> In contrast to the “proof of concept” round, where ICANN had expected to approve only a limited number of applications, the applications in the 2004 round were not expected to compete with each other, and, as publicly described, any number of applications that met the criteria would be accepted by ICANN. Each application was to be individually compared to the selection criteria in the RFP, and judged against those criteria alone.<sup>255</sup>

124. The RFP was broken down into six sections. The first section “provided applicants with explanatory notes on the process as well as an indication of the type of information requested by ICANN[,]” and the remaining five sections consisted of the application itself. Consistent with ICANN’s Bylaws, the Explanatory Notes accompanying the RFP

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<sup>254</sup> sTLD RFP, Part A: Explanatory Notes (“The selection procedure is based on principles of objectivity, non-discrimination and transparency. . . . The following criteria will be used in the evaluation of all proposals received. They are designed as objective criteria to enable the independent evaluators to determine which applications best meet ICANN’s requirements under the Request for Proposal”), Cl. Exh. 45; *see also* ICANN, Special Meeting of the Board (9 Sept. 2003), Cl. Exh. 77 (“The discussion included the importance of the establishment of and adherence to objective criteria for review”); Williams Witness Statement, para. 14 (“[The sponsorship evaluators] did not compare the applications to each other . . . but evaluated each individually against the selection criteria.”).

<sup>255</sup> ICANN Announcement: Progress and Process for Introducing New Sponsored Top-Level Domains (19 Mar. 2004), available at <http://www.icann.org/announcements/announcement-19mar04.htm> (“ICANN Announcement: Progress and Process”), Cl. Exh. 82; *see also* Williams Witness Statement, para. 15 (“[W]e never ranked the applications against each other during the evaluation process, but rather, only evaluated the applications against the set RFP criteria.”).

explicitly stated that “[t]he selection procedure [was to be] based on principles of objectivity, non-discrimination and transparency.”<sup>256</sup>

125. The RFP established the following criteria that an application had to meet in order to be approved:

- **Technical Standards**—The ability to comply with the necessary technical standards “to ensure that [the proposed domain would] not affect the stability and integrity of the domain name system.” Applicants were required to provide: (1) evidence of an ability to ensure stable registry operation; (2) evidence that the registry could comply with best practice technical standards for registry operations; (3) evidence of a full range of registry services; and (4) assurances of continuity of registry operation in the event of business failure of the proposed registry;
- **Business Plan Information**—The necessary financial, technical, and operational capabilities. Evaluators were to assess each applicant’s: (1) financial model; and (2) business plan (which included staffing, marketing plan, registrar arrangements, fee structure, technical resources, uniqueness of application, and engagement with and commitment to the sponsoring organization);
- **Sponsorship Information**—The proposed domain’s ability to “address the needs and interests of a clearly defined community.” Evaluators were to assess each applicant’s: (1) definition of a sponsored community; (2) support by a Sponsoring Organization; (3) submissions regarding the appropriateness of the Sponsoring Organization and the policy formulation environment (to demonstrate that the Sponsoring Organization would operate in the best interests of the sTLD community and had the appropriate policy-formulation role); and (4) evidence that it had broad-based support from the community to be represented; and
- **Community Value**—The value that would be added to the Internet by virtue of the inclusion of the proposed sTLD. Evaluators were to assess whether the proposed sTLD would have in effect policies and procedures to: (1) add value to the Internet name space; (2) protect the rights of others; (3) assure charter-compliant registrations and avoid abusive registration

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<sup>256</sup> sTLD RFP, Part A: Explanatory Notes, Cl. Exh. 45.

practices; (4) assure adequate dispute-resolution mechanisms; and (5) provide ICANN-policy compliant WHOIS services.<sup>257</sup>

**c. The Two-Step Evaluation Process**

126. In order to process the sTLD applications in a timely and efficient manner, ICANN established a two-step process for the consideration, approval, and implementation of the submitted applications. Kurt Pritz, ICANN’s Senior Vice President of Services and the executive managing the sTLD RFP process, explained the process as follows:

- **First**, sTLD applications were to be (1) checked for completion; (2) posted for public comment; and (3) evaluated for compliance with the Board-approved RFP criteria by independent evaluation teams.<sup>258</sup> As explained by Mr. Pritz, “[t]his first round of the process is to demonstrate involvement in the community, technical competence, financial viability, and a robust business model.”<sup>259</sup> The independent evaluators were charged with identifying the applications which met the RFP criteria. The independent evaluators would provide recommendations to the Board, and approved applications would then proceed to the second round.
- **Second**, the applications that were determined to have met the published RFP criteria would proceed to technical and commercial negotiations with ICANN staff to determine “the terms of the contract of that sTLD, both with respect to technical considerations and with respect to the business model and commercial applications.”<sup>260</sup>

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<sup>257</sup> *Id.*

<sup>258</sup> ICANN, Status Report on the sTLD Evaluation Process at 5 (posted on 19 Mar. 2004) (appendices cited separately), available at <http://www.icann.org/en/tlds/stld-apps-19mar04/stld-status-report.pdf> (“sTLD Status Report”), Cl. Exh. 83.

<sup>259</sup> Kurt Pritz, sTLD Update, ICANN Meetings in Rome, ICANN Public Forum—Part 1, Rome, Italy (4 Mar. 2004), available at <http://www.icann.org/meetings/rome/captioning-forum1-04mar04.htm> (“sTLD Update, Rome”), Cl. Exh. 84. .

<sup>260</sup> *Id.*; see also Kurt Pritz, sTLD Powerpoint Presentation for the ICANN Meeting, Rome, Italy (4 Mar. 2004), available at <http://www.icann.org/presentations/pritz-forum-rome-04mar04.pdf>, Cl. Exh. 85 (describing the process as including two major steps: first, the application must “demonstrate community participation, technical competence, financial viability and a robust business model” and would then proceed to “[c]ommercial / technical negotiation”).



127. This two-step process was repeatedly confirmed, not only, as ICANN now asserts, during the “sTLD updates” presented to the ICANN Board and ICANN Public Forums,<sup>261</sup> but also in various other written and oral communications from ICANN, including communications directly to ICM. One of the first instances the process was described was in the October 2003 Board resolution directing the finalization of the RFP, which provided that “upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms shall be negotiated.”<sup>262</sup> At the same meetings in Carthage, Tunisia where the Board resolution was adopted, describing the process ICANN intended to follow once the RFP was finalized, Dr. Vinton Cerf (ICANN’s Chairman) stated that “**upon completion of the sTLD selection process**, which we will document, there will be an agreement reflecting commercial and technical terms. And that needs to be negotiated.”<sup>263</sup>

128. The two-step process was subsequently reconfirmed in numerous public statements and through other communications. For example, at the ICANN Public Forum meetings in Rome in March 2004, just before the applications were submitted, Mr. Pritz explained:

May through July, the independent evaluation will occur. That time may shrink or grow a little bit, depending on the number of applications received. And then with the 1st of August, **we’ll identify those sTLDs that completed the first round and met the criteria, and we’ll go on to the round** of technical and commercial negotiations.<sup>264</sup>

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<sup>261</sup> ICANN Response, para. 59.

<sup>262</sup> Board Resolution Finalizing New sTLD RFP, Cl. Exh. 78; *see also* sTLD Update, ICANN Board Meetings Captioning, Carthage (31 Oct. 2003), *available at* <http://www.icann.org/en/meetings/carthage/captioning-board-31oct03.html> (“sTLD Update, Carthage”), Cl. Exh. 86.

<sup>263</sup> sTLD Update, Carthage (emphasis added), Cl. Exh. 86.

<sup>264</sup> sTLD Update, Rome (emphasis added), Cl. Exh. 84.

129. In December 2004 at the ICANN meeting in Cape Town, South Africa, Mr. Pritz is again on record as having described the process for all applications:

There was, essentially, **a two-step process** to evaluate that application with the goal of establishing a new sTLD. First, the application was reviewed by a panel of independent evaluators. And having passed that hurdle, the applicant would enter into technical and commercial negotiations with the target of establishing the new sponsored top-level domains.<sup>265</sup>

130. And again, the transcript of Mr. Pritz's comments at the Mar del Plata, Argentina Public Forum Meeting in April 2005 reflects confirmation of this two-step process:

If it was **determined that an application met those three sets of baseline criteria, technical, commercial and sponsorship community, they, then, were informed that they would enter into a phase of commercial and technical negotiation** with ICANN, the culmination of those negotiations is and was intended to result in the designation of the new top-level domain. At the conclusion of that, we would sign agreements that would be forwarded to the Board for their approval.<sup>266</sup>

131. In addition to these sTLD status updates, the two-step process is also described in ICANN's written announcement of the applications received, "Progress in Process for Introducing New Sponsored Top-Level Domains," which stated:

The applications will be reviewed by an independent evaluation panel beginning in May 2004. The criteria for evaluation were posted with the RFP. **All applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN** for agreements for the allocation and sponsorship of the requested TLDs.<sup>267</sup>

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<sup>265</sup> Kurt Pritz, "sTLD Update," ICANN Meetings in Cape Town, ICANN Public Forum—Part 1 (3 Dec. 2004) (emphasis added), available at <http://www.icann.org/meetings/capetown/captioning-public-forum-1-03dec04.htm> ("sTLD Update, Cape Town"), Cl. Exh. 87.

<sup>266</sup> ICANN Meetings in Mar Del Plata, ICANN Public Forum Meeting—Part 2 (7 Apr. 2005) (emphasis added), available at <http://www.icann.org/meetings/mardelplata/captioning-public-forum-2-07apr05.htm>, Cl. Exh. 88.

<sup>267</sup> See ICANN Announcement: Progress and Process (emphasis added), Cl. Exh. 82.

132. The two-step process was also described in a direct communication from ICANN to ICM, which stated that “[i]f it is determined that the sponsorship criteria have been met, the application will proceed immediately into technical and commercial negotiation.”<sup>268</sup> This statement clearly indicated that proceeding to the second step of registry agreement negotiations was contingent upon successfully completing the first step: a determination that the RFP criteria had been met.

133. As discussed below, following the initial reports from the independent evaluators, the Board decided to intervene in the process and evaluate the applications itself. Nonetheless, the two-step process was repeatedly confirmed, even after the ICANN Board’s intervention in the evaluation process. For example, Mr. Pritz’s description at the Public Forum during the Cape Town meeting in December 2004, by which time the ICM application was known to be actively under consideration by the Board, made it clear that the Board’s intervention had not changed the two-step nature of the process:

So after that process . . . if there were still contingencies remaining at the close of that iteration process, we asked the ICANN board, giving them full information, meaning the original application, the independent evaluators’ report, the questions that were asked, and the written responses of the applicants, **we asked the board to determine whether the contingencies on the application had been satisfied and that the application could move on to the negotiation step** or whether the contingency had not been removed or, perhaps, thirdly, the board may determine that more information was required to make a determination. . . . **Those that were determined to meet that application then go on to negotiation.**<sup>269</sup>

134. Similarly, Mr. Pritz’s summary of the process at the Mar del Plata Public Forum in April 2005 described the same two-step process, including the intervention of the Board:

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<sup>268</sup> Letter from Kurt Pritz to Stuart Lawley, 31 July 2004, Cl. Exh. 89.

<sup>269</sup> sTLD Update, Cape Town (emphasis added), Cl. Exh. 87.

At the end of [the independent evaluation process], if there were still contingencies remaining in the application, the ICANN Board, with full information, *i.e.*, with access to the original application, the questions that went back and forth, the independent evaluators' report, and subsequent writings, took on to **confirm whether the contingencies in the application had, in fact, been removed and the application could go on to the negotiation phase**, or whether additional information was required, or, in fact, whether the application was deficient and should not be granted.<sup>270</sup>

135. Notwithstanding the foregoing, ICANN now asserts that it “never intended for the sTLD evaluation process to be divided into two concrete and inflexible ‘phases.’”<sup>271</sup> But if ICANN had no such intention, why then did ICANN senior staff and Board members continuously describe the process in such a manner, in both written and oral communications? Based on these and other statements, ICM, along with others involved in the application process, understood that the review of the applications would be a two-step process consisting of a review to determine if the application met the RFP criteria, followed by negotiation over the commercial and technical terms of the registry agreement.<sup>272</sup> For example, Dr. Elizabeth Williams, the Chair of the Sponsorship Evaluation Team, recalls that “[a]s the process was explained to [her], after the Board approved an application, it would negotiate specific contract terms with the applicant, execute the final registry agreement, and enter the new string into the root.”<sup>273</sup> Tellingly, ICANN does not offer any explanation as to why the repeated descriptions of the two-step process by ICANN executives should be disregarded. It does not, because it cannot.

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<sup>270</sup> ICANN Meetings in Mar Del Plata, ICANN Public Forum Meeting—Part 2 (emphasis added), Cl. Exh. 88. *See also* Mueller Expert Report at 37 (“If the June 1, 2005 vote was not about the sponsorship issues and did not resolve the issue of whether the application met those criteria then what, exactly, was the vote about? After several months of delay and uncertainty, why would ICANN have held a vote authorizing contract negotiations if that vote did not resolve the only outstanding issue regarding the application?”).

<sup>271</sup> ICANN Response, para. 59.

<sup>272</sup> Burr Witness Statement, para. 31; *see also* Lawley Witness Statement, para. 47.

<sup>273</sup> Williams Witness Statement, para. 8; *see also* Mueller Expert Report at 37-38.

136. From a practical standpoint, the bifurcated sTLD application process put in place by ICANN made perfect sense. In the first phase, applicants were to be subjected to a rigorous review that would entail: (1) an opportunity for all interested parties, including the GAC, to comment on all applications; (2) recommendations by the independent evaluation teams to the Board, taking into consideration the Board-defined criteria and the submitted public comments; and (3) input by applicants in response to concerns raised by the evaluating teams and the Board. It was only after the Board itself was fully satisfied that an applicant had complied with all of the RFP criteria that an applicant could proceed to phase two: registry agreement negotiations. Indeed, it would have been illogical and inefficient for either ICANN or an applicant to expend the considerable time and expense of negotiating a registry agreement when it had not yet been determined that the application fully satisfied the RFP criteria.<sup>274</sup>

137. Throughout the process, from before the applications were submitted to after the Board took over the evaluations, ICANN consistently reaffirmed that applications would progress through two separate phases: the evaluation of the application for compliance with the RFP criteria, followed by commercial and technical negotiations for those applications which were judged to meet the criteria. In addition to the Board's October 2003 resolution and the other written descriptions of the RFP process, Mr. Pritz's remarks at Rome in March 2004, at Kuala Lumpur in July 2004, at Cape Town in December 2004, and at Mar del Plata in April 2005 never failed to describe the process as occurring in two steps. Accordingly, nothing in the RFP or related *contemporaneous* commentary or documentation describing the evaluation process even hinted at the possibility that an sTLD application could be re-evaluated (or subjected to an on-

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<sup>274</sup> See also Williams Witness Statement, para. 24. ("There would be no purpose to dividing the Board's deliberation process into two phases, and requiring a Board resolution for an application to proceed to the second phase, unless the resolution represented a determination that the application had met the selection criteria."); Burr Witness Statement, para. 13.

going evaluation process) after having already been approved by the Board to progress to the second phase. ICM and others certainly expected, and were justified and reasonable in expecting, that once an application had been approved by the Board, compliance with the RFP criteria would not be a consideration in the second phase, in which the sole focus would be contract negotiations.<sup>275</sup> ICM carefully reviewed the criteria that were to be used in the evaluation of the applications, and the process by which evaluations would be conducted, and, in reliance on the stated requirements and processes, carefully prepared an application that met all of the requirements.<sup>276</sup>

## **B. Ten sTLD Applications Are Submitted**

138. By 16 March 2004, the RFP application deadline, ICANN had received 10 completed applications, each accompanied by the mandatory fee of US\$ 45,000, for the sTLDs .ASIA, .CAT, .JOBS, .MAIL, .MOBI, .POST, .TEL (from two different applicants), .TRAVEL, and .XXX. Like ICM, the applicants for .POST, .MOBI, both versions of .TEL, and .TRAVEL had all previously submitted applications for TLDs during the 2000 “proof of concept” round, but had not been selected. The proposed sTLDs and their sponsoring organizations are briefly described below. As is apparent from the descriptions, the proposals covered a broad range of concepts and sponsored communities.

139. *DotAsia Organisation Limited* applied for the *.ASIA sTLD*, which was to be “a regional Internet namespace with global recognition and regional significance.”<sup>277</sup> The sponsored community to be served by the domain was described as the “Pan-Asia and Asia

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<sup>275</sup> See Lawley Witness Statement, para. 47; Burr Witness Statement, para.13; Williams Witness Statement, para. 24; Mueller Expert Report at 36-38.

<sup>276</sup> Lawley Witness Statement, para. 30.

<sup>277</sup> DotAsia Organisation Limited, New sTLD RFP Application (posted 19 Mar. 2004), *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/asia.htm> (“.ASIA Application”), Cl. Exh. 90.

Pacific Internet community,” using ICANN’s geographic definitions of the Asia / Australia / Pacific region.<sup>278</sup> Registrants could be individuals or entities, and would be required to “declare their ‘proof-of-presence’ stating that they are a legal entity within the Pan-Asia and Asia Pacific region and therefore establishing a nexus within this region.”<sup>279</sup> The overall goal of the TLD would be to create a “globally visible domain that embodies the successful, cooperative atmosphere established within the Pan-Asia and Asia Pacific Internet community to accelerate the overall growth of the region” and to “help cement a common regional identity that will be reinforced by the reinvestment of registry proceeds into further development for the region.”<sup>280</sup> The DotAsia Organisation, which was both the applicant and the proposed sponsoring organization, was founded specifically to serve as the registry operator for the TLD.<sup>281</sup>

140. *Associació puntCAT* applied to serve as the sponsoring organization for the *.CAT sTLD*. The application described the sponsored community for the sTLD as the Catalan linguistic and cultural community. The application stated that the community was identifiable because the relevant Catalan language and cultural-related entities knew their own members and would understand who should be included in the community.<sup>282</sup> One of the ways a potential registrant would be able to demonstrate membership in the community was through references from other members of the community. The application noted that “[t]he vast majority of people will concentrate their communications to and with the services and people using their same language,” and a *.CAT sTLD* would provide a new opportunity for speakers of Catalan to do just

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> Associació puntCat, New sTLD RFP Application (posted 19 Mar. 2004), *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/cat.htm> (“*.CAT Application*”), Cl. Exh. 91.

that.<sup>283</sup> The application was submitted by Associació puntCAT, which was incorporated and operated in order to file the application. In the event of the application’s approval, Associació puntCAT was to be dissolved and Fundació puntCAT created to serve as the sponsoring organization.<sup>284</sup>

141. *Employ Media LLC* applied for the *.JOBS sTLD*. The sponsored community was described as those “engaged in human resource management practices,” and applicants for websites were also required to be supportive of a “Code of Ethical and Professional Standards in Human Resource Management.”<sup>285</sup> Thus, not all members of the human resources community would necessarily be registrants for *.JOBS*; only those who also agreed with the Code as described in the application. According to the application, the sponsored community “shares common goals, objectives and interests including hiring people to perform the activities of the organization, providing proper training, and facilitating appropriate rewards including opportunities for individual achievement and advancement,” and a “shared and common need of this Community is for a reasonable and consistent method for promotion and location by way of a descriptive format within a new Top Level addressing hierarchy (i.e., companyname.jobs).”<sup>286</sup> *Employ Media*, the applicant, was established specifically “to manage and market the *.jobs sTLD*,” and would therefore serve as the registry operator if the *sTLD* was created. The Society for Human Resource Management, “the world’s largest association devoted to human resource management,” was proposed to serve as the sponsoring organization.<sup>287</sup>

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Employ Media LLC*, New *sTLD* RFP Application (posted 19 Mar. 2004), available at <http://www.icann.org/en/tlds/stld-apps-19mar04/jobs.htm> (“*.JOBS* Application”), Cl. Exh. 92.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*



142. *The Anti-Spam Community Registry* applied for the *.MAIL sTLD* to serve a sponsored community of “individuals and companies who wish to [receive and] send spam-free email and who do not want to be blocked, filtered or inconvenienced when doing so.”<sup>288</sup> Although the core of the community would be “technical people who operate mail servers that send and receive email,”<sup>289</sup> the proposed community really would include everyone who uses email and is not a sender of spam (or, more accurately and even more broadly, who did not intend to send spam through the *.MAIL sTLD*). Registrants would maintain their existing email addresses, and the sTLD would operate “during an SMTP transaction between an email sending server and a recipient server” by providing the “means to validate that the email sent with this TLD is spam-free.”<sup>290</sup> The Anti-Spam Community Registry, which was both the applicant and the sponsoring organization, was formed specifically for the purpose of applying and serving as sponsoring organization for the sTLD.<sup>291</sup>

143. *A consortium of mobile Internet service, equipment, and content providers* applied for the *.MOBI sTLD*. The application described the sponsored community for the domain as “consumers of mobile devices, services and applications[;] [m]obile content and service providers[;] [m]obile operators[;] [m]obile device manufacturers and vendors[;] and

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<sup>288</sup> The Anti-Spam Community Registry, New sTLD RFP Application (posted 19 Mar. 2004), available at <http://www.icann.org/en/tlds/stld-apps-19mar04/mail.htm> (“*.MAIL Application*”), Cl. Exh. 93.

<sup>289</sup> *Id.*

<sup>290</sup> The Anti-Spam Community Registry, Frequently Asked Questions, available at <http://www.ascregistry.org/FAQ/default.htm> (last visited 22 Jan. 2009), Cl. Exh. 94.

<sup>291</sup> *.MAIL Application*, Cl. Exh. 93. Although the Anti-Spam Community Registry was a new organization, one of the founding members of the registry, the Spamhaus Project, was already involved in the proposed community by providing services to a large number of organizations to help identify and deal with spam.

[information] technology and software vendors who serve the mobile community.”<sup>292</sup> The webpages registered in the sTLD would be “specifically tailored for access and use by mobile devices,” thereby taking into account the “needs and requirements of the rapidly growing number of Internet connected mobile terminals,” which had not been sufficiently addressed up to that point.<sup>293</sup> The entity created to serve as the sponsoring organization was given the working name “Mobi JV,” and the founders were Nokia, Microsoft, and Vodafone, although a number of other well-known companies were expected to join as investors.<sup>294</sup>

144. *The Universal Postal Union* applied for the *.POST sTLD*. The sponsored community to be served by the domain was described in the application as the worldwide postal community, including “public and private operators, organizations and government agencies that provide and support universal, trusted and secure postal services.”<sup>295</sup> The establishment of the sTLD was to be an attempt to create “a global electronic postal network—establishing up to 650,000 Post Offices on the Internet which will enable users in all parts of the world to access their local postal outlets via the DNS, for services related to local postal functions.”<sup>296</sup> Initially, registration would be open only to officially designated Post Operators, after which registration would be expanded to include “the postal community at large.”<sup>297</sup>

145. *NetNumber, Inc.* applied for the *.TEL sTLD*, with Pulver.com as the sponsoring organization (this application is commonly referred to as the *.TEL (Pulver)* application, and is

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<sup>292</sup> Nokia Corporation *et al.*, New sTLD RFP Application (posted 19 Mar. 2004), available at <http://www.icann.org/en/tlds/stld-apps-19mar04/mobi.htm> (“MOBI Application”), Cl. Exh. 95.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> Universal Postal Union, New sTLD RFP Application (posted 19 Mar. 2004), available at <http://www.icann.org/en/tlds/stld-apps-19mar04/post.htm> (“POST Application”), Cl. Exh. 96.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

referred to herein in the same terms). The sponsored community was to be those who sought to register telephone numbers as internet domain names according to a set of defined rules. Registrants could then link legacy telephone numbers on the Public Switched Telephone Network (“PTSN”) to Internet addresses so that users of IP-enabled communications devices “can continue to use telephone numbers as a common addressing mechanism for both PTSN and Internet services.”<sup>298</sup> The application described the goal of the sTLD as helping to bridge the gap between traditional telephone communication and internet-based forms of communication.<sup>299</sup> The applicant, NetNumber, Inc., would serve as the registry operator, and Pulver.com, an existing organization “dedicated to the creation of a community of interest focused on the advancement of the IP communications industry,” would serve as the sponsoring organization.<sup>300</sup>

146. **Telnic Limited** submitted a different proposal for the **.TEL sTLD** (this application is commonly referred to as the .TEL (Telnic) application, and is referred to herein in the same terms). Telnic’s proposed sponsored community was to be “individuals and/or businesses who wish to have a universal identity, brand or name, in the Internet-Communications space.”<sup>301</sup> Registrants “could use their name as a personal ‘brand’ or a universal identity accessible from any Internet-enabled communications device to publish their contact information or other personal data.”<sup>302</sup> In the event the sTLD was created, the applicant, Telnic Limited, proposed to form an entity to be named Telname Limited to serve as the sponsoring organization.<sup>303</sup>

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<sup>298</sup> NetNumber, Inc., New sTLD RFP Application (posted 19 Mar. 2004), *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/tel-pulver.htm> (“.TEL (Pulver) Application”), Cl. Exh. 97.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> Telnic Limited, New sTLD RFP Application (posted 19 Mar. 2004), *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/tel-telnic.htm> (“.TEL (Telnic) Application”), Cl. Exh. 98 (“For example, Adam Smith could develop a personal mini-website that provides general information  
(continued...)”)

147. *Tralliance Corporation* applied for the *.TRAVEL sTLD*, to serve a sponsored community that would consist of “businesses, organizations, associations, and private, governmental and non-governmental agencies operating” in certain sectors of the travel industry.<sup>304</sup> The major goals of the sTLD were described as developing a stronger community identity within the industry, “increased adoption of Internet technology[,] and improved linkages between the industry and its customers.”<sup>305</sup> The applicant, Tralliance Corporation, would serve as the registry operator for the sTLD; the sponsoring organization was to be The Travel Partnership Corporation, which had been formed specifically for the purpose of serving as the sponsoring organization.<sup>306</sup>

148. *ICM Registry, Inc.* applied for the *.XXX sTLD* to “serve the needs of the global responsible online adult-entertainment community,” including “individuals, businesses, and entities that provide sexually-oriented information, services, or products intended for consenting adults or for the community itself” and who are interested in the “development of responsible business conduct within the Community.”<sup>307</sup> The application clarified that the terms “adult entertainment” and “sexually oriented” are “intended to be understood broadly for a global medium, and are not to be construed as legal or regulatory categories.”<sup>308</sup> The application

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(continued ...)

about himself including his contact information, such as phone numbers, and email addresses. Adam would be able to update and manage this data at will, and Adam’s friends, when trying to reach him, could simply check adamsmith.tel to find his most current contact information and connect the call or send a text message.”).

<sup>303</sup> *Id.*

<sup>304</sup> Tralliance Corporation, New sTLD RFP Application (posted 19 Mar. 2004), *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/travel.htm> (“*.TRAVEL* Application”), Cl. Exh. 99.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> ICM Confidential Application at 3, Cl. Confid. Exh. B.

<sup>308</sup> *Id.*

further described that membership would not be dependent upon specific laws or regulations in any particular jurisdiction;<sup>309</sup> rather, members of the community would be “websites that convey sexually-oriented information **and** for which a system of self-identification would be beneficial.”<sup>310</sup> Since membership in the community would be voluntary, registrants would only become members after affirmatively identifying themselves as responsible providers of adult content by specifically confirming their willingness to comply with the policies established for the community.<sup>311</sup> The proposed TLD would provide a means for the community to organize and engage in self-regulation. The policy development process for the sTLD would also include input from child protection advocates, free speech advocates, and privacy and security advocates, to ensure that the policies developed for the sTLD would benefit the broader Internet community.<sup>312</sup>

149. The .XXX sTLD was proposed by ICM as:

[A] significant step toward the goal of protecting children from adult content, and [to] facilitate the efforts of anyone who wished to identify, filter, or avoid adult content. Thus, the presence of “.XXX” in a web address would serve a dual role: both indicating to users that the website contained adult content, thereby allowing users to choose to avoid it, and also indicating to potential adult-entertainment consumers that the websites could be trusted to avoid questionable business practices.<sup>313</sup>

As described in the application, ICM would serve as the registry operator for the sTLD; the sponsoring organization, which would develop policies for the sTLD, would be the International Foundation for Online Responsibility. As already discussed, IFFOR was established as “the

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<sup>309</sup> Lawley Witness Statement, para. 14; Burr Witness Statement, para. 8.

<sup>310</sup> ICM Confidential Application at 4 (emphasis added), Cl. Confid. Exh. B.

<sup>311</sup> Burr Witness Statement, para. 8.

<sup>312</sup> ICM Confidential Application at 26, Cl. Confid. Exh. B.

<sup>313</sup> Lawley Witness Statement, para. 15.

result of a four-year outreach campaign” conducted by ICM in advance of the application process “to educate and mobilize the responsible online adult-entertainment community.”<sup>314</sup>

### **C. Independent Evaluation Process**

#### **1. Public Posting and Comment Period**

150. The public portions of the 10 applications were posted on the ICANN website on 19 March 2004. The announcement accompanying the posting described the two-step process, explaining that the applications would be reviewed by the independent evaluation panel, and confirming that “[a]ll applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs.”<sup>315</sup>

151. The posting announcement also stated that there would be a single, month-long period for public comment beginning on 1 April 2004. During this comment period, ICANN received and posted “[d]ozens of public comments” on the applications.<sup>316</sup> All 10 applications received both positive and negative comments.

152. Contrary to ICANN’s assertion in its Response that the .XXX application “was by far the most controversial proposal ICANN has ever seriously considered,”<sup>317</sup> at this stage in the process, several of the applications were the subject of heated debate. The public attention, either positive or negative, attracted by the .XXX application, as measured by the number of

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<sup>314</sup> Lawley Witness Statement, para. 29. The process of conducting this outreach, preparing the application, and gathering the ICM “team” cost ICM approximately US\$ 500,000 during the period from early 2003 until the application was filed in March 2004.

<sup>315</sup> ICANN Announcement: Progress and Process, Cl. Exh. 82.

<sup>316</sup> sTLD Status Report at 5, Cl. Exh. 83.

<sup>317</sup> ICANN Response, para. 5.

comments posted, was no greater than the attention attracted by other applications.<sup>318</sup> Sixty-three comments were posted to the comment forum for ICM's application, the majority of which were positive.<sup>319</sup> Similar numbers of comments were posted for other applications. The application for .MAIL, in particular, received a significant amount of negative attention, including a number of complaints that the application was unnecessary or unworkable and that registration would be too expensive.<sup>320</sup>

153. The .TRAVEL application was also the subject of heated debate in the public comments.<sup>321</sup> A .TRAVEL domain was already in existence, although it was not part of the official root and could only be accessed if users had a plug-in provided by the company running the domain. Numerous registrants, having paid for websites in the domain, were upset about the proposal for an official domain, while others rejected the idea that the existence of an unofficial domain could ever serve to block the creation of an official domain. Yet others complained about the definition of the community, including raising questions about a long-running controversy over an alleged "secret deal" between ICANN and the sponsoring organization. At least one individual objected to the application so vehemently that he attempted to file a Request

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<sup>318</sup> See Mueller Expert Report at 31-32; Burr Witness Statement, para. 18. It was only *after* the 1 June 2005 approval of ICM's application that the .XXX proposal attracted significantly more controversy than other applications, and that controversy arose from the Board's unfair and arbitrary handling of the proposal, not due to the proposed TLD's application. Mueller Expert Report at 32.

<sup>319</sup> Archive of Public Comments on .XXX, available at <http://forum.icann.org/lists/stld-rfp-xxx/index.html> (last visited 22 Jan. 2009), Cl. Exh. 100.

<sup>320</sup> Archive of Public Comments on .MAIL, available at <http://forum.icann.org/lists/stld-rfp-mail/>, (last visited 22 Jan. 2009), Cl. Exh. 101.

<sup>321</sup> Archive of Public Comments on .TRAVEL, available at <http://forum.icann.org/lists/stld-rfp-travel/> (last visited 22 Jan. 2009), Cl. Exh. 102.

for Independent Review, only to be frustrated by ICANN's failure to have established a process for such a request.<sup>322</sup>

154. .MOBI also received a significant number of negative comments, from those who felt that the sponsoring organization was not sufficiently representative; those who felt that it was a gTLD instead of an sTLD; and those who felt that the technical aspects of the application were problematic.<sup>323</sup> The opposition to .MOBI included statements from the European telecommunications provider Telefónica Móviles, which noted that the application was inconsistent with regulations for mobile telecom numbering in Europe.<sup>324</sup>

155. Another global telecommunications provider, as well as the European Telecommunications Network Operators Association, submitted comments opposing .TEL (Telnic), noting the applications failed to adequately safeguard consumers, and did not contain sufficient protections for intellectual property, data, and privacy.<sup>325</sup>

156. In short, when the applications were first made public, the reaction to .XXX was no different in either scope or nature than the reactions to other applications, such as those submitted for the .MAIL, .MOBI, .TEL, or .TRAVEL sTLDs.<sup>326</sup>

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<sup>322</sup> See Mueller Expert Report at 31; Ed Hasbrouk, The Practical Nomad (8 April 2005), available at <http://www.hasbrouk.org/blog/archives/000554.html>, Cl. Exh. 103.

<sup>323</sup> Archive of Public Comments on .MOBI, available at <http://forum.icann.org/lists/stdl-rfp-mobi/index.html> (last visited 22 Jan. 2009), Cl. Exh. 104. Burr Witness Statement para. 18; Mueller Expert Report at 31-32.

<sup>324</sup> See, e.g., Posting of Maria Luisa Rodriguez Lopez (30 Apr. 2004), available at <http://forum.icann.org/lists/stdl-rfp-mobi/msg00035.html> Cl. Exh. 105.

<sup>325</sup> Posting of Gerd Wiedenaupt (30 Apr. 2004), available at <http://forum.icann.org/lists/stdl-rfp-tel-telnic/msg00008.html>, Cl. Exh. 106; Posting of Ramiro Sánchez (29 Apr. 2004), available at <http://forum.icann.org/lists/stdl-rfp-tel-telnic/msg00004.html>, Cl. Exh. 107. See Archive of Public Comments on the .MOBI Application, Cl. Exh. 104.

<sup>326</sup> Mueller Expert Report at 32-33.



## 2. Outcome of the Independent Evaluation Process

157. As described above, the first step in the two-step process included a review of the applications by independent evaluators. The independent evaluators were divided into three teams, and each team was assigned to analyze one set of the RFP criteria. (The sponsorship criteria and the community values criteria were combined, so the independent evaluation teams were the Business and Financial Team, the Technical Team, and the Sponsorship and Other Issues Team.) The three teams began their review of the sTLD applications in May 2004. After an initial review period, during which the evaluators created a first draft of their recommendation reports, the evaluators submitted a number of questions to each applicant, to allow the applicants to clarify various portions of their respective applications.<sup>327</sup> Once the evaluation teams received the applicants' responses, they completed their review and issued their final recommendation reports.

158. The independent evaluators determined that only two applications, .POST and .CAT, satisfied all of the selection criteria. Every other application was found to be lacking in some respect or another. .XXX had easily gained approval from the Business and Financial and the Technical teams; only the Sponsorship Team raised concerns about its application. Two of the other applications, .ASIA and .TRAVEL, also satisfied the technical and the business and financial criteria, but did not fulfill the sponsorship criteria. Two other applications, .JOBS and .MOBI, satisfied only the business and financial criteria, but failed both the technical and the

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<sup>327</sup> sTLD Status Report, Appendix B, Status Report on the sTLD Evaluation Process (28 Nov. 2005), available at <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppB.pdf> ("Appendix B, sTLD Status Report"), Cl. Exh. 108; see also sTLD Status Report, Appendix C, Applicants' Responses to Questions (28 Nov. 2005), available at <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppC.pdf> ("Appendix C, sTLD Status Report"), Cl. Exh. 109.

sponsorship criteria; and the application for .MAIL<sup>328</sup> and both applications for .TEL were deemed to have failed all three sets of criteria.

159. The evaluation report of the Sponsorship Evaluation team ultimately softened its recommendation against the .ASIA, .JOBS, and .TRAVEL applications by stating that they merited further discussions with ICANN, despite not meeting the selection criteria at the time of the evaluations, whereas, in the opinion of the evaluators, the .MAIL, .MOBI, .TEL (Telnic), .TEL (Pulver), and .XXX applications did not merit further discussion. The final conclusions of the evaluation teams are summarized in the following chart:

	.ASIA	.CAT	.JOBS	.MAIL	.MOBI	.POST	.TEL (TELNIC)	.TEL (PULVER)	.TRAVEL	.XXX
<b><u>Technical Criteria</u></b>	Passed	Passed	Failed (but further review suggested)	Not recommended ; further review suggested	Failed	Passed	Failed	Failed	Passed (with caveats)	Passed
<b><u>Business and Financial Criteria</u></b>	Passed	Passed	Passed	Failed	Passed	Passed	Failed	Failed	Passed	Passed
<b><u>Sponsorship Criteria</u></b>	Failed, based on failing 6 of 9 categories , but further discussion suggested	Passed	Failed, based on failing at least 4 of 9 categories, but further discussion suggested	Failed, based on failing at least 4 of 9 categories	Failed, based on failing at least 4 of 9 categories	Passed	Failed, based on failing 5 of 9 categories	Failed, based on failing 4 of 9 categories	Failed, based on failing 3 of 9 categories but further discussion suggested	Failed, based on failing 4 of 9 categories

A more complete chart of the conclusions of the independent evaluation teams is included in Appendix A to this Memorial.

160. The Sponsorship Evaluation Team gave very similar reasons for its rejection of the .ASIA, .JOBS, .MAIL, .MOBI, .TEL (Pulver), .TEL (Telnic), .TRAVEL, and .XXX

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<sup>328</sup> The technical evaluators did not recommend .MAIL, stating that they were not yet convinced the proposal was likely to succeed given its technical complexity, but did recommend further discussions.

applications.<sup>329</sup> Because the Sponsorship Evaluation Team had employed a very narrow definition of the “sponsored community,” it concluded that most applicants, including .XXX, had failed to define the community with sufficient clarity.<sup>330</sup> Although it was failed for similar reasons as the other applicants, .XXX came closer to satisfying the criteria. In fact, according to, Dr. Williams, the chair of the Sponsorship Evaluation Team:

Although [the sponsorship evaluators] never ranked the applications against each other during the evaluation process, but rather, only evaluated the applications against the set RFP criteria, it is fair to say that .XXX received a better overall evaluation than at least .ASIA, .MAIL, and .TEL (Telnic), which did not meet the criteria related to charter compliant registrations and/or the protection of the rights of others, and also, to a lesser degree, a better evaluation than .JOBS and .MOBI, given our somewhat tentative conclusions regarding those two applications.<sup>331</sup>

#### **D. The Board Evaluates the Applications**

161. In July 2004, the ICANN Board announced that it would give all of the applicants an opportunity to provide additional clarifying information and to answer further questions from the evaluators and the ICANN Board “relating to any potential deficiencies in the application that were highlighted in the independent evaluation.”<sup>332</sup> The clear implication of this decision, and the understanding of all of the applicants, was that the Board was less than satisfied with the recommendations of the independent evaluations, especially of the Sponsorship Evaluation

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<sup>329</sup> Williams Witness Statement, para. 4; sTLD Status Report, Appendix D, Public Evaluation Reports (updated 30 Nov. 2005) (“Appendix D, sTLD Status Report”), available at <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf>, Cl. Exh. 110.

<sup>330</sup> Appendix D, sTLD Status Report, Cl. Exh. 110; *see also* Williams Witness Statement, para. 17.

<sup>331</sup> Williams Witness Statement, para. 14; *see also* Appendix D, sTLD Status Report, Cl. Exh. 110; Confirming Dr. Williams testimony, the first draft of the Sponsorship Evaluation Team’s report tentatively concluded that the .XXX application met at least eight of the nine sponsorship selection criteria, and perhaps all nine. *See* Confidential Draft Evaluation Report with handwritten notes, 28 June 2004, Cl. Confid. Exh. C.

<sup>332</sup> ICANN Meetings in Kuala Lumpur, Malaysia: ICANN Public Forum (22 July 2004), available at <http://www.icann.org/meetings/kualalumpur/captioning-public-forum-23jul04.htm>, Cl. Exh. 111.

Team. Establishing new TLDs was one of the ICANN's most visible roles in Internet governance. It was, therefore, important to ICANN's executives, at that time, that numerous applications be approved so that the process would be viewed as a success and ICANN's ongoing role in Internet governance further legitimized.<sup>333</sup>

162. After the Board took over review of the applications, in late August 2004, it provided each applicant with the evaluation report of its application, and requested that the applicants comment on their respective evaluations. Over the next several months, almost all of the applicants worked to answer questions, clarify information, or provide additional materials to ICANN staff, the Board, and/or the independent evaluation panels.<sup>334</sup>

### **1. Two Applications Fail to Continue in the Process**

163. Two applicants eventually failed to complete the process. NetNumber, Inc. (the applicant for the .TEL (Pulver) sTLD) did not respond to ICANN's request for information to remedy the deficiencies that had been identified in its application by the evaluation teams, and was therefore informed in November 2004 that the process for its application was closed.<sup>335</sup>

164. From December 2004 through March 2005, the .MAIL applicant collaborated with the independent evaluation panel's business and financial team in an effort to remedy the deficiencies identified in its application. Ultimately, however, in April 2005, the independent evaluators concluded that "the proposal 'for a .mail TLD is not financially viable and that the

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<sup>333</sup> Williams Witness Statement, para. 20.

<sup>334</sup> Even the applicant for .CAT was required to provide additional information, despite the opinion of the independent evaluators that the application had satisfied all three of the selection criteria. Only the .POST application automatically entered into registry agreement negotiations (*i.e.*, without Board intervention, action, or resolution) based on the satisfactory results from the evaluation panel.

<sup>335</sup> See sTLD Status Report at 19, Cl. Exh. 83.

business plans are not sound.”<sup>336</sup> Given this conclusion, the questions relating to the technical and sponsorship criteria were never revisited.

## 2. Eight Applications are Approved

165. With .TEL (Pulver) and .MAIL no longer involved in the process, only eight applications remained. All eight were approved to enter into registry agreement negotiations, and six successfully completed negotiations and executed registry agreements (most with little time for any public comment on the proposed registry agreements). The process for each application is summarized below:

- **.TRAVEL**

- Board Approval: 18 October 2004<sup>337</sup>

- Resolution Terms:

Resolved (04.86) the board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .TRAVEL sponsored top-level domain (sTLD) with the applicant.

Resolved (04.87) if after entering into negotiations with the .TRAVEL sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, The President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the .TRAVEL sTLD.<sup>338</sup>

- Registry Agreement Draft Posted: 24 March 2005<sup>339</sup>

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<sup>336</sup> *Id.* at 15.

<sup>337</sup> ICANN Board Resolution on .TRAVEL Sponsorship, Adopted Resolutions: Special Meeting of the Board (18 Oct. 2004), available at <http://www.icann.org/en/minutes/resolutions-18oct04.htm>, Cl. Exh. 112.

<sup>338</sup> *Id.*

<sup>339</sup> ICANN Board Resolution approving .JOBS and .TRAVEL Registry Agreements, Regular Meeting of the Board: Minutes (8 Apr. 2005), available at <http://www.icann.org/en/minutes/minutes->

(continued...)

- Final Registry Agreement Approved: 8 April 2005<sup>340</sup>
- **.POST**
  - Board Approval: 27 October 2004<sup>341</sup>
  - Resolution Terms: Approved without formal resolution based on evaluation team reports<sup>342</sup>
  - Registry Agreement Draft Posted: The parties have not yet completed negotiations<sup>343</sup>
- **.JOBS**
  - Board Approval: 13 December 2004<sup>344</sup>
  - Resolution Terms:

Resolved (04.\_\_) the board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .JOBS sponsored top-level domain (sTLD) with the applicant. **During these negotiations, the board requests that special consideration be taken as to how broad-based policy-making would be created for the sponsored community, and how this sTLD would be differentiated in the name space.**

Resolved (04.\_\_) if after entering into negotiations with the .JOBS sTLD applicant the President and General

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(continued ...)

[08apr05.htm](#) (“ICANN Board Resolutions Approving .JOBS and .TRAVEL Registry Agreements”), Cl. Exh. 113.

<sup>340</sup> *Id.*

<sup>341</sup> See ICANN Announcement, ICANN Moves Forward in First Phase Commercial & Technical Negotiations with Two sTLD Applicants, (27 Oct. 2004), available at <http://www.icann.org/en/announcements/announcement-27oct04.htm> (“ICANN has entered into commercial and technical negotiations with . . . .post . . . .”), Cl. Exh. 114.

<sup>342</sup> *Id.*

<sup>343</sup> See ICANN Announcement, ICANN Announces Plans for Conclusion of sTLD Application Process, (4 Jan. 2007), available at <http://www.icann.org/en/announcements/announcement-04jan07.htm>, Cl. Exh. 115.

<sup>344</sup> ICANN Board Resolutions on .JOBS and .MOBI sTLD Approval to Enter Negotiations, Special Meeting of the Board (13 Dec. 2004), available at <http://www.icann.org/en/minutes/resolutions-13dec04.htm> (“ICANN Board Resolutions on .JOBS and .MOBI sTLD Negotiation”), Cl. Exh. 116.

Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the .JOBS sTLD.<sup>345</sup>

- Registry Agreement Draft Posted: 24 March 2005<sup>346</sup>
- Final Registry Agreement Approved: 8 April 2005<sup>347</sup>

- **.MOBI**

- Board Approval: 13 December 2004<sup>348</sup>
- Resolution Terms:

Resolved (04.\_\_) the board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .MOBI sponsored top-level domain (sTLD) with the applicant. **During these negotiations, the board requests that special consideration be taken as to confirm the sTLD applicant's proposed community of content providers for mobile phones users, and confirmation that the sTLD applicant's approach will not conflict with the current telephone numbering systems.**

Resolved (04.\_\_) if after entering into negotiations with the .MOBI sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the .MOBI sTLD.<sup>349</sup>

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<sup>345</sup> *Id.* (emphasis added).

<sup>346</sup> ICANN Board Resolutions Approving .JOBS and .TRAVEL Registry Agreements, Cl. Exh. 113.

<sup>347</sup> *Id.*

<sup>348</sup> ICANN Board Resolutions on .JOBS and .MOBI sTLD Negotiation, Cl. Exh. 116.

<sup>349</sup> *Id.* (emphasis added).

- Registry Agreement Draft Posted: 3 June 2005<sup>350</sup>
- Final Registry Agreement Approved: 28 June 2005<sup>351</sup>
- .CAT
  - Board Approval: 18 February 2005<sup>352</sup>
  - Resolution Terms:

Resolved [05.10] the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .CAT sponsored top-level domain (sTLD) with the applicant, **in conjunction with consultation with the appropriate governmental authorities.**

Resolved [05.11] if after entering into negotiations with the .CAT sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.<sup>353</sup>
  - Registry Agreement Draft Posted: 9 August 2005<sup>354</sup>
  - Final Registry Agreement Approved: 15 September 2005<sup>355</sup>

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<sup>350</sup> ICANN Board Resolution on .TEL (Telnice) Approval to Enter Negotiations and Approval of .MOBI Registry Agreement Special Meeting of the Board: Minutes (28 June 2005), available at <http://www.icann.org/en/minutes/minutes-28jun05.htm>, Cl. Exh. 117.

<sup>351</sup> *Id.*

<sup>352</sup> ICANN Board Resolution on .CAT sTLD Approval to Enter Negotiations, Special Meeting of the Board: Minutes (18 Feb. 2005), available at <http://www.icann.org/en/minutes/minutes-18feb05.htm>, Cl. Exh. 118.

<sup>353</sup> *Id.* (emphasis added).

<sup>354</sup> ICANN Board Resolution on Proposed .XXX Sponsored Top-Level Domain Registry Agreement and Approval of .CAT Registry Agreement, Special Meeting of the Board: Minutes (15 Sept. 2005), available at <http://www.icann.org/minutes/minutes-15sep05.htm>, Cl. Exh. 119.

<sup>355</sup> *Id.*



- .XXX

- Board Approval: 1 June 2005<sup>356</sup>

- Resolution Terms:

Resolved [05.32] the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant.

Resolved [05.33] if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.<sup>357</sup>

- Registry Agreement Draft Posted: 9 August 2005;<sup>358</sup>  
18 April 2005;<sup>359</sup>  
5 January 2007<sup>360</sup>
- Initial Rejection of Draft Registry Agreement: 10 May 2006<sup>361</sup>
- Rejection of Draft Registry Agreement and Application: 30 March 2007<sup>362</sup>

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<sup>356</sup> ICANN Board Resolution on .XXX sTLD Approval to Enter into Contractual Negotiations, Special Meeting of the Board: Minutes (1 June 2005), *available at* <http://www.icann.org/minutes/minutes-01jun05.htm>, Cl. Exh. 120, The approval of the .XXX application is discussed in more detail below.

<sup>357</sup> *Id.*

<sup>358</sup> ICANN Board Resolution on Proposed sTLD Agreement with ICM Registry, Adopted Resolutions from ICANN Board Meeting (30 Mar. 2007), *available at* <http://www.icann.org/minutes/resolutions-30mar07.htm> (“ICANN, 30 Mar. 2007 Board Resolution”), Cl. Exh. 121.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> ICANN Board Consideration of .XXX sTLD Registry Agreement and Approval of the .TEL (Telnic) Registry Agreement, Special Meeting of the Board: Minutes (10 May 2006), *available at* <http://www.icann.org/en/minutes/minutes-30may06.htm>, Cl. Exh. 122.

- **.TEL (Telnic)**

- Board Approval: 28 June 2005<sup>363</sup>

- Resolution Terms:

Resolved [05.44] the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .TEL sponsored top-level domain (sTLD) with the applicant.

Resolved [05.45] if after entering into negotiations with the .TEL sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.<sup>364</sup>

- Registry Agreement Draft Posted: 16 March 2006<sup>365</sup>
- Final Registry Agreement Approved: 10 May 2006<sup>366</sup>

- **.ASIA**

- Board Approval: 4 December 2005<sup>367</sup>

- Resolution Terms:

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(continued ...)

<sup>362</sup> ICANN Board Meeting (30 Mar. 2007).

<sup>363</sup> ICANN Board Resolution on .TEL (Telnic) Approval to Enter Negotiations and Approval of .MOBI Registry Agreement, Special Meeting of the Board: Minutes (28 June 2005), *available at* <http://www.icann.org/en/minutes/minutes-28jun05.htm>, Cl. Exh. 117.

<sup>364</sup> *Id.*

<sup>365</sup> ICANN Board Consideration of .XXX sTLD Registry Agreement and Approval of the .TEL (Telnic) Registry Agreement, Special Meeting of the Board: Minutes (10 May 2006), *available at* <http://www.icann.org/en/minutes/minutes-30may06.htm>, Cl. Exh. 122.

<sup>366</sup> *Id.*

<sup>367</sup> ICANN Board Resolution on .ASIA sTLD Approval to Enter Negotiations, Regular Meeting of the Board: Minutes (4 Dec. 2005), *available at* <http://www.icann.org/en/minutes/minutes-04dec05.htm>, Cl. Exh. 123.

Resolved (05.\_\_) the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .ASIA sponsored top-level domain (sTLD) with the applicant.

Resolved (05.\_\_) if after entering into negotiations with the .ASIA sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.<sup>368</sup>

- Registry Agreement Draft Posted: 18 July 2006<sup>369</sup>
- Final Registry Agreement Approved: 18 October 2006<sup>370</sup>

166. As the foregoing demonstrates,<sup>371</sup> even applications that had been identified by the independent evaluation teams as having more deficiencies than the .XXX application, such as .ASIA, .JOBS, .MOBI, and .TEL (Telnic), were subsequently approved by the ICANN Board and the applicants proceeded to execute registry agreements with ICANN. None of these applications were changed in order to receive Board approval; but were instead approved because the Board chose to apply the business and financial, technical, and most importantly, the sponsorship criteria in a less narrow manner than had the independent evaluators. Indeed, even ICANN now admits that the Board felt that the Independent Evaluators “may have taken too

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<sup>368</sup> *Id.*

<sup>369</sup> ICANN Board Approval of the .ASIA Registry Agreement, Special Meeting of the Board: Minutes (18 Oct. 2006), available at <http://www.icann.org/en/minutes/minutes-18oct06.htm>, Cl. Exh. 124.

<sup>370</sup> *Id.*

<sup>371</sup> A graph summarizing more fully the progression of these applications through the evaluation and negotiation stages is attached as Appendix B.

narrow a view of the sponsorship criteria.”<sup>372</sup> As the Sponsorship Evaluation Team’s objections to the .XXX application were the same as their objections to these applications, the negative evaluation from the Sponsorship Team could no longer be the basis for rejecting the .XXX application. The Board’s subsequent analysis of the applications necessarily involved applying a less narrow interpretation of the sponsorship criteria. Thus, to reject the .XXX application based on the Sponsorship Evaluation Team’s objections, after having accepted the others by applying different standards, would mean, as the Sponsorship Evaluation Team Chair has pointed out, treating the .XXX application differently from all the others.<sup>373</sup> Having applied the sponsorship criteria to some applications in a less restrictive manner, the Board was obligated to treat all of the applications, including ICM’s, in the same manner.<sup>374</sup>

167. Despite the longer than anticipated time frame in some cases, the process for each application still followed the original two-step process of application approval followed by registry agreement negotiation. Once the Board felt it had received sufficient additional materials to answer any concerns or questions, the Board voted to allow the applicant to proceed to registry agreement negotiations, signaling that the applicant had met the RFP criteria. As displayed above, in the December 2004 resolutions approving .JOBS and .MOBI and the February 2005 resolution approving .CAT, the Board specifically noted that there were certain issues that should be discussed during the contract negotiation phase.<sup>375</sup> It is not clear whether these concerns were addressed during the negotiations, but regardless, in no case, other than with the .XXX application, did the Board approve an applicant to progress to the second phase (*i.e.*,

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<sup>372</sup> ICANN Response, para. 52

<sup>373</sup> Williams Witness Statement, para. 29.

<sup>374</sup> *Id.*

<sup>375</sup> ICANN Board Resolution on .JOBS and .MOBI Approval to Enter Negotiation, Cl. Exh. 116; ICANN Board Resolution on .CAT sTLD Approval to Enter Negotiations, Special Meeting of the Board: Minutes (18 Feb. 2005), Cl. Exh. 118.

registry agreement negotiations) and then later reverse the basis for that decision regarding the technical, business and financial, or sponsorship criteria.

168. Moreover, had the Board wished to make the 1 June 2005 vote approving the .XXX application conditional upon the resolution of certain issues during the negotiation phase, the Board could have used language similar to that used in the already-approved resolutions for .JOBS and .MOBI.<sup>376</sup> As discussed below, no such language appears in the 1 June 2005 resolution with respect to the .XXX sTLD application, confirming that the Board's approval of the application was unconditional.

169. Not only was the two step process essentially the same for all of the applicants that were approved to enter into negotiations, but the Board should have limited its consideration of the merits of each application to the criteria as established by the RFP. Although the Board certainly had the discretion to apply the criteria in a different, and more correct manner than the evaluators, the Board should not have considered new or different criteria not previously created through the ICANN policy development process or included in the approved RFP.<sup>377</sup>

## **E. The Board Considers the .XXX Application**

### **1. ICM Responds to the Evaluation Reports**

170. As with the other applicants, ICM received the independent evaluation panel's report regarding its .XXX sTLD application in August 2004, with the conclusions described above. The letter to ICM from ICANN which accompanied the report specifically referenced the

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<sup>376</sup> See ICANN Board Resolution on .JOBS and .MOBI Approval to Enter Negotiation, Cl. Exh. 116.

<sup>377</sup> Williams Witness Statement, para. 23.

two-stage process, stating that “[i]f it is determined that the sponsorship criteria have been met, the application will proceed immediately into technical and commercial negotiation.”<sup>378</sup>

171. After receiving the report, between September and December 2004, ICM submitted to the ICANN Board, *inter alia*, a detailed letter and follow-up memoranda responding to each section of the evaluators’ report; information regarding the functionality of the proposed policy development processes for the .XXX sTLD; information regarding the global value of the proposed sTLD; justifications as to why an sTLD (as opposed to a gTLD) was the best means of achieving the goals of the sponsored community and other stakeholders; and confirmations regarding the commitment of ICM and IFFOR to the success of the proposed sTLD.<sup>379</sup> ICM’s initial response letter also described how the sponsored community, as defined by the application, met the sponsorship requirements, and provided information regarding the support the application had received in the sponsored community and among child safety advocates.<sup>380</sup>

172. ICM’s submissions to the ICANN Board responded directly to the misconceptions contained in the Sponsorship Evaluation Team’s report, noting that the evaluators had “attempted to substitute [their] own definition” of the sponsored community for .XXX, “which was both unworkable and over-broad.”<sup>381</sup> ICM noted that it does not matter that there is no single, universally acceptable definition of “adult content.” There still exists “a community of online providers (1) of material that is sexually explicit as judged by common sense and the

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<sup>378</sup> Letter from Kurt Pritz to Stuart Lawley, 31 July 2004, Cl. Exh. 89. This is clearly not an sTLD update at an ICANN meeting; but rather a direct, written communication with ICM.

<sup>379</sup> See, e.g., Letter from Stuart Lawley to Kurt Pritz, 9 Oct. 2004, Cl. Exh.125; Letter from Stuart Lawley to Vinton Cerf, 16 Dec. 2004, Cl. Confid. Exh. F.

<sup>380</sup> See sTLD Status Report, Appendix E—Supplemental/Follow-up Materials (updated 30 Nov. 2005), available at <http://www.icann.org/tlds/stld-apps-19mar04/AppE-30nov05.pdf> (“Appendix E, sTLD Status Report”), Cl. Exh. 127.

<sup>381</sup> ICM Confidential Memorandum to the ICANN Board of Directors, Revised (7 Dec. 2004), Cl. Confid. Exh. D.

providers themselves, and (2) who are committed to working together, and with public-interest and civil-liberties organizations, to identify and implement industry best practices.”<sup>382</sup> ICM noted that there was no need to identify community members with the degree of specificity that would be needed for a regulatory definition.<sup>383</sup> Rather, its goal was to create “an easily identifiable virtual marketplace for the global online adult-entertainment community to offer their goods and services, while providing a forum for the industry to interact with the various stakeholders impacted;”<sup>384</sup> and ICM’s was certainly clear enough to allow producers, consumers, and other stakeholders to understand the nature of the marketplace. Moreover, ICM was not concerned that the definition would be over-inclusive, as there would be no incentive for anyone who was not a provider of adult entertainment or other entities not related to the industry to register in the domain.<sup>385</sup>

173. ICM also reiterated that it had significant support from the sponsored community, noting that it had “received letters of support for our proposal from organizations and webmasters accounting for” very large annual revenues.<sup>386</sup> ICM had provided ICANN with over 20 letters of support from major organizations, and other organizations and individuals had posted to ICANN’s public comment forum.<sup>387</sup> The letters expressed support for the .XXX proposal and willingness to participate in the policy-making function, demonstrating that

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<sup>382</sup> Letter from Stuart Lawley to Kurt Pritz, 9 Oct. 2004, Cl. Exh. 125. For a regulatory regime, “adult content” needs to be defined with enough precision so providers know with certainty whether the regulations are meant to apply to them or not. For a voluntary community, with no penalties for those who do not join, such certainty is not necessary; a basic, common sense understanding of the concept will serve.

<sup>383</sup> Burr Witness Statement, para. 24.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*; see also Burr Witness Statement, para. 20.

<sup>386</sup> ICM Confidential Memorandum to the ICANN Board of Directors, Cl. Confid. Exh. D.

<sup>387</sup> Archive of Public Comments on .XXX, Cl. Exh. 100.

members of the sponsored community were “both willing and able to work toward a common goal.”<sup>388</sup> Although the support was largely from North American providers, ICM noted that (a) this was appropriate, as the bulk of the industry was based in North America; and also (b) ICM had secured support from organizations outside the United States, including community members “from the United Kingdom, Australia, Netherland Antilles, Spain and the Caribbean,” and had engaged in broad, international outreach.<sup>389</sup> ICM never claimed that this support was unanimous, but that was never a criteria for approval.<sup>390</sup> There was certainly enough support to ensure that the sTLD would be a commercial success, and enough support to justify approving the sTLD for the good of the sponsored community and stakeholders, and then expending the effort needed to establish the domain.

174. ICM also had support from other stakeholders, including WiredSafety (an organization that helps families protect their children online), the Internet Content Rating Association (an international non-profit organization that helps content providers develop labels for their websites), the founder of TRUSTe, (an organization that helps businesses and consumers identify trustworthy websites), UNESCO's Innocence in Danger Program, leading free speech advocates, and privacy watchdog groups.<sup>391</sup> ICM had been conducting outreach to these constituencies, as it had to the adult entertainment community, and had garnered significant support and little opposition.<sup>392</sup>

175. Although the various stakeholders had often been divided on the issues to be addressed in the policy-making process, ICM explained that diverse constituencies could

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<sup>388</sup> Letter from Stuart Lawley to Kurt Pritz, 9 Oct. 2004, Cl. Exh. 125.

<sup>389</sup> *Id.*

<sup>390</sup> Burr Witness Statement, para. 19.

<sup>391</sup> *Id.*

<sup>392</sup> Lawley Witness Statement, paras. 25-29.



successfully collaborate. IFFOR's structure was based on ICANN's structure,<sup>393</sup> which has been successful in achieving collaboration between constituencies with competing goals or viewpoints. The policy-formation structure would benefit everyone involved by allowing the community to begin self-regulating to address some of the big problems identified by child safety and privacy advocates, while avoiding mandatory regulations that would interfere with freedom of expression. Collaborating to accomplish this goal would be more productive than continued fighting between the various stakeholders in the public policy sector to achieve their diverse ends.<sup>394</sup> While it is unlikely the sTLD will ever result in the removal of all adult content from other TLDs, customers would learn that the .XXX sTLD meant that a website was free from malicious programs and the use of unsavory business practices, thus drawing customers—and therefore providers—to the .XXX sTLD over others. In fact, registrants in the sTLD would have an advantage over other online adult content providers in attracting customers, as customers would know that sites registered in the .XXX sTLD were safe, and others could more easily filter and avoid such sites.<sup>395</sup>

176. For this reason, as ICM explained, it was crucial that .XXX be a **sponsored** TLD; only as a sponsored TLD would .XXX add value to the existing Internet structure.<sup>396</sup> The goal of voluntary self-regulation could not be accomplished through the existing DNS structure, but could “only be achieved by creating a forum that allows the sponsored community and other stakeholders to participate in the development, implementation and enforcement of best

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<sup>393</sup> Letter from Stuart Lawley to Vinton Cerf, 16 Dec. 2004, Cl. Confid. Exh. F.

<sup>394</sup> Lawley Witness Statement, paras. 12-13.

<sup>395</sup> Lawley Witness Statement, para. 26.

<sup>396</sup> *Id.* at 12.

practices;” in other words, through the policy development process of an sTLD.<sup>397</sup> In his investigation of the 2000 “proof of concept” round, Stuart Lawley had personally decided that he was interested in preparing the .XXX application as a sponsored TLD.<sup>398</sup> Although he was aware that an adult-content general TLD probably would be more lucrative in terms of the extra registrations that an unrestricted space would attract, he felt that a gTLD provided negligible benefit for the online adult entertainment industry and the wider Internet community as a whole.<sup>399</sup> An sTLD would aid responsible providers in organizing to engage in self-regulation. The policy development process would be led by the providers themselves, in cooperation with stakeholders interested in child protection and free speech, ensuring that the resulting policies are suited to the community’s needs. There would be no utility in .XXX as a gTLD; the value was in the development and enforcement of best business practices for the industry.

## **2. The Board’s Deliberations Leading up to Approval of ICM’s Application**

177. In addition to ICM’s prompt submissions to the Board in October,<sup>400</sup> November,<sup>401</sup> and December 2004,<sup>402</sup> ICM consistently expressed its willingness to meet with the Board to explain its application and answer questions, and remained in frequent

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<sup>397</sup> ICM Confidential Memorandum to the ICANN Board of Directors, Revised (emphasis in original), Cl. Confid. Exh. D.

<sup>398</sup> See Lawley Witness Statement, para. 11.

<sup>399</sup> See *id.*

<sup>400</sup> Letter from Stuart Lawley to Kurt Pritz, 9 Oct. 2004, Cl. Exh. 125.

<sup>401</sup> Confidential Memorandum from ICM Registry to the ICANN Board of Directors (2 Nov. 2004), Cl. Confid. Exh. E.

<sup>402</sup> *Id.*

communication with the Board and senior ICANN staff. ICM also began to ask ICANN to move forward with consideration of the application.<sup>403</sup>

178. The Board first discussed the .XXX application at the end of January 2005. The discussion was “extensive,” but no decision was taken on the application.<sup>404</sup> Instead, the Board accepted ICM’s offer to meet with the Board and make a presentation.<sup>405</sup>

179. During discussions with senior ICANN staff in early 2005, ICM was told that the major issue concerning the Board was the existence of an appropriate and sufficient sponsored community.<sup>406</sup> ICM thus focused its efforts on demonstrating to the Board the existence of the community, with the understanding that, if this was demonstrated to the Board’s satisfaction, the application would be approved and move into the registry agreement negotiation phase.<sup>407</sup>

180. Finally, in April 2005, ICM was able to meet with the Board and make its presentation about the application during the Board meetings in Mar del Plata, Argentina. Importantly, Mohamed Sharil Tarmizi, Chairman of the GAC, was also in attendance for at least part of the meeting.<sup>408</sup> In its presentation, ICM reiterated the facts about the sponsored community, the support from the community and other stakeholders, the policy-making process,

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<sup>403</sup> See, e.g., Email from Becky Burr to John Jeffrey, 2 Nov. 2004, Cl. Exh. 128; Email from Becky Burr to Paul Twomey, 5 Nov. 2004, Cl. Exh. 129; Letter from Stuart Lawley to Vinton Cerf, 16 Dec. 2004, Cl. Confid. Exh. F; Email from Kurt Pritz to Becky Burr, 20 Dec. 2004, Cl. Exh. 130; Emails between Becky Burr and John Jeffrey, 19 Jan. 2005, Cl. Exh. 131.

<sup>404</sup> ICANN, Minutes, Special Meeting of the Board (24 Jan. 2005), *available at* <http://www.icann.org/en/minutes/minutes-24jan05.htm>, Cl. Exh. 132.

<sup>405</sup> *Id.* There is no clear reason for the delay in the consideration of ICM’s application, as other applications were being considered by the Board during this time, and ICM would have been more than willing to arrange to meet with the Board well in advance of when the meeting actually occurred.

<sup>406</sup> See Burr Witness Statement, para. 32.

<sup>407</sup> See Lawley Witness Statement, paras. 47-49; Burr Witness Statement, para. 24.

<sup>408</sup> Burr Witness Statement, para. 26.

and the importance of the sTLD format.<sup>409</sup> Parry Aftab, from Wired Kids and WiredSafety also participated in the presentation to explain the support from other stakeholders (*i.e.*, child protection advocates), and Robert Corn-Revere spoke from the perspective of a free-speech advocate.<sup>410</sup>

181. ICM had hoped for a decision following this presentation. Instead, at the Board meeting several days later on 8 April 2005, Board Chairman Vinton Cerf reminded the Board that there had been “extensive discussion” of ICM’s application, that the application was still under consideration, and that the Board would try to reach a decision within 30 days.<sup>411</sup> Further discussion of the application was postponed until the May 2005 Board meeting. No decision on ICM’s application was made at that time, either, although there was “broad discussion” of the application, “particularly relating to whether or not there was a ‘sponsored community’.”<sup>412</sup> The Board specifically agreed that the topic would be carried over to the next meeting in June 2005.<sup>413</sup>

182. Despite the delay in the Board’s vote, senior staff at ICANN were confident that the application would eventually be approved, and, based on this assessment, ICM and ICANN began working together in preparation for moving forward as soon as the approval vote had

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<sup>409</sup> ICM Confidential Presentation, *The Sponsored .xxx TLD: Promoting Online Responsibility* (2 April 2005), Cl. Confid. Exh. G.

<sup>410</sup> *Id.*

<sup>411</sup> ICANN Board Resolutions Approving .JOBS and .TRAVEL Registry Agreements, Cl Exh. 113. Importantly, GAC Chairman Mohamed Sharil Tarmizi was present for all or part of this meeting. See ICANN, Board Meeting Real Time Captioning (8 Apr. 2005), available at <http://www.icann.org/en/meetings/mardelplata/captioning-BoD-meeting-08apr05.htm>, Cl. Exh. 133.

<sup>412</sup> Special Meeting of the Board: Minutes (3 May 2005), available at <http://www.icann.org/en/minutes/minutes-03may05.htm>, Cl. Exh. 134.

<sup>413</sup> *Id.* Once again, GAC Chairman Mohamed Sharil Tarmizi “participated in all or part of the meeting.” *Id.* Given the fact that .XXX was on the agenda and discussed by the Board at the meetings on 24 January 2005, 8 April 2005, and 3 May 2005, Mr. Tarmizi was surely aware that the Board was actively considering the .XXX application, and intended to decide on the application very soon.

taken place.<sup>414</sup> Indeed, such was ICANN's confidence regarding the approval of ICM's application, that it instructed its outside counsel to provide ICM's counsel (J. Beckwith Burr) with various templates and sample registry agreements so that Ms. Burr could begin modifying them for the draft of the .XXX registry agreement.<sup>415</sup> Additionally, ICM's public relations firm began working with ICANN to develop a plan for managing public relations following the Board's vote,<sup>416</sup> and John Jeffrey, ICANN's General Counsel, personally approved the wording of a press release ICM planned to issue immediately following the Board's approval of its application.<sup>417</sup>

#### **F. The Board Approves the .XXX Application**

183. At its 1 June 2005 Board meeting, the Board's deliberations again focused on the sponsorship criteria. Board members, liaisons, and ICANN staff all participated in the discussion.<sup>418</sup> The Board proceeded to adopt a formal resolution authorizing the commencement of the second phase of the approval process: registry agreement negotiations with ICM for the .XXX sTLD registry agreement.<sup>419</sup>

184. Thus, before voting on ICM's application, the Board engaged in months of deliberations over ICM's application—essentially from ICM's first response to the evaluation reports in October 2004 through June 2005. The Board had discussed ICM's application extensively at 4 separate Board meetings over the course of 6 months. Several of the meetings were attended by the GAC Chairman, who was therefore fully aware that the Board was actively

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<sup>414</sup> Emails between John Jeffrey and Becky Burr, 3 May 2005, Cl. Exh. 135; Email from Becky Burr to Stuart Lawley, *et al.*, 5 May 2005, Cl. Exh. 136.

<sup>415</sup> Email from Becky Burr to Stuart Lawley, 8 May 2005, Cl. Exh. 137.

<sup>416</sup> Email from Jennifer Curley to Kelli Emerick, *et al.*, 29 April 2005, Cl. Exh. 138.

<sup>417</sup> Emails between John Jeffrey and Becky Burr, 3 May 2005, Cl. Exh. 120.

<sup>418</sup> Special Meeting of the Board: Minutes (1 June 2005), Cl. Exh. 120.

<sup>419</sup> *Id.*

considering the application. The Board even met personally with ICM to discuss the application and ask questions; the GAC Chairman also was present for at least some part of the meeting at which this took place. The Board's conversations about the application frequently centered on the question of sponsorship. In short, the 1 June 2005 vote represented the culmination of a careful, thorough, and extensive process by the Board that included ample opportunities for the GAC or other constituencies to express an opinion or offer advice.

185. As mentioned above, the 1 June 2005 resolution approved ICM's applications without caveats, reservations, or conditions, stating:

Resolved [05.32] the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant.

Resolved [05.33] if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.<sup>420</sup>

186. By its terms, the resolution reflected the Board's **unconditional** decision that ICM's application satisfied the RFP evaluation criteria, including the sponsorship criteria, an outcome that was also reflected in contemporaneous comments made by senior ICANN officials and members of the Board. For example, in July 2005, at ICANN's Luxembourg meetings, Dr. Vinton Cerf (then the Chairman of the ICANN Board) informed the GAC that ICM's application had satisfied the selection criteria:

[t]he [.XXX] proposal this time **met the three main criteria, financial, technical, sponsorship**. They [sic] were doubts expressed about the last criteria which were discussed extensively

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<sup>420</sup> ICANN Board Resolution on .XXX sTLD Approval to Enter into Contractual Negotiations, Special Meeting of the Board: Minutes (1 June 2005), *available at* <http://www.icann.org/minutes/minutes-01jun05.htm>, Cl. Exh. 120 (emphasis added).

and the Board reached a positive decision considering that ICANN should not be involved in content matters.”<sup>421</sup>

187. Likewise, during the Public Forum at the Luxembourg meetings, Mr. Pritz (the ICANN executive in charge of the 2004 sTLD round), stated that the .XXX application “ha[d] been found to satisfy the baseline criteria,” and was therefore “in negotiation for the designation of registries.”<sup>422</sup> Importantly, the Luxembourg meetings were the first public ICANN meetings following the approval of the .XXX application and, as such, represent ICANN’s first public statements about the approval of ICM’s application.

188. Moreover, emails between ICM’s counsel, Ms. Burr, and ICANN’s general counsel, Mr. Jeffrey, regarding the wording of a press release describing the 1 June vote clearly indicate that ICANN viewed the vote as an approval of the ICM application. John Jeffrey initially protested wording that he felt erroneously implied that the contract itself had been approved, or that the decision had been made “for the societal good” rather than the proper characterization of the vote as “**an approval of having met [the] RFP criteria.**”<sup>423</sup> The version of the press release which John Jeffrey approved for ICM to use stated unequivocally in the very first sentence, “ICANN’s board of directors today determined that the proposal for a new top level domain submitted by ICM Registry **meets the criteria established by ICANN.**”<sup>424</sup>

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<sup>421</sup> ICANN Governmental Advisory Committee Meeting XXII, Plenary Session, Luxembourg City, Luxembourg: Minutes (11 July 2005) (emphasis added), *available at* [http://www.gac.icann.org/web/meetings/mtg22/LUX\\_MINUTES.doc](http://www.gac.icann.org/web/meetings/mtg22/LUX_MINUTES.doc) (“GAC Luxembourg Minutes”), Cl. Exh. 139. At this meeting, several GAC representatives expressed concern that the GAC had not been consulted sufficiently regarding the public policy aspects of the .XXX application, although it was also noted that there had been several opportunities for the GAC to comment as the process had been public.

<sup>422</sup> ICANN Meetings in Luxembourg, Public Forum—Part II, Luxembourg (14 July 2005), *available at* <http://www.icann.org/meetings/luxembourg/captioning-pf2-14jul05.htm>, Cl. Exh. 140.

<sup>423</sup> Emails between John Jeffrey and Becky Burr, 3 May 2005, Cl. Exh. 135 (emphasis added).

<sup>424</sup> *Id.* (emphasis added).

189. Additionally, “[f]ollowing the 1 June vote, John Jeffrey, Kurt Pritz, and others at ICANN congratulated ICM on [its] success in getting the application approved.”<sup>425</sup> Following the vote and these conversations, it was clear to both Ms. Burr and ICM’s President, Mr. Lawley, that the Board’s vote was nothing short of an unconditional approval of ICM’s application having met the RFP criteria.<sup>426</sup>

190. ICANN Board member Joichi Ito reinforced the clear meaning of the vote in statements posted on his blog two days after the 1 June 2005 vote, where he noted “[o]ur approval of .XXX is a decision **based on whether .XXX met the criteria** and does not endorse or condone any particular type of content or moral belief.”<sup>427</sup>

191. Further confirmation that the vote represented an approval of ICM’s application came in the form of an invitation from ICANN’s gTLD Registries Constituency to Mr. Lawley. The Chair of the Constituency emailed Mr. Lawley to congratulate him on the vote, and in light thereof, to invite ICM to participate in the gTLD Registries Constituency.<sup>428</sup> This Constituency “represent[s] the interests of gTLD Registries who are currently under contract with ICANN to provide gTLD Registry Services.”<sup>429</sup> The invitation meant that the Constituency felt that ICM would soon be an official registry operator under contract with ICANN, and thus had an interest in participating in the Constituency.<sup>430</sup>

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<sup>425</sup> Lawley Witness Statement, para. 51. One such well-wisher was Bruce Tonkin, who later became a member of the ICANN Board. Email from Bruce Tonkin to Stuart Lawley, 2 June 2005, Cl. Exh. 141.

<sup>426</sup> Burr Witness Statement, paras. 30-33.

<sup>427</sup> Joichi Ito, Some Notes on the .XXX Top Level Domain (3 June 2005), *available at* <http://joi.ito.com/weblog/2005/06/03/some-notes-on-t.html> (emphasis added), Cl. Exh. 142.

<sup>428</sup> Email from Marie Zitkova, Chair of the gTLD Registries Constituency, to Stuart Lawley, 29 June 2005, Cl. Exh. 143.

<sup>429</sup> gTLD Registries Constituency, About Us, *available at* [http://www.gtldregistries.org/about\\_us](http://www.gtldregistries.org/about_us) (last visited 22 Jan. 2009), Cl. Exh 144.

<sup>430</sup> Lawley Witness Statement, para. 52.



192. There is also evidence confirming that outside observers understood that ICM's application had been approved and that a registry agreement would soon be in place.<sup>431</sup> Shortly after the Board's vote, Mr. Lawley was invited by the Council of Europe to speak at a conference in Strasbourg on human rights and the information society, in his capacity as a representative for IFFOR. Mr. Lawley attributes this invitation to the publicity surrounding the 1 June 2005 approval.<sup>432</sup> In a report from the conference, ICM and IFFOR were specifically commended for being industry actors that had "assume[ed] responsibility for self-regulation and labeling" and that were collaborating with impacted stakeholders.<sup>433</sup> Not only did this endorsement demonstrate the support for .XXX from various stakeholders, it also represented the Council's belief that the sTLD would soon be launched; the Council would not have awarded an initiative it felt was unlikely to ever take place.<sup>434</sup>

193. Finally, others who had been monitoring the process understood the 1 June 2005 vote to constitute the Board's approval of the application, having judged that it met the RFP criteria.<sup>435</sup> For instance, Dr. Williams, the head of the Sponsorship Evaluation Team, testifies in her witness statement in this arbitration that "the 1 June 2005 Board resolution [approving negotiations with ICM Registry for the .XXX sTLD] was a definitive statement that the Board

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<sup>431</sup> This was the characterization given to the vote in the international press at the time. *See, e.g.*, BBC News, Sex Sites Get Dedicated Net Home (2 June 2005), *available at* <http://news.bbc.co.uk/2/hi/technology/4602449.stm> Cl. Exh. 145; Declan McCullough, Porn Friendly '.xxx' Domains Approved, News.com (1 June 2005), *available at* [http://news.cnet.com/Porn-friendly-.xxx-approved/2100-1030\\_3-5728713.html](http://news.cnet.com/Porn-friendly-.xxx-approved/2100-1030_3-5728713.html), Cl. Exh. 146; Keith Regan, ICANN Approves Concept of .xxx Domain for Porn, E-Commerce Times (2 June 2005), *available at* <http://www.ecommercetimes.com/story/43537.html>, Cl. Exh. 147; Holden Frith, Web to Put All Its Pornography in One Basket, The Times Online (2 June 2005), *available at* [http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/article529082.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/article529082.ece), Cl. Exh. 148.

<sup>432</sup> Lawley Witness Statement, para. 52.

<sup>433</sup> Council of Europe General Report, *Human Rights in the Information Society: Responsible Behavior by Key Actors* (13 Sept. 2005), Cl. Exh. 149.

<sup>434</sup> Lawley Witness Statement, para. 52.

<sup>435</sup> *See* Williams Witness Statement, para. 24; Mueller Expert Report at 36-37.

. . . had approved the application based on its determination that the application met the selection criteria.”<sup>436</sup> She also testifies that others had the same understanding of the vote.<sup>437</sup>

194. Thus, all of the contemporaneous evidence demonstrates that the 1 June 2005 vote was an approval of ICM’s application. Even if ICANN did not mean for the vote to have this significance, in light of all the evidence, ICM reasonably interpreted the vote as an approval, and therefore expected that it would soon enter into a registry agreement with ICANN.<sup>438</sup> Throughout the next 11 months, ICANN never gave ICM any reason to doubt that the application had been approved.

**G. Initial Contract Negotiations Result in the First Agreed-Upon Draft of the .XXX Registry Agreement**

195. Given how long it had taken for the Board to approve ICM’s application, and the amount of money and effort ICM had expended up to this point, ICM was understandably eager to begin and complete its registry agreement negotiations. When it had first submitted its application, ICM had expected that the whole process would be completed within a relatively short time frame, based on various ICANN timelines and statements. Although the initial stage, from March 2004 through June 2005, had lasted longer than expected, ICM reasonably believed that the negotiation phase would be briefer, as the registry agreement would be based mostly on

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<sup>436</sup> Williams Witness Statement, para. 24. Not only was this the way the process had been described, but the way the process worked for all other applicants; none were turned down for failure to meet the RFP criteria after the Board voted to approve registry agreement negotiations. The .POST example is also illustrative. The .POST application was passed directly to registry agreement negotiations, without an official vote of the Board, based solely on the fact that the independent evaluation teams concluded .POST met the RFP criteria. *See* ICANN Announcement, ICANN Moves Forward in First Phase Commercial & Technical Negotiations with Two sTLD Applicants, 27 Oct. 2004, Cl. Exh. 114. This clearly demonstrates that the requirement for moving into registry agreement negotiations was that the application meet the RFP criteria. No vote was necessary for .POST because the evaluators had decided the issue; the purpose of the Board’s vote on all of the other applications was to decide that the application had met the criteria.

<sup>437</sup> Williams Witness Statement, para. 24.

<sup>438</sup> Lawley Witness Statement, para. 52.

standard terms, thus requiring very few modifications.<sup>439</sup> Using as templates the form contract that it had received from ICANN and the recently-approved .MOBI, .TRAVEL and .JOBS registry agreements, ICM submitted to ICANN a draft registry agreement less than two weeks after the Board's approval of its application.<sup>440</sup>

196. ICANN assured ICM that the contract negotiations would be "straightforward." Moreover, ICM's attorney, J. Beckwith Burr, had just helped conclude successful negotiations for the .MOBI registry agreement. Accordingly, she had an understanding of the limited areas in which ICANN was willing to even consider changes. ICM therefore had every expectation that the registry agreement negotiations would be concluded in short order.

197. Ms. Burr and Mr. Jeffrey agreed to discuss the draft registry agreement at the end of the ICANN meetings in Luxembourg, in July 2005. Once again, ICM was immediately responsive, providing ICANN with a revised draft the very same day the discussions were held.<sup>441</sup> During the second half of July 2005, ICM and ICANN made minor revisions to the standard contract, and came to agreement on a proposed draft, resulting in the first agreed-upon draft of the .XXX sTLD Registry Agreement (the "First Draft Registry Agreement"). The revisions made during this phase were largely unrelated to the substance of the agreement, and certainly unrelated to RFP criteria.

198. In point of fact, there was absolutely no mention of the sponsorship criteria, or any of the other RFP criteria, during this stage of the process. Instead, the revisions made were to correct typos, standardize terminology, remove provisions specific to other sTLDs and

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<sup>439</sup> Email from John Jeffrey to Becky Burr, 13 June 2005, Cl. Exh. 150.

<sup>440</sup> Email from Becky Burr to John Jeffrey, 12 June 2005, Cl. Exh. 151; Email from Becky Burr to John Jeffrey, 13 June 2005, Cl. Exh. 152.

<sup>441</sup> Email from Becky Burr to John Jeffrey and Esme Smith, 15 July 2005, Cl. Exh. 153.

inapplicable to .XXX, and so forth.<sup>442</sup> While ICANN asserts that the “continued consideration of the sponsorship issue after the initial vote to permit contract negotiations clearly did not violate ICANN’s Bylaws or Articles,”<sup>443</sup> it overlooks the fact that there was no such continued consideration. In fact, ICANN never even raised the issue with ICM. By 1 August 2005, ICM’s counsel, J. Beckwith Burr, and ICANN’s outside counsel, Esme Smith, believed they had come to agreement.<sup>444</sup>

199. The First Draft Registry Agreement was subsequently posted in early August 2005. ICM expected that the Board would vote on the agreement at the 16 August 2005 meeting, and began preparing for the introduction of the new sTLD. ICM was “inundated with indications of support” and requests to register from “well over a thousand webmasters from around 70 different countries.”<sup>445</sup>

#### **H. Belated Government Reaction and Unilateral Intervention**

200. It was at this stage that the GAC, instigated by certain persons within the administration of then U.S. President George H. W. Bush (the “Bush Administration”), decided to become actively involved in the process; approximately 18 months after ICM’s application had first been posted for comment on ICANN’s website.

##### **1. The GAC Had Previously Informed the ICANN Board it Had No Comments on the .XXX sTLD**

201. As always, throughout the Board’s deliberations regarding ICM’s application, the GAC liaison had been invited to and often attended Board meetings. The GAC was regularly

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<sup>442</sup> See, e.g., Email from Becky Burr to John Jeffrey and Esme Smith, 19 July 2005, Cl. Exh. 154; Email from Becky Burr to John Jeffrey and Esme Smith, 21 July 2005, Cl. Exh. 155.

<sup>443</sup> ICANN Response, para. 95.

<sup>444</sup> Email from Esme Smith to Becky Burr, 1 Aug. 2005, Cl. Exh. 156 (“I think we are there on the agreement.”). This was the first agreed-upon draft of the registry agreement.

<sup>445</sup> Lawley Witness Statement, para. 53. Mr. Lawley estimates that “ICM spent approximately US\$ 500,000 preparing for the introduction of .XXX” during the year following the 1 June 2005 vote.

provided with briefing papers regarding the sTLD RFP process, and the GAC liaison was present at the Board's discussions regarding ICM's application (and others), including several of the meetings that ultimately led to the Board resolution authorizing registry agreement negotiations with ICM.<sup>446</sup> As already described, the GAC had been aware of the process leading up to the RFP, and understood that it could offer advice on the applications. Additionally, ICM had spoken with GAC Chairman Mohamed Sharil Tarmizi on several occasions, and had extended offers to meet with the GAC and explain the application, or to meet with individual representatives, but had been told this was not necessary.<sup>447</sup>

202. The GAC also had multiple specific opportunities to comment on the RFP process or individual applications. In December 2004, the CEO and President of ICANN, Paul Twomey, wrote to the Chairman of the GAC, Mohamed Sharil Tarmizi, to solicit the GAC's advice on various public policy matters, as provided for in the Bylaws. Specifically mentioned in that letter as a matter for GAC attention was ICANN's intention to move toward contract negotiations with various sTLD applicants.<sup>448</sup> Chairman Tarmizi responded in a letter of 3 April 2005, stating unequivocally that “[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round.”<sup>449</sup>

203. This statement was reconfirmed during the GAC's meetings in Luxembourg in July 2005. Although there was significant discussion during the Luxembourg meetings of the

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<sup>446</sup> See, e.g., Special Meeting of the Board: Minutes (3 May 2005), Cl. Exh. 134; Special Meeting of the Board (18 Oct. 2004), Cl. Exh. 112; Burr Witness Statement, para. 36.

<sup>447</sup> See Burr Witness Statement, para. 36.

<sup>448</sup> Letter from Paul Twomey to Sharil Tarmizi (1 Dec. 2004), available at <http://gac.icann.org/web/docs/twomey-to-tarmizi-01dec04.pdf>, Cl. Exh. 157.

<sup>449</sup> Letter from Sharil Tarmizi to Paul Twomey (3 Apr. 2005), available at <http://www.icann.org/correspondence/tarmizi-to-twomey-03apr05.htm> (“Tarmizi Letter, 3 Apr. 2005”), Cl. Exh. 158.

Board's 1 June approval of the .XXX application,<sup>450</sup> the resulting GAC Communiqué, consistent with the GAC's letter of April 2005, welcomed "the initiative of ICANN to hold consultations" with the GAC regarding policy only for **future** TLDs, and made no mention of any reservations or objections to the .XXX application or any other pending sTLD application.<sup>451</sup> In fact, during the Luxembourg GAC meetings, the **U.S. representative to the GAC** advised against offering any negative comments on .XXX, arguing that the GAC had already had "several opportunities to raise questions" since the entire process "had been public since the beginning."<sup>452</sup> Having declined to offer comments in the past, the U.S. representative argued that the GAC should not intervene "at this late stage."<sup>453</sup> Thus the GAC, and individual governments, were certainly aware of the process, and were given more than sufficient opportunity to ask questions or offer advice and comments to ICANN regarding .XXX or other applications at any point in the process.

204. Thus, contrary to ICANN's current assertion that "the GAC had been silent with respect to the .XXX application" prior to 1 June 2005,<sup>454</sup> Chairman Tarmizi's 3 April 2005 letter was an affirmative statement that the GAC was declining to take a position on the .XXX, or any other, application. This letter therefore constituted the "timely advice" provided to the ICANN

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<sup>450</sup> ICANN Governmental Advisory Committee Meeting XXII, Plenary Session, Luxembourg City, Luxembourg: Minutes (11 July 2005), Cl. Exh. 139.

<sup>451</sup> GAC 2005 Communiqué # 22—Luxembourg (12 July 2005), *available at* <http://www.gac.icann.org/web/communiqués/gac22com.rtf>. Given that there had been some debate in the GAC at the Luxembourg meetings regarding ICM's 159; the fact that the Communiqué made no reference to the ICM application is notable.

<sup>452</sup> ICANN Governmental Advisory Committee Meeting XXII, Plenary Session, Luxembourg City, Luxembourg: Minutes (11 July 2005), Cl. Exh. 139.

<sup>453</sup> ICANN Governmental Advisory Committee Meeting XXII, Plenary Session, Luxembourg City, Luxembourg: Minutes (11 July 2005), Cl. Exh. 139. Following this meeting, the U.S. Representative to the GAC, in an internal Department of Commerce email, noted that "happily . . . there is no mention of . . . .XXX in the final [GAC] communiqué." Email from Meredith Attwell, senior advisor at the NTIA to Jeffrey Joyner, NTIA, *et al.*, 14 June 2005, Cl. Exh. 160.

<sup>454</sup> ICANN Response, para. 60.

Board on the subject. The ICANN Board was well within the requirements of the Bylaws that it consider the “timely advice” of the GAC when it approved the .XXX application on 1 June 2005, having received the GAC’s explicit assurance that it was declining to take a position.<sup>455</sup> ICANN’s proffered excuses for the failure of various countries to say more on the subject of .XXX prior to 1 June 2005<sup>456</sup> cannot alter the fact that the only timely advice from the GAC was the GAC’s April 2005 statement that it had no objections to the .XXX application.<sup>457</sup>

205. Even if the GAC had remained silent on the .XXX application, it would not have been for lack of opportunities to comment, as the U.S. representative noted during the Luxembourg meeting.<sup>458</sup> The .XXX application had been publicly available for more than a year, since its posting on the ICANN website in March 2004. The GAC, or any individual government, could have commented on the application, either by direct submission to the ICANN Board, or by posting a statement in the public forums, at any time.<sup>459</sup> The GAC held three meetings (in Kuala Lumpur, Malaysia, in July 2004; in Cape Town, South Africa, in December 2004; and in Mar del Plata, Argentina, in April 2005), and issued three communiqués, between when ICM’s application was posted and when it was approved. Each meeting was an opportunity to discuss the proposed .XXX sTLD and each communiqué was an opportunity to provide advice. Even if the GAC somehow felt that it had not been given sufficient opportunity

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<sup>455</sup> Burr Witness Statement, para. 36-37; Mueller Expert Report at 50.

<sup>456</sup> ICANN’s Response, para. 62.

<sup>457</sup> Tarmizi Letter, 3 Apr. 2005, Cl. Exh. 158.

<sup>458</sup> ICANN Governmental Advisory Committee Meeting XXII, Plenary Session, Luxembourg City, Luxembourg: Minutes, Cl. Exh. 139.

<sup>459</sup> The idea of a government submitting a comment via a public forum, as would any other ICANN stakeholder, is not unheard of; in fact, the government of Canada later choose the public forum as a means to submit a statement on .XXX. See Government of Canada Comments on the Proposed ICM Registry Agreement (2 Feb. 2007), available at <http://forum.icann.org/lists/xxx-icm-agreement/msg00558.html>, Cl. Exh. 161.

to comment before the 1 June 2005 approval of the .XXX application, the Luxembourg meeting in July 2005 was the GAC's first post-approval opportunity to meet as a body and state a position; once again, the GAC declined to do so.<sup>460</sup>

## **2. The U.S. Government Suddenly Changes its Approach and Spurs Other Governments to do the Same**

206. It was not until a month after the Luxembourg meeting—after the application had not only been approved, but ICM and ICANN staff had already negotiated the First Draft Registry agreement—that the GAC and certain individual governments (clearly spurred on by the Bush Administration) chose to intervene.

207. Between 11 August and 15 August 2005, ICANN received, and posted to its website, two letters: one from Michael Gallagher, Assistant Secretary for Communications and Information, United States Department of Commerce, and head of the National Telecommunications and Information Administration (“Gallagher Letter”), and the other from Mr. Tarmizi, the GAC Chairman.<sup>461</sup> The Gallagher Letter referenced negative comments that the United States Department of Commerce had received regarding the .XXX sTLD. Nonetheless, the letter did not expressly state that the U.S. Government had any objection to the .XXX proposal, but “urge[d] the Board to ensure that the concerns of all members of the Internet community on [the issue of .XXX] have been adequately heard and resolved before the Board takes action on this application,” and “request[ed] that the Board [] provide a proper process and

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<sup>460</sup> GAC 2005 Communiqué # 22—Luxembourg, Cl. Exh. 159.

<sup>461</sup> Letter from Michael Gallagher, Assistant Secretary for Communications and Information, United States Department of Commerce, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors (posted 15 Aug. 2005) (“Gallagher Letter”), *available at* <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf>, Cl. Exh. 162. Letter from Mohamed Sharil Tarmizi, GAC Chairman, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors (12 Aug. 2005), *available at* <http://www.icann.org/correspondence/tarmizi-to-board-12aug05.htm> (“Tarmizi Letter, 12 Aug. 2005”), Cl. Exh. 163.



adequate additional time for these concerns to be voiced and addressed before any additional action takes place on this issue.”<sup>462</sup>

208. The Gallagher Letter represented a significant and precipitous change in the U.S. government’s position. Previously, as internal Department of Commerce emails (obtained through a Freedom of Information Act request) reveal, the United States had been in favor of the application; and was even preparing talking points to use in support of the application.<sup>463</sup> At some point, between the Luxembourg meetings in mid-July 2005 and the Gallagher Letter in mid-August, the U.S. government decided not only to change its position on .XXX, but to intervene in the ongoing ICANN process. This U.S. intervention was a result of political pressure from domestic conservative interest groups, and was unrelated to the actual merits of the .XXX application or ICANN’s conduct of the evaluation process.<sup>464</sup>

209. The second letter ICANN received in August 2005, from GAC Chair Mohamed Sharil Tarmizi, also refrained from stating direct opposition from the GAC to ICM’s application, instead noting that “there remain[ed] a strong sense of discomfort in the GAC about the TLD,

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<sup>462</sup> Gallagher Letter, Cl. Exh. 162.

<sup>463</sup> As late as mid-June, a senior policy advisor at the Department of Commerce was gathering talking points on “why [.XXX] is a good thing and why we support it.” Email from Meredith Attwell to Jeffery Joyner *et al.*, 14 June 2005, Cl. Exh. 160. Additionally, the U.S. representative to the GAC was arguing at the Luxembourg GAC meetings in July 2005 that it was too late to object to the application, and noted in an email following that meeting that “happily . . . there was no mention of . . . .XXX in the final [GAC] communiqué.” *Id.*

<sup>464</sup> See Mueller Expert Report at 50. There is evidence suggesting that the U.S. government’s change in position regarding the .XXX sTLD was the result of political pressure from conservative Christian allies of then U.S. President George W. Bush. See Email from Fred Schwien to Michael Gallagher, *et al.*, 16 June 2005, Cl. Exh. 164. (“Who really matters in this mess is Jim Dobson [head of Focus on the Family and founder of the Family Research Council]. What he says on his radio program in the morning will determine how ugly this really gets--if he jumps on the bandwagon, our mail server may crash.”); Internet Governance Project, Paper IGP06-003, *Review of Documents Released under the Freedom of Information Act in the .XXX Case* (19 May 2006), available at <http://www.internetgovernance.org/pdf/xxx-foia.pdf>, Cl. Exh. 165. (“What we do know, from other sources, is during this period James Dobson met with Bush administration political operative Karl Rove to insist that XXX be stopped. And then the US government suddenly abandoned its commitment to the independence of ICANN and took the initiative.”).

notwithstanding the explanations to date.”<sup>465</sup> Mr. Tarmizi stated that he had informed governments that had approached him on the subject that they were free to write to ICANN directly, and therefore believed that “the Board should allow time for additional governmental and public policy concerns to be expressed before reaching a final decision on this TLD.”<sup>466</sup>

210. Mr. Tarmizi later confirmed that ICANN had asked him to write this letter in order to deflect as much as possible negative reactions to the unilateral intervention by the U.S. Government, and to lessen the appearance that ICANN was acting solely on the basis of an objection from the United States.<sup>467</sup> This is also consistent with the order in which the letters were posted on ICANN’s website; it appears that ICANN held the U.S. government’s letter, which it had received first, in order to first post the later-received letter from the GAC’s Mr. Tarmizi. The Gallagher letter, which was received by 12 August 2005, was not posted until 15 August 2005.<sup>468</sup> The Tarmizi letter was posted on 12 August 2005.

211. There can be little doubt that ICANN requested the letter from Mr. Tarmizi to enable it to take the position that the request for a delay in the consideration of the First Draft Registry Agreement had come from the broader GAC instead of just the U.S. government.<sup>469</sup> Given the political dynamics associated with the tension over ICANN’s independence from the U.S. government, and the sensitivities of other governments regarding the U.S. government’s perceived excessive influence over ICANN, the U.S. government’s intervention with respect to

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<sup>465</sup> Tarmizi Letter, 12 Aug. 2005, Cl. Exh. 163.

<sup>466</sup> *Id.*

<sup>467</sup> *See* Burr Witness Statement, para. 39; Mueller Expert Report at 43-44.

<sup>468</sup> Burr Witness Statement, para. 39.

<sup>469</sup> *See* Burr Witness Statement, para. 39.

the .XXX sTLD was of significant concern.<sup>470</sup> ICANN could neither ignore the demands of the U.S. government nor appear to acquiesce too readily.

212. In conversations that took place at the time of the U.S. government's intervention, Dr. Twomey was clear about the nature and importance of the intervention, and reported that the U.S. Department of Commerce had gone so far as to suggest "that it might be willing to use its residual authority to prevent .XXX from being added to the authoritative root, which would have incensed the international community."<sup>471</sup> While Ms. Burr has no other personal knowledge of this threat, Department of Commerce officials stated in internal communications that "if the international community decides to develop an .XXX domain for adult material, it will not go on the Top Level Domain (TLD) registry if the U.S. does not wish for that to happen."<sup>472</sup> There can be little doubt that the threat (whether explicit or tacit) affected ICANN's decision-making process. After all, the last thing ICANN wanted was to precipitate a standoff with the Bush Administration arising out of its decision to add a new TLD to the root and the U.S. government's refusal to allow this to happen.<sup>473</sup>

### **3. The Belated Government Intervention Delays the Board's Consideration of ICM's Draft Registry Agreement**

213. ICANN staff informed ICM of the unexpected intervention signaled by the letter from the U.S. government shortly before the Board meeting scheduled for 16 August 2005, at which ICM had expected the First Draft Registry Agreement to be put to a vote. ICM was extremely disappointed in this turn of events, especially as the requests for additional time

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<sup>470</sup> Williams Witness Statement, para. 29. In fact, Dr. Twomey confided to Dr. Williams (with whom he had a close working relationship as well as a prior personal acquaintance) "his anxiety about the .XXX registry agreement as a result of this intervention." *Id.*

<sup>471</sup> See Burr Witness Statement, para. 40.

<sup>472</sup> United States Control of the Domain Name System, Memorandum attached to email from Meredith Attwell, senior advisor at the NTIA, to Robin Layton, NTIA, 8 Aug. 2005, Cl. Exh 166.

<sup>473</sup> Burr Witness Statement, para. 38-41.

appeared unreasonable and disingenuous in light of the amount of time that had already been devoted to the process and the ample opportunities already given to the GAC or any concerned government to comment on the application. Although ICANN defends its actions now by asserting that it was bound by the Bylaws to consider the opinion of the GAC,<sup>474</sup> ICANN's concerns were, in truth, political rather than substantive. ICANN made it clear to ICM that the surprise interventions had placed the ICANN Board in an awkward situation, as ICANN believed it would be criticized if it proceeded to a vote without making an effort to consider the concerns of the GAC, even though the concerns were untimely.<sup>475</sup> ICM therefore sought to accommodate ICANN by requesting that ICANN delay consideration of the proposed First Draft Registry Agreement for one month so that ICM could help ICANN by comprehensively addressing the concerns that were now being voiced; ICM expected that the delay would allow ICM and ICANN to correct misconceptions about the application and thereby improve the public image of the sTLD within the GAC. When ICM agreed to request the delay, it was with the understanding that ICANN was involved in ongoing conversations with the U.S. Department of Commerce, so that the newly formed objections could be overcome and ICM's application could progress.<sup>476</sup> The decision to request the delay was made collectively between ICM and ICANN, over the course of several conversations.<sup>477</sup> It was certainly not a request made unilaterally by ICM.

214. Consideration of the First Draft Registry Agreement was therefore postponed until the Board meeting scheduled for 15 September 2005. During this delay, ICANN received additional letters from certain governments, concerned more with the process ICANN had used

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<sup>474</sup> ICANN Response, paras. 7(c), 26.

<sup>475</sup> Burr Witness Statement, para. 42.

<sup>476</sup> Burr Witness Statement, para. 42.

<sup>477</sup> Burr Witness Statement, para. 42-43.

in approving ICM's application, rather than with the content of the application itself.<sup>478</sup> Additionally, there was a flood of comments sent to ICANN via email, mostly through automated email addresses in the United States.<sup>479</sup>

215. Throughout this phase, ICM cooperated with ICANN as much as possible. It was ICM's understanding that the implementation of the sTLD was essentially a done deal, pending only agreement on minor alterations to the standard registry agreement already used by ICANN. Therefore, it was in ICM's best interest to allow ICANN time to allay any concerns within the GAC, explain its decision, and hopefully create a better atmosphere for the eventual launch of the .XXX sTLD. Even though approval of the registry agreement was the correct course of action under the terms of the RFP, ICM was willing to agree to a delay in order to allow ICANN to find a better political moment to act.<sup>480</sup>

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<sup>478</sup> Among the comments from governments and others about the .XXX proposal was a letter from the Brazilian Secretary of Information and Technology Policy; Brazil did not oppose the .XXX registration, instead stating that the .XXX and .TRAVEL sTLDs had been introduced without sufficient consultation between ICANN and the GAC. The Brazilian Government requested only that the introduction of new TLDs *in the future* include more robust consultations, especially with national governments. See Letter from Marcelo de Carvalho Lopes, Brazilian Secretary of Information and Technology, to Mohamed Sharil Tarmizi, GAC Chairman (6 Sept. 2005), <http://www.icann.org/correspondence/lopez-to-tarmizi-06sep05.pdf>, Cl. Exh. 167. A second letter, from the Swedish State Secretary for Communications and Regional Policy, expressed the opinion that pornography "is not compatible with [] gender equality goals" and asked ICANN to delay consideration of the .XXX proposal until after the next GAC meeting at the end of November in Vancouver, Canada. See Letter from Jonas Bjelfvenstam, Swedish State Secretary for Communications and Regional Policy, to Dr. Paul Twomey, ICANN CEO and President (23 Nov. 2005), <http://www.icann.org/correspondence/bjelfvenstam-to-twomey-23nov05.htm>, Cl. Exh. 168. None of these letters addressed the merits of ICM's application or the RFP criteria in general, although at least one letter, from Taiwan, noted the benefits of the sTLD in providing a "filtered, labeled, and more appropriate online content and environment," while still requesting a delay to allow further expression of government concerns. Letter from Kai Sheng-Kao, GAC Representative of Taiwan, to ICANN Board of Directors, 30 Sept. 2005, Cl Exh. 169.

<sup>479</sup> Williams Witness Statement, para. 25. Dr. Williams, who had a close working relationship with Dr. Twomey, and who knew him personally as well, believes that he was particularly sensitive to pressure from Australia; although Australia did not submit formal comments to ICANN until early 2007, one of Dr. Twomey's former colleagues in the Australian government was very critical of .XXX, and ICANN, in the Australian media for some time before the formal submission. *Id.*, para. 26.

<sup>480</sup> Burr Witness Statement, paras. 42-43.

216. To assist in the attempt to placate the U.S. Government and the GAC, ICM sent the ICANN Board a detailed letter responding to the letters from Mr. Gallagher and Mr. Tarmizi, describing the ways in which ICM had addressed the concerns of all stakeholders and expressing ICM's continued willingness to work with all stakeholders and governments.<sup>481</sup> The letter reiterated ICM's repeated prior offers, all ignored, to meet with the GAC at any time in order to allow ICM to address any concerns that the GAC had with its application.<sup>482</sup> Ms. Burr was in close contact with Mr. Jeffrey, working to "identify strategies to produce the best results for both ICM and ICANN."<sup>483</sup> Ms. Burr even shared drafts of various ICM letters to the GAC and the U.S. Government with Mr. Jeffrey and senior ICANN staff so that they could offer comments and suggestions before the letters were sent in aid of this joint public relations effort.<sup>484</sup>

#### **4. ICM Revises the Draft Registry Agreement to Provide Reassurances**

217. ICM expected the Board to vote on the proposed registry agreement at its 15 September 2005 meeting, and had declined ICANN's request to further defer consideration until October.<sup>485</sup> ICANN's counsel, John Jeffrey, informed ICM's counsel, Ms. Burr, that the only questions on the Board's mind at the 15 September meeting would be first, how to ensure that ICM would develop good policies, and second, what to do if ICM did not do so, further enforcing the conclusion that the issue of sponsorship had already been resolved. During the September meeting, however, the Board once again postponed its decision by directing the

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<sup>481</sup> Letter from Stuart Lawley to ICANN Board of Directors, 15 Sept. 2005, Cl. Exh. 170.

<sup>482</sup> *Id.* The letter also noted the inordinate length of the application evaluation and negotiation process, and the significant costs that had been incurred by ICM, and requested that the finalization of the .XXX registry agreement not be delayed further.

<sup>483</sup> Burr Witness Statement, para. 46.

<sup>484</sup> *Id.* at 47.

<sup>485</sup> *See* Burr Witness Statement, para. 43.

ICANN President and General Counsel “to discuss possible additional contractual provisions or modifications for inclusion in the .XXX Registry Agreement, to ensure that there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application.”<sup>486</sup> The resolution specifically mentioned compliance issues in relation to potential changes in the ownership of ICM.<sup>487</sup> Notably, the resolution made no mention of any concern that the application had not met the sponsorship or other RFP criteria, or that the negotiations should address any of those criteria.

218. For the most part, ICM did not believe that these changes were necessary, and already considered itself obligated to fulfill the commitments made in the application and subsequent communications to ICANN. To advance the process, however, ICM responded to ICANN’s requests, discussing with ICANN staff the requested changes to the First Draft Registry Agreement. These discussions began the very same day the resolution was passed, 15 September 2005. Over the course of these discussions, ICM willingly added language (1) regarding its obligations to achieve certain policy outcomes; (2) requiring ICM to notify ICANN in advance of any proposed change in control, and not to effect any such change until all ICANN concerns were addressed; (3) requiring ICM to enter into a contract with IFFOR; and (4) requiring ICM to provide ICANN with periodic reports following the launch of the sTLD.<sup>488</sup> None of these changes—nor any of the changes made during later negotiations with the Board—

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<sup>486</sup> ICANN Board Resolution on Proposed .XXX Sponsored Top-Level Domain Registry Agreement, Special Meeting of the Board: Minutes (15 Sept. 2005), *available at* <http://www.icann.org/minutes/minutes-15sep05.htm>, Cl. Exh. 119.

<sup>487</sup> Following this meeting, the Board received a communication from Taiwan’s representative to the GAC, noting that the proposed registry agreement would be both technically workable and would assist in the labeling and filtering of adult entertainment websites, but requesting that approval of the proposal take into consideration customs, culture, social conditions, and legal conditions of different countries.

<sup>488</sup> *See* Draft, Sponsored TLD Registry Agreement, Appendix S, Part 7 (18 Apr. 2006), *available at* <http://www.icann.org/tlds/agreements/xxx/revise-proposed-xxx-agreement-clean-20060418.pdf>, Cl. Exh. 171. No such request was ever made of the other applicants.

were major, from ICM's perspective. Indeed, for the most part, the commercial and technical terms remained the same through each iteration of the draft .XXX registry agreement, and were largely the same as the terms in ICANN's agreements with other registry operators; the only important difference concerned the lack of a cap on punitive damages.<sup>489</sup> Before the end of the month, ICM provided ICANN staff with revisions to the First Draft Registry Agreement, reflecting those consultations. ICANN staff, however, were less responsive, and did not respond to the proposed revisions for approximately six months.<sup>490</sup>

## **5. ICM and ICANN Continue to Respond to the Belated GAC Concerns**

219. During the pendency of the negotiations, from September 2005 through March 2006, ICANN received additional letters from GAC representatives. Among these was one from Peter Zangl, the Deputy Director of the European Commission's Information Society and Media Directorate General, dated 16 September 2005, requesting ICANN to allow the GAC the opportunity to review the independent sTLD evaluation reports before the Board made a final determination on the .XXX application and suggesting that the Board explain to the GAC why the .XXX application had been accepted after being rejected in the 2000 "proof of concept" round.<sup>491</sup> Notably, in these letters, and also in various conversations between ICM and

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<sup>489</sup> Lawley Witness Statement, para. 56; Burr Witness Statement, para. 69.

<sup>490</sup> Burr Witness Statement, para. 45. Notwithstanding ICM's prompt discussions with ICANN staff and its immediate proffer of language to effect the relevant changes, the First Draft Registry Agreement (*i.e.*, the version that had been posted on 9 August 2005), remained on the ICANN website, with no indication that revisions had been discussed and agreed to by ICM, or that ICM had drafted contractual language to implement the changes. As a result, long after ICM had addressed the Board's concerns, debate centered on a version of the registry agreement that did not reflect the additional safeguards or terms and conditions agreed to by ICM and ICANN staff and which were ultimately included in the second draft.

<sup>491</sup> Letter from Peter Zangl, Deputy Director of the European Commission's Information Society and Media Directorate General, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors (16 Sept. 2005), available at <http://www.icann.org/correspondence/zangl-to-cerf-16sep05.pdf>, Cl. Exh. 172. Importantly, as described above, ICM's application had not been rejected in the 2000 "proof of concept" (continued...)



government representatives, very few governments opposed the ICM application, mentioned any concerns about the sponsorship criteria, or expressed any interest in seeing the registry agreement rejected.<sup>492</sup> Most complained about the *process* ICANN had followed,<sup>493</sup> and offered suggestions for improving the process in future rounds. It also appears that the U.S. Government may have encouraged GAC members to send letters regarding .XXX; the United States specifically sent the Gallagher letter to countries it identified as being active in the GAC, hoping that it could provoke them into sending similar letters.<sup>494</sup> In all likelihood, these efforts were accompanied by other communications, including telephone calls and in-person meetings in an effort to garner additional support against the .XXX sTLD.

220. ICM continued to reach out to the GAC and to individual governments, and at the GAC meeting in Vancouver in November 2005, the GAC finally allowed ICM to make a brief presentation about the .XXX sTLD. During this presentation, ICM once again explained the benefits of the sTLD, the support the application had received from the sponsored community

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(continued ...)

round, but simply had not been one of the very few that were accepted.

<sup>492</sup> See, e.g., Email from Sidse Aegidius to Stuart Lawley, 25 Sept. 2005, Cl. Exh. 173 (“I would however like to [clarify] the Danish position. The remarks I have made have solely addressed the fact that ICANN board has not followed the procedures that it – according to the bylaws – must follow when making decisions. In other words my remarks could have concerned any other TLD with possible public policy implications, and [Denmark] has not taken any position on [.XXX] as such . . . my remarks could have concerned any other TLD with possible public policy implications.”); Memorandum from Stuart Duncan to Paul Twomey, 3 Dec. 2005, Cl. Exh. 174.

<sup>493</sup> For instance, certain members of the GAC complained that the reports of the independent evaluators had not been made public before the Board began approving sTLD applications. As a result of a request from the GAC for the reports (and Board Chairman Vinton Cerf’s mistaken assertion to the GAC that the reports were already available), ICANN decided to post the evaluations in December 2005. This was contrary to the process previously established and disadvantaged the .XXX application. Although the Board had disregarded the conclusions of the Sponsorship Team months ago, their conclusions provided new ammunition for those who opposed the ICM application, whereas other applicants that had also failed the independent evaluation but were approved by the Board before the reports were made public were immune from such assaults.

<sup>494</sup> Burr Witness Statement, para. 47.

and other stakeholders, and the planned policy development process.<sup>495</sup> ICM once again offered to meet with any individual representatives to explain or answer follow-up questions. Neither the GAC nor any individual representatives were willing to do so.

221. At the Vancouver meeting in the first days of December 2005, the GAC requested an explanation of the Board's reasoning with regard to the acceptance of ICM's application. When ICANN CEO and President Dr. Twomey finally responded to this request, in February 2006, he discussed the differences between the 2000 "proof of concept" round and the 2004 round, explained the evaluation process, and described the Board's deliberations regarding ICM's application. The letter concluded that:

[b]ased on the extensive public comments received, the independent evaluation panel's recommendations, the responses of ICM and the proposed Sponsoring Organization (IFFOR) to those evaluations, and a review of all supporting documents provided during the evaluation process, at its teleconference on 1 June 2005, the Board authorized the President and General Counsel to enter negotiations relating to proposed commercial and technical terms with ICM.<sup>496</sup>

222. Importantly, Dr. Twomey made no mention of the fact that any residual reservations had remained among Board members as to whether ICM's application had satisfied the sponsorship criteria, nor did he indicate that the registry agreement negotiations authorized by the Board were intended to address any outstanding sponsorship issues. This is because, on both counts, there were none.

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<sup>495</sup> ICM, *The Sponsored .xxx TLD: Promoting Online Responsibility*, Cl. Confid. Exh. G

<sup>496</sup> Letter from Dr. Paul Twomey, ICANN CEO and President, to Mohamed Sharil Tarmizi, GAC Chairman (11 Feb. 2006), available at <http://www.icann.org/correspondence/twomey-to-tarmizi-16feb06.pdf> ("Twomey Letter, 11 Feb. 2006"), Cl. Exh. 175.

## **I. The Second and Third Drafts of the Registry Agreement**

### **1. ICANN Accepts ICM's Proposed Revisions, Resulting in the Second Draft of the Registry Agreement**

223. As discussed above, ICM and ICANN staff reached agreement in concept regarding revisions to the First Draft Registry Agreement almost immediately following the September 2005 Board meeting, and ICM submitted the revised language soon thereafter. ICANN, however, did not respond to the proposed revisions at this stage; thus, the draft available to the public was still the First Draft Registry Agreement (*i.e.*, the version that had been agreed in early August 2005). The delay in further negotiations was despite ICM's express wishes to ICANN that the process continue.<sup>497</sup> Even so, it was not until March 2006 that ICANN staff directed its outside counsel to work directly with ICM's counsel to come to an agreement on the precise language for the revised agreement, based on the text that had been provided by ICM six months earlier.

224. The discussion largely focused on the provisions dealing with providing ICANN a right of approval over changes in control of ICM. On its own initiative, and in response to discussions with the GAC in Vancouver, ICM added a provision that would permit governments to designate names with cultural or religious significance to be set aside so that they could not be registered, added a few events to the calendar for the start-up phase of the registry, and specified that the policies to be developed by the sponsoring organization would include prohibitions on practices including fraudulent marketing; child pornography or the suggestion of child

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<sup>497</sup> See, e.g., Email from Stuart Lawley to Vinton Cerf, 14 October 2005, Cl. Exh. 176; Email from Becky Burr to John Jeffrey and Paul Twomey, 27 Jan. 2005, Cl. Exh. 177.

pornography; and the misuse of credit cards or personal data.<sup>498</sup> The parties promptly reached agreement on these changes, resulting in the Second Draft Registry Agreement.<sup>499</sup>

## 2. ICM Further Revises the Registry Agreement

225. For some reason, ICANN staff failed to post the Second Draft Registry Agreement in advance of (or even during) ICANN's meetings in March 2006 in Wellington, New Zealand. As a result, neither the GAC nor the ICANN community was aware of the changes, and both the U.S. Government and the GAC continued to criticize the "failings" of the First Draft Registry Agreement (*i.e.*, the version that had been posted in August 2005), without the benefit of the revisions that had been negotiated and agreed upon, in September 2005 and March 2006, specifically to address the concerns that had been expressed with respect to that draft.<sup>500</sup> Thus, on 20 March 2006—the eve of the Wellington meetings—the U.S. Department of Commerce issued another letter asserting that the draft registry agreement failed to guarantee the public interest benefits ICM had described in its application and previous presentation to the GAC,<sup>501</sup> notwithstanding the fact that ICM and ICANN had already negotiated contract language specifically to address this concern.<sup>502</sup> Following the GAC Plenary meeting in Wellington, New Zealand in March 2006, the GAC issued a Communiqué (the "Wellington Communiqué")

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<sup>498</sup> See Email from Becky Burr, 19 March 2006, Cl. Exh. 178

<sup>499</sup> See Email from Becky Burr to Esme Smith, 19 March 2006, Cl. Exh. 179. This was the second agreed-upon draft of the registry agreement.

<sup>500</sup> These communications were themselves especially unusual for the U.S. Government, as they appear to be the one and only time the U.S. Government has ever commented on the terms of a proposed registry agreement. See Mueller Expert Report at 40-44.

<sup>501</sup> Letter from John Kneuer, Acting Assistant Secretary, United States Department of Commerce, to Mohamed Sharil Tarmizi, GAC Chairman (20 Mar. 2006), available at <http://www.icann.org/correspondence/kneuer-to-tarmizi-20mar06.pdf>, Cl. Exh. 180.

<sup>502</sup> Moreover, as already discussed, the First Draft Registry Agreement already obligated ICM to fulfill its commitments even before the revisions. The revisions were largely to provide additional assurances, in response to vague expression of concerns from governments, of ICM's commitment to its obligations.

requesting confirmation “that any contract currently under negotiation between ICANN and ICM Registry . . . include enforceable provisions covering all of ICM Registry’s commitments.”<sup>503</sup>

226. ICM was understandably frustrated with the continuing delays in the process, and ICANN’s failure to promptly respond to revisions to the agreement or post the revised versions. ICANN, however, continued to assure ICM that the agreement would be approved if ICM remained patient. For instance, Dr. Cerf assured both Ms. Burr and Mr. Lawley that the only open item was “just contract negotiations.”<sup>504</sup> And Dr. Twomey volunteered to Ms. Burr at the end of the Wellington meeting that he was feeling positive that the registry agreement would be approved.<sup>505</sup>

227. In response to the Wellington Communiqué, ICM made additional revisions to the Second Draft Registry Agreement, and sent those revisions to ICANN staff on 31 March 2006. In these revisions, ICM stated even more clearly its obligation to establish the policy formation process “set forth in the Application,” expanded on the types of policies it expected would be developed by IFFOR, reaffirmed its commitment to the policies as already outlined in various documents submitted to ICANN, and, at ICANN’s request, added a provision stating that all requirements for registration would be “in addition to the obligation to comply with all

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<sup>503</sup> GAC 2006 Communiqué # 24—Wellington, New Zealand (28 Mar. 2006), *available at* <http://gac.icann.org/web/communiques/gac24com.pdf>, Cl. Exh. 181. One of the public policy concerns identified in the Wellington Communiqué was “the degree to which the .xxx application would . . . [t]ake appropriate measures to restrict access to illegal and offensive content.” *Id.* The Communiqué also stated that several GAC members were generally opposed to a .XXX sTLD “from a public policy perspective.” *Id.* Following the Wellington meetings, the United Kingdom’s representative to the GAC wrote to the Board, affirming that ICANN had the authority to approve the proposed registry agreement, but noting that it “would be important that ICANN ensures that the benefits and safeguards proposed by the registry, ICM, . . . are genuinely achieved.” Letter from Martin Boyle, United Kingdom Representative to the GAC, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors (4 May 2006), *available at* <http://www.icann.org/correspondence/boyle-to-cerf-09may06.htm>, Cl. Exh. 182.

<sup>504</sup> Burr Witness Statement, para. 52.

<sup>505</sup> *Id.*, para. 53.

applicable law[s] and regulation[s].”<sup>506</sup> ICM did not anticipate the problems that misinterpretation of this last addition would later cause.<sup>507</sup> ICM’s intention was merely to affirm the fact that all registrants, regardless of the TLD for which they were registering, would be required to follow the applicable laws and regulations based on the registrant’s jurisdiction; the additional requirement to comply with the sTLD policies would not alter that requirement.<sup>508</sup> Adding that statement to the registry agreement would not require ICM, or ICANN for that matter, to enforce any laws or regulations. Instead, if a registrant somehow violated any applicable laws or regulations, it would be the responsibility of the local law enforcement to take the necessary steps; just as would be the case for the abundant adult content currently available in other TLDs, such as .COM, .NET, or .ORG. In fact, ICANN has provisions in its agreements requiring all accredited registrars to “abide by applicable laws and governmental regulations.” ICANN also requires every registry to include provisions in its agreements obligating recipients of the registry zone file to “comply with all applicable laws and regulations governing the use of the [zone file data].”<sup>509</sup> Regardless of contractual provisions, a registrant or registry operator is always required to comply with the dictates or decisions of local authorities, but is not required to take any other affirmative action to investigate or enforce any laws. In this regard, the .XXX sTLD would be no different than any other TLD; and the “applicable law” provision only restated that reality.<sup>510</sup> And, once again, it bears emphasizing that none of these alterations

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<sup>506</sup> Email from Becky Burr to John Jeffrey, 31 Mar. 2006, Cl. Exh. 183. Burr Witness Statement, para. 53.

<sup>507</sup> Burr Witness Statement, para. 53.

<sup>508</sup> *See id.*, para. 53.

<sup>509</sup> *Id.*, para. 53.

<sup>510</sup> *See id.*, para. 53. When national governments identify a problem with content on particular websites, it is not the registry operator who is responsible for removing it; instead, governments may require that search engines or hosting sites like Google, Yahoo, YouTube, or eBay remove or block certain content.

changed the .XXX proposal with regard to the sponsorship or any other RFP criteria—they were only meant to provide additional assurances that ICM would comply with the obligations it had already assumed.<sup>511</sup>

### **3. Without Responding to ICM’s Proposed Revisions, ICANN Requests Further Revisions, Resulting in the Third Draft Registry Agreement**

228. Despite the revisions submitted by ICM on 31 March, at the Board meeting later that same day, the Board again directed further registry agreement negotiations, without any acknowledgment or discussion of any of the revisions that had already been agreed upon prior to the Wellington meeting, or the additional revisions offered by ICM during and after the Wellington meeting.<sup>512</sup> Discussions between ICM and ICANN staff during the two weeks following the Wellington meeting resulted in the Third Draft Registry Agreement, based largely on the revisions proposed by ICM on 31 March. The Board discussed the Third Draft Registry Agreement on 18 April 2006.<sup>513</sup> The draft agreement was then posted for public comment on the ICANN website, with the announcement that the agreement would be considered by the ICANN Board on 10 May 2006.<sup>514</sup> The Third Draft Registry Agreement “contained a number of extraordinary enforcement tools,” including termination provisions for ICM’s non-performance,

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<sup>511</sup> Nonetheless, due to the confusion caused by this provision, ICM later took it out of the agreement.

<sup>512</sup> See ICANN Board Resolution on ICM Registry sTLD Application, Regular Meeting of the Board: Minutes (31 Mar. 2006), available at <http://www.icann.org/minutes/minutes-31mar06.htm>, Cl. Exh. 184; ICANN Meetings in Wellington, New Zealand: Board Meeting (31 Mar. 2006), available at <http://www.icann.org/meetings/wellington/captioning-board-31mar06.htm>, Cl. Exh. 185.

<sup>513</sup> Meeting Minutes for the Special Meeting of the Board (18 Apr. 2006), available at <http://www.icann.org/minutes/minutes-18apr06.htm>, Cl. Exh. 186.

<sup>514</sup> ICANN Announcement, ICM Registry Submits Revised Proposed .XXX Registry Agreement, 18 Apr. 2006, available at <http://www.icann.org/en/announcements/announcement1-18apr06.htm>, Cl. Exh. 187. This was the second time a draft registry agreement between ICM and ICANN had been posted and subjected to public comment.

specific performance rights, damages provisions, full indemnification of ICANN, and more.<sup>515</sup> Indeed, ICM had given the Board more assurances and guarantees than any other applicant had been required to do.<sup>516</sup>

229. Dr. Twomey, ICANN's President and CEO, also responded to the belated input from the GAC contained in the Wellington Communiqué. On 4 May 2006, he wrote to the GAC that, although the Board had determined that the materials provided by ICM were sufficient "to proceed with contractual discussions, the Board [had also] expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be addressed by contractual obligations to be stated in a registry agreement."<sup>517</sup> Dr. Twomey's statement to the GAC was not only plainly contradictory of the terms of the Board's June 2005 resolution in which the Board had unconditionally approved ICM's application, the letter also represented the first indication that anyone at ICANN was going to reopen the question of the sponsorship criteria.<sup>518</sup>

#### **4. The Record of Negotiations Demonstrates Sponsorship Was Never Discussed**

230. There is, simply put, nothing in the record that supports Dr. Twomey's about-face that the Board still had concerns about whether ICM's application satisfied the RFP criteria when it had approved ICM's application. There is nothing at all in the 1 June 2005 ICANN Board resolution, pursuant to which the registry agreement negotiations were authorized, reflecting the

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<sup>515</sup> Burr Witness Statement, para. 59.

<sup>516</sup> Burr Witness Statement, para. 60.

<sup>517</sup> Letter from Dr. Paul Twomey, ICANN CEO and President, to Mohamed Sharil Tarmizi, GAC Chairman (4 May 2006), available at <http://www.icann.org/correspondence/twomey-to-tarmizi-04may06.pdf>, Cl. Exh. 188.

<sup>518</sup> Lawley Witness Statement, para. 58. Ironically, the letter was not posted to the ICANN website until after the 10 May 2006 Board meeting, when the Board discussed the sponsorship criteria before rejecting the draft .XXX registry agreement.



Board's new "concerns" as to whether ICM had "met all of the criteria." In fact, nothing in any Board minutes, transcripts or other ICANN pronouncements suggest that the Board's approval to proceed to the registry agreement negotiation stage was subject to any residual concerns as to whether ICM's application satisfied all of the RFP selection criteria. Nor was there any indication in these documents or in ICM's discussions with ICANN staff, during the course of negotiating the registry agreement, that any issues remained regarding the sponsorship or other RFP criteria.<sup>519</sup> All communications between the ICANN and ICM negotiators were related to the terms of the registry agreement only.<sup>520</sup>

231. The evidence confirms the ICANN Board's 1 June 2005 determination that ICM's application had satisfied all of the RFP selection criteria and its approval of the parties' negotiations to enter into a registry agreement. This was confirmed by the Chairman of the Board, senior ICANN staff, and members of the Board in **contemporaneous** statements, and publicly reiterated by senior ICANN staff at numerous subsequent meetings. There is no controversy that those negotiations were only to concern the "proposed commercial and technical terms" of the .XXX registry agreement, a fact that had been confirmed to the GAC only months earlier by Dr. Twomey.<sup>521</sup> Moreover, ICANN had already approved registry agreements with .JOBS, .MOBI, and .TRAVEL (and would very soon approve .TEL (Telnic), and later .ASIA), despite the Sponsorship Evaluation Team's concerns with the sponsorship criteria. Given the Board's acceptance of the sponsored communities described in those applications, there was no reason for the Board to have had any remaining concerns with the .XXX application.<sup>522</sup> Dr.

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<sup>519</sup> Burr Witness Statement, para. 32.

<sup>520</sup> *Id.*

<sup>521</sup> Twomey Letter, 11 Feb. 2006, Cl. Exh. 175.

<sup>522</sup> Williams Witness Statement, para. 28

Twomey's about-face regarding the Board's concerns with the sponsorship criteria was the only indication ICM had, up until that point, that ICANN might not approve the registry agreement, or that the sponsorship criteria might be a basis for rejection.

232. In retrospect, in ICM's view, there can be little doubt that the delays, postponements, and stalling were nothing more than an attempt by some ICANN representatives to manufacture reasons for rejecting its registry agreement, even though there was no basis to do so under the established criteria. At the time, however, ICM was focused on working cooperatively with ICANN, and therefore tolerated the delays under the impression that ICANN was attempting, in good faith, to find the opportune moment to approve the agreement.

#### **J. ICANN Rejects the .XXX Registry Agreement**

233. When the .XXX registry agreement was finally on the Board's agenda for the 10 May 2006 meeting, ICM was certain that it would be approved. The Board first engaged in a lengthy discussion of the Third Draft Registry Agreement, touching upon a number of issues, including the enforceability of the agreement, the sponsorship criteria, public and industry comments, and the "advice" that it had received from the GAC. The agreement was then put to a roll call vote. It was rejected, eight votes to five. The vote constituted only a rejection of the draft registry agreement that had been negotiated with ICANN staff, but did not constitute a rejection of ICM's application for the .XXX sTLD.<sup>523</sup>

##### **1. Misguided Reasons are Given for the Rejection of ICM's Agreement**

234. The transcript of the vote makes it clear that the Board rejected the Third Draft Registry Agreement for reasons other than its commercial and technical terms, which is all the Board should have been focused on. In particular, several Board members became fixated on

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<sup>523</sup> Voting Transcript of ICANN Board Meeting (10 May 2006), *available at* <http://www.icann.org/minutes/voting-transcript-10may06.htm>, Cl. Exh. 189.

whether ICM would be able to address adequately the various public policy (read: objections to adult content) issues that had been raised by the GAC;<sup>524</sup> in other words, whether ICM could provide an advance guarantee that it would be able to comply strictly with what it was agreeing to in the draft registry agreement.

235. For example, Dr. Paul Twomey focused his criticisms on the “all applicable law” provision, misunderstanding it as a commitment by ICM to enforce laws related to adult content in all relevant jurisdictions, which he pointed out would be impossible to carry out.<sup>525</sup> This was not, however, a unique obligation assumed by ICM, but merely a statement of the fact that registrants would be subject to the laws of their relevant jurisdictions.<sup>526</sup> Dr. Twomey also invoked failure to meet the sponsorship criteria as a basis for rejecting the application, notwithstanding the fact that he had been intimately involved in the negotiations over various drafts of the .XXX registry agreement. If he truly had concerns regarding the sponsorship criteria, those concerns could easily have been expressed to ICM “during the contract negotiations so they could be addressed, rather than [springing them on ICM] after the fact as a reason for rejecting the registry agreement.”<sup>527</sup>

236. Other Board members, such as Hagen Hultzsch, voted against the agreement because the negotiations “didn’t produce the expected results” or did not comply with the GAC’s advice and the Board’s requests, without specifying what they thought was lacking from the agreement.<sup>528</sup> Similarly, Board member Njeri Rionge voted against the agreement on the basis

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<sup>524</sup> *Id.*

<sup>525</sup> Voting Transcript of ICANN Board Meeting (10 May 2006), Cl. Exh. 189.

<sup>526</sup> Burr Witness Statement, para. 53.

<sup>527</sup> Lawley Witness Statement, para. 60.

<sup>528</sup> Voting Transcript of ICANN Board Meeting (10 May 2006), Cl. Exh. 189.

that there was insufficient information to vote in its favor.<sup>529</sup> Having responded to every request for information, made every revision requested, attempted to address every concern raised, and reached agreement with ICANN staff—an indication that ICANN staff thought that all of the Board’s requirements had been met and did not have any more changes to propose—it is not clear how ICM could have satisfied these Board members. These votes had the effect of rejecting the agreement for failing to meet some objective that the Board had never disclosed to ICM.

237. With respect to the public policy considerations that would appear to have motivated the thinking of some of the Board members, there is nothing in the RFP—the sole criteria governing the 2004 round—that would have required ICM or any applicant to address governmental concerns about the content of websites within the TLD, particularly inasmuch as the content in question—sexually explicit adult content—was and is abundantly available in most of the existing top-level domains, and in light of the fact that content regulation of any sort is well outside ICANN’s mission. During the lengthy process of developing the RFP, ICANN could have decided to include such requirements, but did not do so.<sup>530</sup> Rejecting the .XXX registry agreement based on such considerations therefore constituted an *ex post facto* alteration of the rules that had been applied to the other applicants.

238. The Board’s reasons for rejecting the agreement were either based on extreme naiveté regarding the nature, purpose, and effect of ICM’s contractual commitments pursuant to

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<sup>529</sup> *Id.*

<sup>530</sup> Creating criteria relating content or public policy concerns might still have been outside of ICANN’s legitimate authority, but at least applicants would have known that considerations of content or public policy would be part of the evaluation process. Williams Witness Statement, para. 30. Once again, the draft documents for the upcoming 2009 round of applications, which incorporate processes in certain circumstances for raising objections based on morality and public order grounds, provide an example of how ICANN could have structured the December 2003 RFP, had it so chosen. ICANN, New gTLD Program Explanatory Memorandum, Cl. Exh. 81.

its registry agreement with ICANN, or a more hidden agenda; certainly not one that was ever disclosed to ICM. None of the other applicants were required to give assurances to ICANN that they would address public policy concerns associated with or arising out of potentially offensive content on a website in their domains, or somehow “guarantee” that they would comply with their contractual obligations. Like any contractual relationship between two parties, there is always a possibility of non-compliance by one of the parties. If and when this happens, remedies are available in law or equity to enforce the contract or obtain other relief. The Board’s position that somehow ICM should be required to conclusively “guarantee” up front that it would, in fact, always comply with all of its obligations reflected, at best, a complete misunderstanding as to how contracts work, or, at worst, the articulation of a standard that it knew ICM would never be able to meet. There was absolutely no way that ICM could have established in advance that the registry agreement would never be breached; at least not beyond the commitments it had bent over backwards to provide.

## 2. Several Board Members Express Concern with the Board’s Misguided Action

239. Several Board members who were in favor of approving the agreement expressed their dissatisfaction with the obligations being imposed on ICM. Their comments are telling. Mouhamet Diop stated that he was in favor of the .XXX agreement because “[c]hanging our **position** after all that process will weaken more the organization that [sic] it will help it . . . . If we vote against, we will open the door to a process that we will never come back [from] again. Any group of pressure [sic] will see itself able to make us **change everything** on any issue.”<sup>531</sup>

240. Board Member (and now Chairman) Peter Dengate-Thrush commented that he felt it was “unfair on this particular applicant to attempt to ask it to build a complete and working

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<sup>531</sup> *Id.* (emphasis added).

compliance model before it's allowed to start. That hadn't been imposed on any other applicant, and I don't think it could be or should be imposed on this one.”<sup>532</sup>

241. Likewise, Board Member Joichi Ito stated:

Although enforcement and compliance issues have been raised with this agreement, they are mostly general issues that should be addressed in the framework of ICANN's ability to enforce agreements generally. ICANN is not in the business and should not be in the business of making judgment on content. Each country has the ability to legislate and enforce its laws to control content inside of that country.

I believe ICM has followed the process put forth by ICANN and has addressed concerns from the community in a reasonable way and I vote in favor . . . .<sup>533</sup>

242. Board Member Susan Crawford believed that not only had ICM addressed all the concerns raised about the .XXX registry agreement, but that ICANN may have imposed too many requirements on ICM to address “policy concerns”:

I am not persuaded that there is any good technical-competency or financial-competency reason not to enter the draft registry agreement between ICM and ICANN that has been posted for public comment. . . .

. . . I have carefully reviewed the concerns raised by the Governmental Advisory Committee in its 28 March 2006 communique, and have compared them to the draft contract, and I am satisfied that these concerns have been addressed by this draft contract. Indeed, I believe we may have gone too far in addressing these concerns. . . . We should not run the risk of turning ICANN into a convenient chokepoint for the content-related limitations desired by particular governments around the world. Governments have many powers within their territories, and are free to use them there.<sup>534</sup>

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532 *Id.*

533 *Id.*

534 *Id.*

**K. ICM Files, Then Withdraws, a Request for Reconsideration Pending Further Negotiations**

243. The Board's May 2006 rejection of the registry agreement came as something of a shock to ICM, especially in light of the amount of time and effort that it had spent negotiating with ICANN over not one, but three versions of the agreement. During the course of these negotiations, ICM had gone to significant lengths to acquiesce to every reasonable request from ICANN staff, notwithstanding the fact that certain of the conditions being imposed upon ICM had not been required of any of the other applicants. Indeed, ICM's representatives had repeatedly informed the ICANN negotiators that there was effectively no reasonable amendment to the agreement that ICM would not accept. Other factors outside of ICM's control, however, were apparently at play.<sup>535</sup> Given all the effort ICM had already expended, and the approximately US\$ 1 million spent between June 2005 and May 2006 in negotiations and preparation for the launch of the sTLD, ICM was unwilling to simply abandon its proposal.<sup>536</sup> Nor was there any legitimate reason for ICM to abandon its proposal, which, after all, had previously been found by ICANN to meet the RFP criteria. Accordingly, shortly after the 10 May Board meeting, ICM filed a Request for Reconsideration of Board Action.<sup>537</sup>

244. No decision, however, was made on ICM's Request. In conversations regarding the status of the Committee's deliberations, ICANN's counsel, John Jeffrey, informed ICM's counsel that the ICANN Board would be receptive to discussing (yet another) revised agreement.<sup>538</sup> In light of this conversation, ICM felt that there was no need to force the

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<sup>535</sup> Burr Witness Statement, para. 64; Williams Witness Statement, paras. 25-28.

<sup>536</sup> Lawley Witness Statement, para. 61.

<sup>537</sup> ICM filed an Amended Request for Reconsideration of Board Action shortly thereafter, once the Board minutes from the 10 May Board meeting were published. *See* ICM Amended Request for Reconsideration of Board Action (21 May 2006), Cl. Exh. 190.

<sup>538</sup> Lawley Witness Statement, para. 60.

Reconsideration Committee to find that the Board had erred in its decision, and that it would be best to once again cooperate with ICANN by submitting a new draft agreement and engaging in further negotiations. ICM believed, based on Mr. Jeffrey's statements, that this would be the approach most likely to result in the outcome ICM desired.<sup>539</sup> Thus, on 29 October 2006, ICM officially withdrew its Amended Request for Reconsideration, quite likely protecting ICANN from the embarrassment of a negative vote.<sup>540</sup>

**L. ICM Resumes Negotiations with ICANN Resulting in the *Fourth Agreed-Upon Draft***

245. Through November and December 2006, ICM engaged in further negotiations with senior ICANN representatives regarding revisions to the Third Draft Registry Agreement. As had previously been the case, ICM worked to accommodate every demand put forward by ICANN, to demonstrate that all of the concerns raised by the GAC and others had been addressed through the registry agreement, to the extent possible, and to provide ICANN with various additional materials to demonstrate its commitment to abide by the letter and spirit of the proposed agreement.<sup>541</sup>

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<sup>539</sup> Burr Witness Statement, paras. 64-65.

<sup>540</sup> *Id.* at para. 64. At that time, ICM President Stuart Lawley invested another US\$ 200,000 in ICM, "money that [he] certainly would not have invested . . . had I not been assured that [the] agreement would ultimately be approved." Lawley Witness Statement, para. 62.

<sup>541</sup> Among the many materials ICM provided to ICANN over the course of the years were a list of individuals within the child safety community who would be willing to sit on the Board of IFFOR, the sponsoring organization for .XXX, *see* Letter from Stuart Lawley to Vinton Cerf and the ICANN Board, 14 Dec. 2006, Cl. Confid. Exh. H; commitments to enter into agreements with rating associations to provide tags for filtering .XXX websites and to monitor compliance with child pornography provisions, *see id.*; several descriptions of the industry pre-registration service ICM had initiated to demonstrate the level of support among the sponsored community and updates regarding the level of response, *see, e.g.*, Letter from Stuart Lawley to Vinton Cerf and the ICANN Board, 30 May 2006, Cl. Exh. 191; *see also* Letter from Stuart Lawley to Vinton Cerf and the ICANN Board, 22 Dec. 2006, Cl. Exh. 192; and a number of memos and summaries explaining how the revised agreement addressed all of the concerns that had been raised throughout the process, *see, e.g.*, Letter from Stuart Lawley to Vinton Cerf and the ICANN Board, 18 Apr. 2006, Cl. Exh. 193; *see also* Memorandum from Stuart Lawley to Vinton Cerf and the ICANN Board, 22 December 2006, Cl. Exh. 194.



**1. ICM Submits Information About its Pre-Reservation Service, Further Demonstrating its Community Support**

246. Among the most significant materials presented was information on ICM's pre-reservation service. Just after the May 2006 vote rejecting the ICM registry agreement, in order to further demonstrate the community support for the application and counter Dr. Twomey's statements about the Board's concerns regarding ICM's failure to satisfy the sponsorship criteria, ICM established a "pre-reservation" service, offering "to accept reservations from webmasters (or their authorized agents) operating corresponding adult sites on other ICANN-recognized top-level domain[s]."<sup>542</sup> In the first six months the service was available, ICM received more than 75,000 pre-reservations, which was "more than double the best-case business projections included in [the] application."<sup>543</sup> ICM's analysis of the pre-reservations concluded that most were likely neither speculative nor defensive, but rather showed limited duplication consistent with actual registration patterns.<sup>544</sup>

247. ICM had not advertised or promoted the service, but simply made it publicly available. The high level of demand for the pre-reservations demonstrated the continued community support for the .XXX application, despite ICANN's delays and even the rejection of the registry agreement.<sup>545</sup> Thus, even if the Board could have legitimately revisited its conclusion on the sponsorship criteria, there was no reason to find that the level of support which the Board had previously felt was sufficient to justify approving the application on 1 June 2005 was no longer sufficient. There was more than enough support to make the proposal commercially viable.

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<sup>542</sup> Letter from Stuart Lawley to Vinton Cerf and ICANN Board, 8 Mar. 2007, Cl. Exh. 195.

<sup>543</sup> *Id.*

<sup>544</sup> *Id.* ICM spent approximately US\$ 50,000 to establish and maintain this pre-reservation program. Lawley Witness Statement, para. 29.

<sup>545</sup> Lawley Witness Statement, para. 61.

248. Not only is the sTLD commercially viable, but the figures for the TLDs already in existence show that .XXX would, almost immediately, have received far more registrants than some TLDs which have been in existence for years. Even after the March 2007 vote rejecting the application for the last time, the pre-reservation system has resulted in an additional 25,000 reservations. Currently, ICM has received pre-reservations for over 100,000 names, over 92,000 of which are unique.<sup>546</sup> By contrast, as of June 2008, .AERO and .COOP, both of which were launched in 2002, each had less than 6,000 registrants.<sup>547</sup> .MUSEUM, which was launched in 2003, had only 553 registrants as of June 2008.<sup>548</sup> There is no question that registrations in .XXX would far outnumber registrants in these TLDs. While the TLDs launched as a result of the 2004 round have generally attracted more registrants than the TLDs launched as a result of the 2000 round, .XXX would still be more popular than .CAT, which had 29,741 registrants as of June 2008, and .JOBS, which had 13,726 registrants as of that date.<sup>549</sup>

## **2. The Fourth Agreed-Upon Draft Restates ICM's Commitment to Fulfill All Obligations**

249. By the end of December 2006, ICM and senior-most ICANN staff had once again reached agreement regarding the language, terms, and conditions for the proposed registry agreement, resulting in the Fourth Draft Registry Agreement. The contract revisions made during this stage of negotiations were more significant and extensive than any of the previous revisions; nonetheless, the commercial and technical terms of the agreement remained largely unchanged.<sup>550</sup>

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<sup>546</sup> Lawley Witness Statement, para. 43.

<sup>547</sup> ICANN Dashboard—Registry Status, available at <http://forms.icann.org/idashboard/public/> (last visited 22 Jan. 2009), Cl. Exh. 196.

<sup>548</sup> *Id.*

<sup>549</sup> *Id.*

<sup>550</sup> Burr Witness statement, para. 63.

250. An extensive list of commitments was added whereby ICM agreed to engage in policy formulation together with IFFOR; impose certain requirements on registrants; develop mechanisms for compliance with those requirements; create dispute resolution mechanisms; provide written reports to ICANN; engage independent monitors; and provide funding for IFFOR. Despite the addition of this list, ICM's earlier agreement to abide by commitments made in the application and formal correspondence with regard to the registry agreement remained, thereby ensuring that even if some item was not mentioned on the detailed list, it would still be included in ICM's obligations.

251. ICM did, however, remove the clause regarding registrants' obligations to comply with "all applicable law." attempting to end the misunderstanding caused by that clause.<sup>551</sup> ICANN staff had no objection to removing this clause, understanding that ICM's obligations did not change whether this statement was explicitly included in the registry agreement or not.<sup>552</sup> Thus, the problematic provision, which had caused confusion regarding whether either ICM or ICANN would become entangled in "monitoring content," was no longer in the final text of the agreement which would be ultimately be voted upon. The list of specific commitments was more detailed than any previous commitments made by ICM, and more detailed than any list required of the other sTLD applicants. Nonetheless, even during these more extensive revisions, ICANN never sought to have ICM attempt to re-define the sponsored community or otherwise demonstrate that it met any of the RFP criteria.<sup>553</sup> Nor were there any material changes made to the commercial and technical terms of the agreement.<sup>554</sup>

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<sup>551</sup> Burr Witness Statement, para. 67.

<sup>552</sup> See Burr Witness Statement, para. 67.

<sup>553</sup> Burr Witness Statement, paras. 65-69.

<sup>554</sup> *Id.*

252. Additionally, again at ICANN's insistence, ICM committed in writing to enter into an agreement with the International Content Rating Association, a respected international child protection organization (later renamed the Family Online Safety Institute, or FOSI).<sup>555</sup> ICM was reluctant to agree to this request, as it was unnecessary and inappropriate; no such request had been made of any other applicants.<sup>556</sup> Nonetheless, ICM acquiesced, and a contract was executed between ICM and ICRA/FOSI on 1 February 2007.<sup>557</sup>

### **3. While Never Expressing a GAC Position Against ICM's Application, the GAC Continues to Request Delays**

253. The Fourth Draft Registry Agreement was posted on the ICANN website for public comment on 5 January 2007, with the expectation that the comment period would last for approximately 30 days, to be followed by the Board's vote on 12 February 2007.<sup>558</sup> This was the third time that a draft registry agreement associated with the .XXX sTLD was posted (as the Second Draft Registry Agreement had never been posted) and subjected to public comments.

254. In anticipation of the planned vote, ICANN's Board once again discussed the draft registry agreement at its meeting on 16 January 2007. During this meeting, GAC Chair Mohamed Sharil Tarmizi noted that there was much discussion and disagreement in the GAC, and argued that the GAC needed more time to provide comments. Among the GAC's concerns was the question of the enforceability of the registry agreement. Not only was this concern unfounded, but the GAC's concerns amounted to no more than speculation of "a group of

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<sup>555</sup> *Id.* at para. 69.

<sup>556</sup> *Id.*

<sup>557</sup> Burr Witness Statement, para. 96; Agreement Between ICRA/FOSI and IFFOR, 1 Feb. 2007, Cl. Confid. Exh. I.

<sup>558</sup> ICANN Announcement, ICANN Publishes Revision to Proposed ICM (.XXX) Registry Agreement for Public Comment (5 Jan. 2007), *available at* <http://www.icann.org/announcements/announcement-05jan07.htm>, Cl. Exh. 197.

government employees from around the world, almost none of whom were lawyers,” about the legal “enforceability of a contract under U.S. law.”<sup>559</sup>

255. On 2 February 2007, the out-going and in-coming Chairs of the GAC issued a letter to Dr. Cerf commenting on ICM’s application. Not only did this letter add little of substance, it was sent without the support or input from much of the GAC.<sup>560</sup> The letter stated that the Wellington Communiqué remained “a valid and important expression of the GAC’s views” regarding the .XXX sTLD and referred to no other GAC statements amending or altering the statements of the Wellington Communiqué.<sup>561</sup> The letter also reiterated that various GAC members had objections to the proposed agreement, requested additional information from the Board regarding the Board’s decision that ICM’s application had overcome the deficiencies identified in the initial evaluation conducted by the independent evaluators, requested information about the enforceability of ICM’s commitments, and requested that a final decision on ICM’s agreement be delayed until the ICANN meetings in Lisbon, scheduled for the end of March 2007.<sup>562</sup> Again, the GAC’s unfounded concerns about the legal enforceability of the

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<sup>559</sup> Burr Witness Statement, note 119..

<sup>560</sup> The letter had been sent after a phone call where only a few GAC representatives participated; even among those few several were not in support of the letter. See Email from J. Beckwith Burr to John Jeffrey with attachment, 11 Feb. 2007, Cl. Confidential Exh. J.

<sup>561</sup> Letter from Mohamed Sharil Tarmizi, GAC Chairman, to Vinton Cerf (2 Feb. 2007), available at <http://www.icann.org/correspondence/tarmizi-to-cerf-02feb07.pdf>, Cl. Exh. 198. The Wellington Communiqué, as discussed above, had asked the Board to ensure that any registry agreement with ICM “include enforceable provisions covering all of ICM Registry’s commitments.” GAC 2006 Communiqué # 24—Wellington, New Zealand, Cl. Exh. 181. The entire negotiation process had, in fact, been an attempt, on ICM’s part, to assure everyone that the agreement contained sufficient assurances of its commitments.

<sup>562</sup> *Id.* In addition to this comment from the GAC, ICANN was subjected to a flood of comments submitted to the public forums by a small group of adult webmasters attempting to create an appearance of opposition far greater than the opposition which really existed. ICM kept ICANN informed of these efforts; once again, never hiding that there was some opposition to .XXX among the adult content industry, but demonstrating that it was not significant enough to justify rejecting the proposal. Moreover, even many opponents of the application acknowledged that ICM registry would earn large profits as the registry operator for .XXX, indicating that even ICM’s opponents in the adult-entertainment industry  
(continued...)

registry agreement were largely the opinions of government representatives with no real knowledge of U.S. contract law that would govern the registry agreement.

#### **4. The ICANN Board Acknowledges It is Reconsidering Previously Decided Issues Relating to the Sponsorship Criteria**

256. The ICANN Board engaged in a discussion regarding ICM's draft registry agreement at its 12 February 2007 meetings. The discussion centered on three main issues: "1) community review and public comment of the agreement and the sufficiency of the proposed agreement; 2) the status of advice from the [GAC] and a clarification of the letter from the GAC Chair and Chair-Elect, and whether additional public policy advice had been received or was expected following the Wellington Communiqué; and 3) how ICM measures up against the RFP criteria."<sup>563</sup>

257. Following the discussion, a resolution was approved stating that "a majority of the Board ha[d] serious concerns about whether the proposed .XXX domain has the support of a clearly-defined sponsored community as per the criteria for sponsored TLDs," although a minority felt the criteria had been met.<sup>564</sup> Because there had been some very slight revisions made to the registry agreement following the 5 January posting, the resolution also required that the newest revision (the *fifth* agreed-upon draft) be posted for public comment for no less than 21 days,<sup>565</sup> and directed ICANN staff to confer with ICM to provide additional information to the

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(continued ...)

were aware that .XXX would be successful. Part of the motivation for the opposition was envy on the part of certain industry participants, who would have liked to operate—and earned the profits from—the .XXX sTLD themselves. *See* Lawley Witness Statement, para. 42.

<sup>563</sup> Meeting for the Special Meeting of the ICANN Board of Directors (12 Feb. 2007), *available at* <http://www.icann.org/minutes/minutes-12feb07.htm>, Cl. Exh. 199.

<sup>564</sup> *Id.*

<sup>565</sup> Throughout the many years ICM's application remained in limbo, ICANN received many additional comments regarding the application, some positive and some negative. Some of the negative comments consisted of "canned" statements, pre-written by opponents of ICM and made available on

(continued...)

Board regarding the sponsorship issue. ICM was, understandably, distressed by this vote, but was once again assured by ICANN staff that the Board could be convinced (again) that the application met the criteria.<sup>566</sup>

258. As the decision was thus again postponed, the ICM application was a subject of discussion at the GAC meetings in Lisbon in March 2007. The Communiqué issued by the GAC following those meetings (“Lisbon Communiqué”) reaffirmed the 2 February letter regarding the Wellington Communiqué, and further expressed mistaken and uninformed concerns that the proposed registry agreement could result in ICANN “assuming an ongoing management and oversight role regarding Internet content.”<sup>567</sup>

**M. ICANN Reverses its Approval of ICM’s Application and Rejects ICM’s Proposed Registry Agreement**

259. At the next Board meeting on 30 March 2007, when both the proposed agreement and ICM’s application for the .XXX sTLD were put to a vote, the Board resolved by 9 votes to 5 to both reject the proposed agreement and to turn down ICM’s application.<sup>568</sup> The operative part of the Board’s resolution reads as follows:

[T]he Board has determined that:

- ICM’s Application and the Revised Agreement fail to meet, among other things, the Sponsored Community criteria of the RFP specification.

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(continued ...)

various websites for others to send, and some were generated by automated tools designed to send posts using randomly selected email addresses.

<sup>566</sup> Burr Witness Statement, para. 74.

<sup>567</sup> GAC 2007 Communiqué #27—Lisbon, Portugal (28 Mar. 2007), *available at* <http://gac.icann.org/web/communiques/gac27com.pdf>, Cl. Exh. 200.

<sup>568</sup> Throughout the application process, ICM’s efforts to engage with the GAC, the Board, the sponsored community, individual governments, and opponents to the application had caused ICM to spend approximately US\$ 2.5 million. ICM’s expenditures were all made with the understanding that the registry agreement would eventually be approved, allowing ICM to operate the sTLD. Lawley Witness Statement, para. 64.

- Based on the extensive public comment and from the GAC’s communiqués that this agreement raises public policy issues.
- Approval of the ICM Application and Revised Agreement is not appropriate as they do not resolve the issues raised in the GAC Communiqués, and ICM’s response does not address the GAC’s concern for offensive content, and similarly avoids the GAC’s concern for the protection of vulnerable members of the community. The Board does not believe these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant.
- The ICM Application raises significant law enforcement compliance issues because of countries’ varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct.
- The Board agrees with the reference in the GAC communiqué from Lisbon, that under the Revised Agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.

Accordingly, it is resolved (07.18) that the Proposed Agreement with ICM concerning the .XXX sTLD is rejected and the application request for a delegation of the .XXX sTLD is hereby denied.<sup>569</sup>

**1. The Board Members Who Rejected the Application Did Not Understand the RFP Process**

260. Rejecting the application was a complete reversal of the earlier 1 June 2005 vote;<sup>570</sup> an outcome that was not even remotely provided for in the sTLD process ICANN had established. Moreover, the reasons given for the rejection in no way justified ICANN’s deviation from the process. To begin with, the question of the sponsored community had been

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<sup>569</sup> ICANN Board Resolution on Proposed sTLD Agreement with ICM Registry, Adopted Resolutions from ICANN Board Meeting (30 Mar. 2007), *available at* <http://www.icann.org/minutes/resolutions-30mar07.htm> (“ICANN, 30 Mar. 2007 Board Resolution”), Cl. Exh. 121.

<sup>570</sup> Williams Witness Statement, para. 28.



specifically discussed and resolved by the Board before the application was approved. Since that approval, ICM's commitment to serving the sponsored community had, if anything, been strengthened through the repeated assurances given to ICANN. Moreover, the .XXX sTLD still had more than sufficient support from the sponsored community. The Board's reversal of its previous conclusion could not be justified by any change in the merits of the application.

261. Aside from the sponsorship question, the reasons listed for denying ICM's application were unrelated to the originally stated evaluation criteria, unreasonable, and outside the mission of ICANN.<sup>571</sup> Nowhere in the published sTLD RFP criteria, established at the outset of the application process after public comment and review by ICANN, was the possibility raised that an application could be denied based on vague references to "public policy" concerns, notions of "offensive content," or variations in national law that might apply to the content of websites registered in the domain. Nowhere does it contemplate that applicants must, in addition to meeting the RFP criteria, address every concern raised by the GAC at any time regarding the application, including concerns about matters far outside of ICANN's mission; to impose such a requirement would transform the GAC from a merely advisory role into a body with actual decision-making power. Finally, ICANN's concern that it would have to assume a role in overseeing Internet content is simply misguided. ICM would be responsible for ensuring that registrants complied with all policies developed by IFFOR. If, after the launch of the .XXX sTLD, ICM were to fail to apply the policies developed by IFFOR, ICANN would not have to engage in such monitoring itself, but could take action against ICM for breach of contract. The same is true of any sTLD.<sup>572</sup> The reasons given by the ICANN Board for denying the .XXX application and registry agreement do not correspond to the criteria established in the RFP;

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<sup>571</sup> See *id.* paras. 29-30.

<sup>572</sup> See Burr Witness Statement, para. 59.

instead of applying the criteria to the application, the Board simply created a new list of objections to the application, many of which were illogical or inaccurate, to justify the decision it wished to make for apparently political reasons.<sup>573</sup>

262. Board Members Vinton Cerf, Raimundo Beca, Alejandro Pisanty, Demi Getschko, Njeri Rionge, Vanda Scartezini, Roberto Gaetano, Steve Goldstein, and Rita Rodin voted to deny the application.<sup>574</sup> Of these, four had not been Board members when the application was originally approved on 1 June 2005 (Njeri Rionge, Roberto Gaetano, Steve Goldstein, and Rita Rodin), and one had been a member but not present for that vote (Njeri Rionge). As the process had dragged on so long, it became very difficult to educate the new Board members about what had taken place previously. Given the amount of correspondence between ICM and ICANN, it was almost impossible for the new Board members to absorb the relevant information before the vote.<sup>575</sup>

263. In fact, the comments by various Board members demonstrated their failure to fully grasp the nature of the process and the information previously presented. One Board member was concerned that, because the community was defined as responsible providers of online adult entertainment, webmasters who did not register in the .XXX sTLD would be seen as irresponsible.<sup>576</sup> This, however, fails to recognize that the voluntary .XXX sTLD was just one proposal for how a webmaster could identify itself as a “responsible” provider; there was no need to say that only those in the sTLD were responsible, and the sponsored community could

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<sup>573</sup> See Williams Witness Statement, paras. 28-30.

<sup>574</sup> ICANN Meetings in Lisbon, Portugal, Transcript: ICANN Board of Directors Meeting (30 Mar. 2007), available at <http://www.icann.org/en/meetings/lisbon/transcript-board-30mar07.htm>, Cl. Exh. 201.

<sup>575</sup> Attached as Appendix D is a chart showing how the composition of the Board changed over time, and the breakdown of how members voted.

<sup>576</sup> ICANN Meetings in Lisbon, Portugal, Transcript: ICANN Board of Directors Meeting (30 Mar. 2007), Cl. Exh. 201.

still be defined as responsible providers even if not all of the responsible providers registered for it.

264. Another Board member was concerned that there was no guarantee that the policies developed would be responsible,<sup>577</sup> notwithstanding the extensive list of commitments to certain policy courses contained in the newly revised contract, the commitment to abide by all representations in the Application and other submissions to ICANN; the presence of child advocates and other stakeholders in the IFFOR policy-development process; the change in control provisions that would prevent new management with a different vision from taking over without ICANN approval; and all of the other assurances provided by ICM over the course of the application process. ICM had done more than had been asked of any other applicant to demonstrate that it would meet its commitments.

265. Another Board member felt that ICM's proposal "focuses on content management which is not in ICANN's technical mandate"—without explaining how an sTLD, which by the very nature of its sponsorship has rules for the type of registrant and content to be included in the domain (though not related to any particular jurisdiction's laws), could avoid focusing on content management to at least some degree.

## **2. Other Board Members Accurately Note the Mistreatment of ICM and Criticize the Board's Mistake**

266. Several Board Members accurately stated the problems with denying the ICM application at this stage. Peter Dengate-Thrush (now ICANN Chair) expressed his opinion that:

On...the issue of the sponsored community, I concluded that there is[,] on the evidence[,] a sufficiently identifiable, distinct community which the TLD could serve. It's the adult content providers wanting to differentiate themselves by voluntary adoption of this labeling system.

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<sup>577</sup> *Id.*

It's not affected in my view by the fact that that's a self-selecting community....

And I think it's a particularly thin argument that's been advanced that all of the rules for the application and operation of this community are not yet finalized. . . .

...

I think the resolution that I'm voting against today is particularly weak on this issue: On why the board thinks this community is not sufficiently identified....[T]his silence is disrespectful to the applicant and does a disservice to the community.

The contract. I've also been very concerned, as other board members have, about the scale of the obligations accepted by the applicant. I think to a certain extent, some of those have been forced on them by the process. But for whatever reason, I'm, in the end, satisfied that the compliance rules raise no new issues in kind from previous contracts.

And I say that if ICANN is going to raise this kind of objection, then it better think seriously about getting out of the business of introducing new TLDs.

It's the same issue in relation to all of the others and we either come to terms with what it means to be granting TLD contracts and the consequences that flow or we stop.<sup>578</sup>

267. Susan Crawford, another Board Member, expressed similar concerns:

It seems to me that the only plausible basis on which the board can answer the question in the negative -- so [it] could say a group of people may not operate and use a lawful string of letters as a top-level domain -- is to say that the people affected by this decision have a broadly-shared agreement that the admission of this string to the root would amount to unjustifiable wrongdoing.

Otherwise, in the absence of technical considerations, the board has no basis for rejecting this application.

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. . . ICANN[.]...ha[s] very limited authority. And we can only speak on behalf of that community. I am personally not aware

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<sup>578</sup> *Id.*

that any global consensus against the creation of a triple X domain exists.

In the absence of such a prohibition, and given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root....

...

Notwithstanding my personal views on the vacuity of the sponsorship idea, the fact is that ICANN evaluated the strength of the sponsorship of triple X, the relationship between the applicant and the community behind the TLD, and, in my personal view, concluded that this criteria had been met as of June 2005. ICANN then went on to negotiate specific contractual terms with the applicant.

...

I do not find these recent comments sufficient to warrant revisiting the question of the sponsorship strength of this TLD, which I personally believe to be closed.

...

[T]his content-related censorship should not be ICANN's concern...

...

ICANN should not allow itself to be used as a private lever for government chokepoint content control by making up reasons to avoid the creation of such a TLD in the first place.

To the extent there are public policy concerns with this TLD, they can be dealt with through local laws...<sup>579</sup>

268. Board Members Joichi Ito, Rajasekhar Ramaraj, and David Wodelet agreed with Mr. Dengate-Thrush and Ms. Crawford. Dr. Twomey, the President and CEO, who had previously voted in June 2005 to authorize the .XXX sTLD registry agreement negotiations, and

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<sup>579</sup> *Id.*

who had personally participated in the negotiations leading up to the Board's 30 March 2007 vote, abstained without explanation.<sup>580</sup>

### **3. The Official Excuses for the Rejection of ICM's Application are Flawed**

269. The record of the Board meeting, and the comments of certain Board members, reflect a great deal of confusion and misconceptions about the .XXX application. This same confusion is evident in the list of official excuses in the March 2007 Board resolution rejecting .XXX. None of the reasons listed in the Board's resolution were valid justifications for rejecting ICM's application; all are arbitrary, discriminatory, in violation of the previously established process, and outside the scope of ICANN's mission and authority.

270. The first excuse given by the Board for rejecting ICM's application was "ICM's Application and the Revised Agreement fail to meet, among other things, the Sponsored Community criteria of the RFP specification."<sup>581</sup> This statement is simply untrue. As fully described above, ICM's application satisfied all of the RFP requirements, as those requirements had been applied to other applications.<sup>582</sup> To reject ICM's application was therefore both arbitrary and discriminatory. Moreover, for the Board to reverse its previous determination that the application had met the criteria was a violation of the processes ICANN had established to govern the RFP.<sup>583</sup> ICM was entitled to expect that ICANN would follow the rules established for the RFP, and was entitled to rely on the Board not to reverse its 1 June 2005 decision. As of the March 2007 vote, every other application that had been approved to enter into registry agreement negotiations, had entered into an approved registry agreement with ICANN (between

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<sup>580</sup> *Id.*

<sup>581</sup> ICANN, 30 Mar. 2007 Board Resolution, Cl. Exh. 121.

<sup>582</sup> *See* Williams Witness Statement, paras. 18, 29; Burr Witness Statement, paras. 27; Mueller Expert Report at 46-48.

<sup>583</sup> *See* Mueller Expert Report at 47-49.

the two rounds, 13 applications had been approved—seven from the 2000 “proof of concept” round and six from the 2004 round).<sup>584</sup> .XXX is the only application to be rejected after first having been approved.<sup>585</sup> ICANN established the processes for the RFP but then failed to follow them, rendering its post-June 2005 deliberations regarding .XXX entirely unpredictable and non-transparent to the ICANN community. The public perception after the 1 June 2005 vote was that ICM’s application had been approved and would proceed to an approved agreement, and yet months later ICANN reversed the decision and rejected the agreement.<sup>586</sup> Such confusion among the ICANN community is the antithesis of the openness and transparency that ICANN is obligated to achieve. Either ICANN is currently engaging in revisionist history when it claims that the 1 June 2005 vote was never meant to be an approval, or ICANN’s procedures are so opaque and ICANN itself is so careless about providing accurate information that observers were completely unable to determine the truth. Not only did ICANN never fully indicate to the public that sponsorship issues were still open for consideration, ICANN spent months negotiating with ICM without ever divulging any concerns about sponsorship.<sup>587</sup> If ICANN really did have residual concerns about the sponsorship criteria, ICANN utterly failed to act in good faith during its negotiations with ICM. Finally, to change the process for ICM alone and to ICM’s detriment was, again, both arbitrary and discriminatory.<sup>588</sup>

271. The second excuse provided by the Board for its rejection of ICM’s application was that, “[b]ased on the extensive public comment and from the GAC’s communiqués that this

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<sup>584</sup> See ICANN, Top Level Domains (gTLDs), Cl. Exh. 24. Appendix B to this Memorial, *infra*.

<sup>585</sup> See Mueller Expert Report at 47-48.

<sup>586</sup> See Williams Witness Statement, para. 24.

<sup>587</sup> See Burr Witness Statement, para. 63-64; Lawley Witness Statement, para. 58.

<sup>588</sup> Mueller Expert Report at 46-49.

agreement raises public policy issues.”<sup>589</sup> Once again, ICANN violated its own processes in invoking this excuse. The only criteria by which applications should have been judged were the criteria in the RFP, which were designed to address certain public policy concerns (*i.e.*, protecting the rights of others and providing dispute resolution mechanisms) but did not include any mention of unspecified “public policy” concerns about controversial content.<sup>590</sup> The Board’s decision to impose this new criteria on ICM partway through the process was an arbitrary violation of the process as established.<sup>591</sup> In developing the RFP, ICANN had more than sufficient opportunity to include criteria related to public policy, but chose not to.<sup>592</sup> Once ICM had prepared and submitted its application with the legitimate expectation that it would be evaluated according to the established criteria, it was unfair for ICANN to then create new criteria. Yet ICM continued to cooperate, and did more than any other applicant to address “public policy” concerns, yet only ICM was rejected. There was no justification for this discriminatory treatment of the ICM application. Additionally, by requiring .XXX to meet all of the requirements imposed by the GAC, the Board elevated the GAC to a decision-making role, with a veto over the application, in violation of the Bylaws which explicitly limit the role of the GAC.<sup>593</sup> ICANN is never bound to follow the advice of the GAC, but only to consider it, and even consideration is only required when the advice is timely. Yet in rejecting the .XXX application, the Board improperly acted as if it could not approve the application unless the GAC consented.<sup>594</sup> Not only did ICANN violate the rules established specifically for the RFP process,

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<sup>589</sup> ICANN, 30 Mar. 2007 Board Resolution, Cl. Exh. 121.

<sup>590</sup> sTLD RFP, Cl. Exh. 45.

<sup>591</sup> *See* Mueller Expert Report at 49-51.

<sup>592</sup> *See* Williams Witness Statement, paras. 5-7.

<sup>593</sup> *See* Bylaws, Article XI, § 2(1), Cl. Exh. 5; GAC Operating Principle 2, Cl. Exh. 42.

<sup>594</sup> *See* Mueller Expert Report at 50-51.



but also acted in violation of the Bylaws; when ICANN arbitrarily acts in such a manner, it becomes impossible for participants and other stakeholders to predict or understand ICANN's actions.

272. The third reason given for the rejection was mostly an elaboration on the second reason just discussed; namely, that the .XXX application did “not address the GAC’s concern for offensive content, and similarly avoids the GAC’s concern for the protection of vulnerable members of the community.”<sup>595</sup> The Board apparently felt that these concerns could not “be credibly resolved with the mechanisms proposed by the applicant.”<sup>596</sup> For the Board to have made any decision about an sTLD application based on the content of websites to be registered in the domain is well outside ICANN’s mission, and a completely unauthorized abuse of ICANN’s authority. ICANN’s role in approving new TLDs is to ensure interoperability, stability, and security, and to promote competition and innovation;<sup>597</sup> ICANN was never intended to have any role in monitoring or prohibiting content. Adult content is certainly present in the .COM domain, and there is no reason that it could not be present in other TLDs as well (for instance, adult content websites could certainly be made compatible with mobile technology and registered to .MOBI). Yet no other registry operator, either in the 2004 round or before, had ever been asked to assure ICANN that it would enforce adult content laws in every jurisdiction.<sup>598</sup> In fact, ICM’s application and proposed agreements contained more provisions designed to protect vulnerable members of the community, and yet was rejected while other applications were accepted. Not only was no other applicant required to commit to satisfying the

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<sup>595</sup> ICANN, 30 Mar. 2007 Board Resolution, Cl. Exh. 121.

<sup>596</sup> *Id.*

<sup>597</sup> Bylaws, Articles I & II, Cl. Exh. 5.

<sup>598</sup> Burr Witness Statement, paras. 53, 57..

GAC on issues of content, but to do so would have been impossible. ICANN was not acting in good faith by arbitrarily imposing an impossible task on ICM, and ICM alone, and then rejecting the application for failure to do the impossible.<sup>599</sup> Had the same requirements been made of all applicants, all would have failed.

273. The Board's fourth excuse was once again based on content: the Board apparently felt that the application raised "law enforcement compliance issues because of countries' varying laws relating to content and practices," which could "obligat[e] ICANN to acquire a responsibility related to content and conduct."<sup>600</sup> In fact, it is the reverse that was true: by rejecting the ICM application, ICANN was, in fact, taking responsibility for the expected content of .XXX—and prohibiting it. Again, ICM would not have any more responsibility for ensuring compliance in multiple jurisdictions than any other registry operator. The policies to be developed by IFFOR would not be related to any laws or regulations, so enforcing those policies would not require enforcing any laws or regulations.<sup>601</sup> In the event that any government felt content within the domain violated any laws, the government would be free to enforce those laws the same way they would for content an any TLD. ICANN's role in content management would be no different than it is for any TLD.<sup>602</sup> For ICANN to impose arbitrary requirements on ICM , not imposed on any other registry operator, is both arbitrary and discriminatory; that those requirements meant that ICANN was, in effect, prohibiting specific content meant that ICANN had far exceeded its legitimate role.

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<sup>599</sup> See Mueller Expert Report at 52-54.

<sup>600</sup> ICANN, 30 Mar. 2007 Board Resolution, Cl. Exh. 121.

<sup>601</sup> See Burr Witness Statement, paras. 54-55.

<sup>602</sup> See *id.*; Mueller Expert Report at 51.

274. Finally, ICANN's fifth excuse for rejecting ICM's application was essentially the same as the fourth excuse: the concern that "there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content."

275. Aside from the Board's erroneous and untimely reversal of the determination that ICM's application met the sponsorship criteria, none of the other excuses given for the Board's rejection of ICM's application were based on the criteria established in the RFP. ICANN's rejection of the application was instead justified by invoking unspecified and unsupported "public policy" concerns. Had ICANN wished to allow for decisions based on content or "public policy", those matters should have been addressed in the RFP,<sup>603</sup> as they apparently will be in the 2009 round. If the RFP had included such criteria, ICM would have been forewarned about what to expect during the process, and would perhaps have decided against applying.<sup>604</sup> As the RFP did not contain any such criteria, they should not have been imposed upon any applicant which, like ICM, prepared an application in reliance on the published criteria.

276. The flaws with the Board's 30 March 2007 resolution are not the only ways in which ICANN violated the Bylaws, Articles of Corporation, and other rules governing ICANN and this project, but they are indicative of the Board's conduct during the administration of the RFP. As a result of ICANN's failure to follow the established processes, failure to abide by the principles in the Bylaws, and discriminatory treatment of ICM compared with other applicants and registry operators, ICM has been materially and adversely affected. ICM has expended considerable time, effort, and money in fruitless consultation and negotiation with ICANN; ICM spent at approximately US\$ 5 million, and untold hours, in its attempts to obtain the sTLD and in

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<sup>603</sup> Though these considerations appear to be largely outside of ICANN's limited technical mission.

<sup>604</sup> Lawley Witness Statement, para. 69.

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

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

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

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

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<sup>605</sup> See *id.*

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

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

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

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<sup>606</sup> Bylaws, Art. IV, § 3, para 1, Cl. Exh. 5.

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

<sup>608</sup> ICANN Response at para. 3.

<sup>609</sup> *Id.* at paras. 3, 8, 88.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>613</sup> See, e.g., Weinberg at 226-27, Cl. Exh. 18.

<sup>614</sup> Goldsmith Expert Report at para. 7.

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

<sup>616</sup> *Id.* at 7.

<sup>617</sup> *Id.* at 30.



December 2002<sup>618</sup> in order to include a number of mechanisms for accountability, including an Ombudsman,<sup>619</sup> a Board Committee on Reconsideration,<sup>620</sup> and the current procedures for Independent Review.

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

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

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

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

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

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

<sup>622</sup> *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1. Arbitration is a Presumptively Binding Dispute Resolution Procedure

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

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

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

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

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

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

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

300. As another leading treatise puts it:

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

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

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

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

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

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

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

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

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

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

. . . . In the early years of this state, this court opined that, “*When parties agree to leave their dispute to an arbitrator, they are presumed to know that his award will be final and conclusive . . .*.” (Montifori v. Engels (1853) 3 Cal. 431, 434). One commentator explains, “*Even in the absence of an explicit agreement, conclusiveness is expected; the essence of the arbitration process is that an arbitral award shall put the dispute to rest.*” (Comment, Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality (1976) 23 UCLA L. Rev. 948-949 . . . .<sup>631</sup>

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

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

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

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

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

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

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

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

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

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



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

According to the court,

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

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

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

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

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

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

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

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

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

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

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<sup>639</sup> *Id.* at 761 (emphasis in original).

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

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

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

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

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

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

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

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<sup>641</sup> ICANN Response, paras. 3, 8, 88.

<sup>642</sup> BLACK'S LAW DICTIONARY at 1345.

<sup>643</sup> *Id.* at 785.

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

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

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

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

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

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

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

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

[...]

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

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

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

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

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

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

<sup>649</sup> ICANN’s Response at para. 85.

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

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

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

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<sup>650</sup> *Id.*

<sup>651</sup> *See* ICANN's Response at paras. 91-93.

<sup>652</sup> *Id.* at para. 87.

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

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

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

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

<sup>654</sup> ICANN Bylaws, Article IV, sec. 3, Cl. Exh. 4.

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

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

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

### **VIII. THE APPLICABLE LAW OF THIS PROCEEDING**

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

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

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<sup>656</sup> Articles of Incorporation, Art. 4, Cl. Exh. 4.

<sup>657</sup> Goldsmith Expert Report at para. 8.



first reference to international law was introduced in the “fifth iteration” of the draft Articles of Incorporation, dated 17 September 1998, which provided:

The Corporation shall operate for the benefit of the Internet Community as a whole, carrying out its activities *with due regard for applicable local and international 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.<sup>658</sup>

A Comment to the “fifth iteration” draft explained that Article IV was added to the Bylaws “in response to various suggestions to recognize the special nature of this organization and the general principles under which it will operate.”<sup>659</sup>

326. However, “this initial effort to acknowledge ICANN’s ‘special nature’” and ‘the general principles under which it will operate’ was widely viewed as inadequate.”<sup>660</sup> Throughout the entire process leading to the creation of ICANN (and even before the process commenced), foreign governments had voiced increasing concern “about U.S. unilateral control of such an important part of the global communication infrastructure.”<sup>661</sup> The international community continued “to express understandable concern about the United States’ control of a critical element of a global communication and commercial resource on which they foresaw their economies and societies becoming ever-more dependent.”<sup>662</sup>

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<sup>658</sup> See Internet Assigned Numbers Authority, Draft Articles of Incorporation – Fifth Iteration, available at <http://forum.icann.org/iana/comments/formation/articles5.html> (last visited 22 Jan. 2009) (emphasis added). Cl. Exh. 209.

<sup>659</sup> *Id.*

<sup>660</sup> Goldsmith Expert Report at para. 9.

<sup>661</sup> RULING THE ROOT at 2, Cl. Exh. 19.

<sup>662</sup> Froomkin at 23, Cl. Exh. 26; see also Angela Proffitt, *Drop the Government, Keep the Law: New International Body for Domain Name Assignment Can Learn from United States Trademark Experience*, 19 LOY. L.A. ENT. L.J. 601, 608 (1999) (noting the concerns of the European Union, the Australian government, and others that the United States had “too much control over the DNS”), Cl. Exh. 209.

327. On 21 November 1998, following further discussions with U.S. government officials, the ICANN Board of Directors held a special meeting “to approve revisions of the Corporation’s articles of incorporation and bylaws.”<sup>663</sup> The Board voted to revise Article 4 to what became its final version. Instead of merely referencing international law, as the previous version had, the final version of Article 4 amplified ICANN’s international law obligations by requiring ICANN to act “*in conformity with,*” first, “*relevant principles of international law,*” and second, “local law.”<sup>664</sup> The current text of Article 4 of the Article of Incorporation reads in full as follows:

[ICANN] shall operate for the benefit of the Internet Community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

328. As ICANN’s Interim Chairman of the Board explained to the Department of Commerce, these changes were made in order to “reflect emerging consensus about our governance and structure” – and, in particular, to “mak[e] it clear that ICANN *will comply with relevant and applicable international and local law.*”<sup>665</sup> In short, the provisions of Article IV

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<sup>663</sup> See ICANN, Minutes of Special Meeting (21 November 1998), available at <http://www.icann.org/en/minutes/minutes-21nove98.html>; see also Goldsmith Expert Report at para. 9.

<sup>664</sup> Goldsmith Expert Report at para. 9. ICANN’s obligations to act in conformity with international law are also reflected in the GAC’s Operating Principles, as amended in April 2005, Cl. Exh. 41. Significantly, Article 4(a) of the Whereas clauses of the Operating Principles states:

The Articles of Incorporation and Bylaws establish that ICANN shall carry out its activities in conformity with relevant principles of international law and applicable international conventions and local law.

<sup>665</sup> Letter from Ester Dyson, ICANN Interim Chairman of the Board, to J. Beckwith Burr, Acting Associate Administrator, National Telecommunications and Information Administration, United States Department of Commerce (23 Nov. 1998), available at <http://www.icann.org/en/announcements/letter-pr23nov98.htm>, Cl. Exh. 208; see also Goldsmith Expert Report at para. 9.

were added to the Articles of Incorporation as “a response to ICANN’s legitimacy deficit, and were designed to bring accountability and international order to ICANN’s decision.”<sup>666</sup>

329. Notwithstanding the foregoing, it is ICANN’s position in these proceedings that there are *no* applicable legal principles relevant to these proceedings, and that ICANN’s commitment to carry out its activities in conformity with international and local law creates no obligations or responsibilities for ICANN under those laws. Indeed, tellingly, in its IRP Response, ICANN relegates its “choice of law” discussion to nothing more than a perfunctory footnote:

ICM has also asserted that ICANN somehow violated “ICM’s rights under international law and applicable conventions, and local law.” *See* ICM’s Request, ¶ 1. Although ICM provides no support for this assertion, the Independent Review Panel need not consider this claim because the scope of the Independent Review Process, as set forth in ICANN’s Bylaws and as discussed below, is limited to ensuring that ICANN operated in a manner that is consistent with its Bylaws and Articles of Incorporation.<sup>667</sup>

330. Contrary to what ICANN suggests, the substantive and procedural requirements set forth in ICANN’s Articles and Bylaws – against which this Panel is to compare the ICANN actions at issue – cannot be decided without reference to relevant legal standards. The requirements in the Articles and Bylaws do not consist merely of open-ended or malleable words that can be given whatever meaning ICANN deems expedient in a given situation. They are terms that have legal context – and must be given legal consequence – according to the legal principles that ICANN voluntarily adopted to govern its activities.

331. Moreover, the requirement that ICANN carry out its activities in conformity with relevant principles of international law and local law by itself creates substantive and procedural

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<sup>666</sup> Goldsmith Expert Report at para. 26.

<sup>667</sup> ICANN Response at para. 6, n.1.

rules that ICANN must follow.<sup>668</sup> The suggestion that ICM's rights under international and local law are somehow not implicated in these proceedings is absurd (but once again evinces ICANN's desire to evade any responsibility or accountability for its conduct). As ICANN's President, Paul Twomey, testified before the U.S. Congress in July 2003, the Independent Review Process was put in place so that disputes would "be referred to an independent review panel operated by an international arbitration provider with an appreciation for and understanding of applicable international laws, as well as California not-for-profit corporate law."<sup>669</sup>

332. As set forth in the Expert Report of Professor Goldsmith, "it follows straightforwardly" from the provisions of ICANN's Articles and Bylaws that this Panel "must determine whether ICANN's decision to deny ICM a .XXX sTLD, as well as the process leading to that decision, were consistent with 'relevant principles of international law and applicable international conventions and local law.'"<sup>670</sup> As further explained by Professor Goldsmith,

The IRP can reach this conclusion about governing law, and in particular about international law's relevance, without a choice-of-law analysis. But if the IRP performs a choice-of-law analysis, it will reach the same conclusion.<sup>671</sup>

333. First, in the context of this Independent Review Process, Article IV acts as a choice-of-law provision. Particularly in the context of international arbitration, the parties are free to choose the substantive and procedural laws that will govern their dispute.<sup>672</sup> Article 28 of

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<sup>668</sup> See Goldsmith Expert Report at para. 15.

<sup>669</sup> *Internet Operations Oversight, Subcommittee on Communications of the Senate Committee of Commerce*, 108<sup>th</sup> Cong. 7, Cl. Exh. 10.

<sup>670</sup> Goldsmith Expert Report at para. 15.

<sup>671</sup> *Id.* at 16.

<sup>672</sup> See REDFERN & HUNTER at 90, 111-13; see K. Lipstein, International Arbitration Between Individuals and Governments and the Conflict of laws, in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER 177, 179 (1988). ("Free

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the ICDR International Arbitration Rules specifically provides that “[t]he Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute.” The parties to this dispute have designated the laws contained in Article IV as applicable to this dispute.

334. Just as a corporate charter or corporate bylaws can contain an offer to arbitrate, so too can they contain a governing law clause.<sup>673</sup> The analysis is straightforward: ICANN’s Bylaws offer to arbitrate the issue of whether the ICANN Board acted consistently with ICANN’s Articles and Bylaws; ICANN’s Articles state that ICANN will carry out its activities in conformity with international and local law; therefore, ICANN has offered to arbitrate the issue of whether the Board carried out its activities in conformity with international and local law. ICM has accepted that offer in submitting its Request for Independent Review Process. Thus, “ICM and ICANN have agreed to arbitrate whether ICANN’s denial of ICM’s application for a .XXX sTLD (as well as the process leading to that denial) complied with ‘relevant principles of international law and applicable international conventions and local law.’”<sup>674</sup>

335. There is nothing unusual about the concurrent choice-of-law provision in ICANN’s Articles. Nor is there anything unusual about a concurrent choice-of-law provision in

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(continued ...)

choice of law as a rule of international conflict of laws, part of public international law, has, of course, long been admitted by international tribunals set up between States, and by international instruments”, citing the European Convention on International Commercial Arbitration, April 1961, Art. VII(1), 484 U.N.T.S. 364 and Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159, Art. 42(1); *see also* Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the Uncitral Model Law on International Commercial Arbitration*, in *INTERNATIONAL COMMERCIAL ARBITRATION, A TRANSNATIONAL PERSPECTIVE* 621 (Tibor Várady, John J. Barceló III, Arthur T. von Mehren eds. 2003) (“The Model Law attempts to provide rules that are in line with generally accepted modern theory and practice. There was little disagreement on the main points of policy: first, that the parties should have complete autonomy to choose any rules to govern the substance of the dispute . . .”).

<sup>673</sup> Goldsmith Expert Report at para. 18; *see also* discussion *supra* at para. 296 (discussing “standing offers” to arbitrate contained in bylaws, articles of incorporation, and other legal instruments).

<sup>674</sup> Goldsmith Expert Report at para. 19.

the context of an international arbitration, which “usually involves more than one system of law or of legal rules.”<sup>675</sup> Parties may choose “international law; or a blend of national law and international law or even an assemblage of rules known as international trade law, transnational law, the ‘modern law merchant’ (the so-called *lex mercatoria*) or by some other convenient title.”<sup>676</sup> The use of a concurrent choice-of-law clause – as in ICANN’s Articles providing for the application of relevant principles of both international and domestic law – is becoming increasingly frequent in international transactions, especially in transactions involving a state actor and/or a public resource.<sup>677</sup> As explained by Redfern and Hunter:

Increasingly, “international law” may be specified as the substantive law of a contract, particularly where that contract is with a state or state agency. The reference may be to “international law” on its own; or it may be . . . used in conjunction with a national system of law.<sup>678</sup>

336. As stated by Professor Goldsmith, “the same conclusion follows even if the parties have not effectively designated the governing laws or rules of law” for these proceedings.<sup>679</sup> “In such a case, Article 28(1) of the ICDR Rules of International Arbitration requires the Panel to apply the ‘appropriate law.’ The ‘appropriate’ starting place for determining whether ICANN has acted consistent with its Articles and Bylaws (including the international law obligations it assumed in the Articles) is almost certainly California law.”<sup>680</sup>

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<sup>675</sup> REDFERN & HUNTER at 91.

<sup>676</sup> *Id.* at 2.

<sup>677</sup> *See id.* at 121-27.

<sup>678</sup> *Id.* at 119.

<sup>679</sup> Goldsmith Expert Report at para. 20.

<sup>680</sup> *Id.* A corporation’s article of incorporation and bylaws are typically interpreted, in the first instance, under the laws of the place of incorporation. *See Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947). Although this rule of construction be limited to the “internal affairs” of a corporation (*i.e.*, affairs limited to the corporation, its officers, directors, and/or shareholders), the construction applied here to ICANN’s foundational documents would almost certainly be the same in any jurisdiction.

And there is nothing under California law that prohibits ICANN from choosing international law – or for that matter, any foreign law – from governing its conduct. Indeed, California’s Nonprofit Corporation Law allows a nonprofit corporation to include in its articles of incorporation “any . . . provision, not in conflict with law, for the management of the activities and for the conduct of the affairs of the corporation.”<sup>681</sup> It also provides that the articles “may set forth a further statement limiting the purposes or powers of the corporation.”<sup>682</sup> And it provides that a nonprofit corporation may “[q]ualify to conduct its activities in any other state, territory, dependency or foreign country.”<sup>683</sup>

337. That ICANN determined in its Articles of Incorporation to conduct its activities in conformity with relevant principles of international law is one the defining characteristics of ICANN as a corporate entity. A corporation is “precisely what the incorporating act has made it . . . . [A corporation] derive[s] all its powers from that act, and [is] capable of exerting its faculties only in the manner in which that act authorizes.”<sup>684</sup> The same principle applies on the international plane: “an international organization is an artificial and deliberate creation. It owes not only its existence but also its ability to act to the instrument which founds it.”<sup>685</sup> Again, there is nothing that prevents ICANN from including in its Articles of Incorporation the requirement that it carry out its activities in conformity with relevant principles of international and local law. To the contrary, with very few limitations, parties are free to choose the law that will govern

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<sup>681</sup> California Corporations Code § 5132.

<sup>682</sup> *Id.* § 5131

<sup>683</sup> *Id.* § 5140(c).

<sup>684</sup> *Supreme Council of the Royal Arcanum v. Samuel Green*, 237 U.S. 531, 543 (1915) (quoting *Head & Amory v. Providence Ins. Co.*, 2 Cranch 127, 167 (1804) (Marshall, C.J.)).

<sup>685</sup> Elihu Lauterpacht, *The Development of the Law of International Organizations by the Decisions of International Tribunals*, 1976-IV Recueil des Cours 152 at 414.

their business or other activities – whether in contracts or in corporate articles and bylaws. That is true both as a matter of international and local law.<sup>686</sup>

338. ICANN’s determination to conduct its activities in conformity with international and local law makes sense given its unique status as an international regulator of a global public resource, while constituted as a California nonprofit corporation. The international scope of its responsibilities is particularly evident when considering the context of this case. The parties submitting applications to serve as registry operators for sTLDs in the 2003 round included companies from England, Finland, Hong Kong, Spain, and Switzerland.<sup>687</sup> Although ICM is incorporated in Florida, it is majority owned and controlled by a national of the United Kingdom.<sup>688</sup>

339. There should be no doubt in a case such as this that relevant principles of international law should take precedence over relevant principles of local law – *assuming* any conflict between the two. (As discussed below, there is not.) To begin with, “there is a general

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<sup>686</sup> REDFERN & HUNTER at 114. Courts in the United States have also recognized that bylaws and articles of incorporation may contain enforceable choice-of-law provisions. *See, e.g., Tkachyov v. Levin*, 1999 WL 782070, \* 8 (N.D. Ill. Sept. 27, 1999) (articles of incorporation contained a choice of law clause providing for Latvian law); *CPS International, Inc. v. Dresser Industries, Inc.*, 911 S.W.2d 18, 24-25 (Tex. App. 1995) (bylaws contained a choice of law clause providing for Saudi Arabian law). As observed by ICJ Judge Roslyn Higgins, “[a]rbitral clauses which refer to international law as the applicable law effectively remove the alleged inability of individuals to be the bearer of rights under international law. This is being done by mutual consent, of course—but the point is that there is no inherent reason why the individual should not be able directly to invoke international law and to be the beneficiary of international law.” ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 54 (1994).

<sup>687</sup> *See* .ASIA Application (Hong Kong), Cl. Exh. 90; .CAT Application (Spain), Cl. Exh. 91; .MAIL Application (United Kingdom), Cl. Exh. 93; .TEL(telnic) Application (United Kingdom), Cl. Exh. 98; .MOBI Application (Finland and United Kingdom), Cl. Exh. 95; .POST Application (Switzerland), Cl. Exh. 96.

<sup>688</sup> Mr. Stuart Lawley, the Chairman and President of ICM, currently owns about 65% of the company. He is a British national. Lawley Witness Statement, para. 1. The other shareholders are citizens or entities of the United Kingdom, Canada, and the United States.



duty to bring internal law into conformity with international law.”<sup>689</sup> Stated differently, an entity may not defend a breach of its international law obligations by claiming to be in compliance with local law. Second, as discussed above, ICANN specifically reversed the order of the sources of law applicable to its activities in the final version of its Articles of Incorporation, to place relevant principles of international law before international conventions or local law. ICANN did so in recognition of the facts that its regulatory responsibilities are, first and foremost, international. Third, ICANN’s activities at issue in this case have little if any connection to California. This is a case between a private Florida entity on the one hand, and, on the other, an entity that by virtue of a contractual relationship with the United States exercises plenary authority over a global resource. The dispute involves a purely international activity.

340. Particularly where, as here, ICANN’s Articles of Incorporation provide that ICANN will conduct its activities primarily in conformity with international law (which provision was made in recognition of the international scope of ICANN’s activities), it would be nonsensical under any rational choice-of-law analysis to assess whether ICANN’s consideration and rejection of ICM’s application were consistent with the Articles and Bylaws solely or even primarily under California law. As summarized by Professor Goldsmith,

ICANN voluntarily subjected itself to “general principles” [of international law] in its Articles of Incorporation, something that both California law permits and that is typical in international arbitrations, especially when the distribution of public goods is at stake. The “international” nature of this arbitration – which is evidenced by the global impact of ICANN’s decisions, by ICANN’s self-description as a “special . . . organization” that should be governed by international law, and by the fact that ICANN itself chose an international arbitral institution for this Independent Review – confirms the appropriateness of applying general principles. Moreover, ICANN is only a nominally private corporation. It exercises extraordinary authority, delegated from

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<sup>689</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 35 (7th ed. 2008) (citations omitted).

the U.S. government, over one of the globe's most important resources. Though for reasons just explained, its status as a de facto public entity is not necessary for the application of general principles here, its control over the Internet naming and numbering system does make sense of its embrace of the "general principles" standard.<sup>690</sup>

341. In the final analysis – as explained in greater detail below – there is no conflict between the relevant principles of international law and of local law as applied to this dispute. It should not be surprising, given that this case involves the international regulation of a global public resource, that there is a far greater body of relevant precedent under international law than under local law. But California precedents concerning the obligations of nonprofit companies, such as ICANN, also impose a duty to act according to the principles set forth in their constitutive documents, to act fairly and in good faith, and to avoid arbitrary and capricious action. Although fewer in number and generally more limited in the applicability to ICANN's activities in this case, the California precedents are consistent with the relevant international law precedents.

342. Accordingly, in the following sections, we demonstrate that ICANN's actions in reviewing and denying ICM's application were not consistent with ICANN's Articles and Bylaws, and why ICANN's actions were not in conformity with, first, relevant principles of international law, and second, relevant principles of local law.

**IX. ICANN'S ACTIONS WERE INCONSISTENT WITH ITS ARTICLES OF INCORPORATION AND BYLAWS UNDER RELEVANT PRINCIPLES OF INTERNATIONAL LAW.**

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343. ICANN's Articles of Incorporation and Bylaws set forth substantive and procedural rules to ensure that ICANN exercises the extraordinary powers that have been given

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<sup>690</sup> Goldsmith Expert Report at 26.

to it in a manner that is, *inter alia*, transparent, fair, and non-discriminatory.<sup>691</sup> These rules are fitting for an organization that effectively functions as a global regulator, and that, among other things, “oversee[s] operation of the authoritative Internet DNS root server system” and “operate[s] for the benefit of the Internet community as a whole.”<sup>692</sup> As explained by Professor Goldsmith in his expert report in this arbitration, given ICANN’s “plenary governance authority over one of the globe’s most important resources,” it was both necessary and appropriate that ICANN’s constitutive documents include “complementary steps to bring basic due process mechanisms, including checks and balances, to its decision-making.”<sup>693</sup>

344. The requirement that ICANN carry out its activities primarily in conformity with principles of international law provides the relevant standards against which terms in the Articles and Bylaws—and ICANN’s compliance with them—must be understood, evaluated and applied. General principles of law—and in particular the obligation of good faith—thus serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted. The requirement that ICANN comply with relevant principles of international law not only guides the interpretation of these terms; it also provides additional (sometime overlapping) substantive and procedural safeguards appropriate for an entity that has oversight authority of a key global resource.<sup>694</sup>

345. Before turning to the provisions in the Articles of Incorporation and Bylaws that are at issue, we discuss below the sources of the “relevant principles of international law” that should guide the Panel’s analysis. As explained by Professor Goldsmith, the place to begin to

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<sup>691</sup> Articles of Incorporation, Art. IV, Cl. Exh. 4; Bylaws Arts. II, III, IV, Cl. Exh. 5.

<sup>692</sup> Articles of Incorporation, Art. III (iv) and Art. IV, Cl. Exh. 4.

<sup>693</sup> Goldsmith Expert Report, para. 7.

<sup>694</sup> *See* Goldsmith Expert Report at paras. 7, 8.

understand the meaning of “principles of international law” is Article 38 of the Statute of the International Court of Justice (“ICJ”), which has become the canonical reference for the sources of international law.<sup>695</sup> The three principal sources of international law listed in Article 38 that are relevant to this dispute are:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations; . . .<sup>696</sup>

346. The phrase “principles of international law” is generally interpreted to include all three of these sources.<sup>697</sup> The first source, “international conventions,” is already specified in Article 4 of the ICANN Articles of Incorporation. Therefore, the reference to “principles of international law” in Article 4 refers to the last two sources: customary international law and general principles of law.<sup>698</sup> As stated by Professor Goldsmith, this interpretation is supported not only by the language of Article 4, but also by its drafting history:

As noted above, a draft of the Articles assumed an obligation to give “due regard” to “applicable . . . international law,” a reference that would naturally have meant all three sources in Article 38 of the ICJ Statute. The final draft changed the standard of compliance from “due regard” to “conformity,” and changed

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<sup>695</sup> Goldsmith Expert Report at para. 23. “Article 38 is generally regarded as a complete statement of the sources of international law.” BROWNLIE at 5. Article 59 provides that a decision of the ICJ “has no binding force except between the parties and in respect of that particular case.” *Id.* Thus, the ICJ’s decisions are persuasive rather than binding authority.

<sup>696</sup> Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat., 33 U.N.T.S. 993.

<sup>697</sup> Goldsmith Expert Report at para. 23; *see also* BROWNLIE at 19 (“[T]he rubric [general principles of international law] may refer to rules of customary law, to general principles of law as in Article 38(1)(c), or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies.”).

<sup>698</sup> Goldsmith Expert Report at para. 23.

“applicable . . . international law” to “relevant principles of international law and applicable international conventions.” This change ratcheted up ICANN’s standard of compliance, for “conformity” is more demanding than “due regard.” And it clarified that its commitment to international law extended to international law in all its forms.<sup>699</sup>

Moreover, references to “principles of international law” and the related phrase “rules of international law” are commonly interpreted to include “general principles of law” as used in Article 38 of the ICJ Statute.<sup>700</sup>

347. The focal point of the analysis herein is on “general principles of law,” given their basic nature and universal application. Customary international law, for present purposes, it is submitted, requires neither an analysis, nor results in an outcome that is any different.

348. General principles of law embody those principles that are so fundamental that they are applied in common as well as civil law systems, and in all countries adhering to either of those systems or to a blend of those systems. As described by the American lawyer and statesman Elihu Root (one of the drafters of the original ICJ statute) nearly a century ago:

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.<sup>701</sup>

General principles of law—often referred to as “universal” principles of law—have three common characteristics:

- (1) they state unwritten norms of wide ranging character;
- (2) they are recognized in and applied in the domestic laws of states; and
- (3) they are transposable at the international level.<sup>702</sup>

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<sup>699</sup> *Id.* at para. 24.

<sup>700</sup> *Id.* at para. 25.

<sup>701</sup> Elihu Root, *The Basic Protection to Citizens Residing Abroad*, 4 AM. J. INT’L L. 517, 521 (1910).

349. The guiding substantive and procedural rules in ICANN’s Articles and Bylaws—including the rules involving transparency, fairness, and non-discrimination—are so fundamental that they appear in some form in virtually every legal system in the world, and, as discussed below, are given definition by numerous sources of international law. As explained by Professor Goldsmith,<sup>703</sup> they arise from the general principle of good faith, which is considered to be “the foundation of all law and all conventions.”<sup>704</sup> As stated by the ICJ, the principle of good faith is “[o]ne of the basic principles governing the creation and performance of legal obligations.”<sup>705</sup> The principle of good faith is found in:

- treaty law;
- the U.N. Charter;
- the law of the World Trade Organization;
- international commercial law; and
- international investment law.<sup>706</sup>

350. As discussed above, ICANN’s legal status remains the subject of considerable debate, given that it is nominally a California not-for-profit corporation, yet acts as the

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<sup>702</sup> See Andreas Zimmerman, *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY*, 765 (Christian Tomuschat, Karen Oellers-Frahm, eds., 2006).

<sup>703</sup> Goldsmith Expert Report at para. 33.

<sup>704</sup> BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 105 (1953) (hereafter, “Cheng”) (quoting *Megalidis Case*, 8 T.A.M. 386, 395 (1928)). Similarly, Schwartzberger and Brown list good faith as one of the seven fundamental principles of international law. GEORG SCHWARTZENBERGER AND EDWARD BROWN, *A MANUAL OF INTERNATIONAL LAW* 7 (1976).

<sup>705</sup> *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 268 (20 Dec.) (merits); *see also* *Land and Maritime Boundary (Cameroon v. Nig.)*, 1998 I.C.J. 275, 296 (11 June) (good faith is a “well established principle of international law”).

<sup>706</sup> See Goldsmith Expert Report at para. 30 (and the authorities cited therein).

international regulator of one of the world's most important resources.<sup>707</sup> The Panel, however, does not need to resolve the issue of whether ICANN should be treated as a state actor (and therefore governed by principles of public international law) or a private corporation (and therefore governed by principles of international commercial law). That is because (1) ICANN has already determined to conduct its activities in conformity with principles of international law (which includes public international law), and (2) the principles that govern ICANN's conduct are so fundamental that they pervade virtually all sources of international law.<sup>708</sup>

351. In its consideration and ultimate rejection of ICM's proposal, ICANN violated a number of its Articles and Bylaws, as interpreted under relevant principles of international law. Specifically, ICANN violated its Articles and/or Bylaws by (a) failing to act openly and transparently and provide procedural fairness; (b) failing to abide by the principle of non-discrimination; (c) acting in excess of its purpose and mission; and (d) violating the provisions of the Bylaws governing the GAC.

352. In addition, ICANN violated principles of international law that exist independently of the Articles and Bylaws and that impose affirmative duties on ICANN in the context of its activities conducted under its Articles and Bylaws. Specifically, ICANN breached the principles of good faith, abuse of rights, legitimate expectations and estoppel, as discussed further below.

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<sup>707</sup> *Id.* at para. 7.

<sup>708</sup> For discussion of the "cross-fertilization" that takes place between public and private international law, *see, e.g.*, Charles N. Brower and Jeremy K. Sharpe, *The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective*, 45 VA. J. INT'L L. 199 (2004); Karl-Heinz Böckstiegel, *The Application of the UNIDROIT Principles to Contracts Involving States or Intergovernmental Organizations*, in INTERNATIONAL CHAMBER OF COMMERCE, UNIDROIT PRINCIPLES IF INTERNATIONAL COMMERCIAL CONTRACTS: REFLECTIONS ON THEIR USE IN INTERNATIONAL ARBITRATION 51 (2002).

**A. ICANN Violated its Articles of Incorporation and Bylaws By Failing To Act Openly and Transparently and By Failing to Provide Procedural Fairness**

353. Article 4 of the Articles of Incorporation provides in relevant part that ICANN

*shall* operate for the benefit of the Internet community as a whole, carrying out its activities . . . 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.<sup>709</sup>

354. Similarly, ICANN's Bylaws state that:

ICANN and its constituent bodies ***shall operate to the maximum extent feasible*** in an ***open and transparent manner*** and consistent with ***procedures designed to ensure fairness***.<sup>710</sup>

355. These provisions are supplemented by the “Core Values” set forth in ICANN's Bylaws, which are to “guide the decisions and actions of ICANN” in the performance of its mission.<sup>711</sup> The Core Values include:

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***.

356. The principle of transparency arises from, and is generally seen as an element of, the principle of good faith. Indeed, transparency has itself obtained “the position of a fundamental principle in international economic relations,” especially in the regulatory and/or standard-setting space that ICANN occupies.<sup>712</sup> The core elements of transparency include

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<sup>709</sup> Articles of Incorporation, Art. IV (emphasis added), Cl. Exh. 4.

<sup>710</sup> Bylaws at Article III, § 1, Cl. Exh. 5.

<sup>711</sup> *Id.* at Art. I, § 2, Cl. Exh. 5.

<sup>712</sup> A. Kotera, *Regulatory Transparency*, in P. MUCHLINSKI, F. ORTINO, C. SCHREUER, OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 619 (2008); *see generally* Stacy Baird, *The Government at the Standards Bazaar*, 18 STAN. L. & POLICY REV. 35, 96-97 (2007). Whether

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clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken.<sup>713</sup> The coupling of the terms “open” and “transparent,” and a consideration of the context within which the term has been included, confirms that ICANN intended the term to also denote the most developed dimension of transparency, namely openness in decision-making. In light of ICANN’s objective to establish its legitimacy and accountability by emphasizing the predictability of its actions and behavior, and its adherence to a consistent interpretation and application of its powers, the inclusion of a robust transparency provision was deemed of fundamental importance.<sup>714</sup>

357. ICANN failed to act transparently and to provide procedural fairness by failing to adhere to the substantive criteria set forth in the RFP for the 2004 round and by failing to follow the established procedures for the 2004 round.

#### **1. Meaning of “Open and Transparent”**

358. In its Response, ICANN suggests that even if it constantly changes the standards and processes under which an sTLD is awarded—including up until (and even after) the time it is awarded—ICANN still satisfies the requirement of transparency simply by “informing” applicants of the multiple changes as those changes occur (or at some point thereafter).<sup>715</sup> ICANN fundamentally misconstrues the transparency requirement. The obligation of

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“transparency” is or should be recognized as a general principle in itself has been debated, but it certainly has a strong relationship to general principles of law such as due process. *See, e.g., Todd Weiler, NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLUM. J. TRANSNAT’L LAW 35, 77-79.

<sup>713</sup> Sacha Prechal and Madeleine de Leeuw, *Dimensions of Transparency: The Building Blocks for a New Legal Principle?*, REVIEW OF EUROPEAN ADMINISTRATIVE LAW 51 (2007).

<sup>714</sup> *See* Goldsmith Expert Report at para. 12.

<sup>715</sup> ICANN Response at 39 (asserting that “ICM was always kept informed of the status of negotiations/evaluations and was given numerous opportunities to respond to the concerns of the Board and the GAC”). ICM disputes that assertion, but it does not satisfy the transparency obligation in any event.

transparency in this context required ICANN to define and publicize all of the relevant criteria in its RFP pursuant to which an sTLD application would be evaluated and processed—and then to *adhere* to those criteria throughout the process.<sup>716</sup>

359. The obligation of transparency has been addressed on numerous occasions in the context of investor-state arbitration. For example, in *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, the tribunal construed the “fair and equitable” treatment standard contained in a bilateral investment treaty “in light of the good faith principle established by international law.”<sup>717</sup> Under that principle, the investor was entitled to expect the respondent “to act in a consistent manner, free from ambiguity and *totally transparently*,” so that the investor would know “beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”<sup>718</sup> The tribunal concluded that when the rules governing the investment were changed in response to political pressures, the obligation of transparency (as well as associated obligations) had been violated.<sup>719</sup>

360. Similarly, in *Saluka Investments BV (the Netherlands) v. Czech Republic*, the tribunal recognized that the foreign investor was owed an obligation of transparency.<sup>720</sup> It stated:

A foreign investor . . . is entitled to expect that the [host state] will not act in a way that is manifestly inconsistent, *non-transparent*, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions). In

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<sup>716</sup> See Debra P. Steger, *Introduction to the Mini-Symposium on Transparency in the WTO*, 11 J. INT’L ECON. L. 705, 713 (2008) (“regulatory transparency . . . relates to the capacity of regulated entities to identify and understand their obligations under the rule of law . . .”).

<sup>717</sup> *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)00/2, Award of May 29, 2003, at para. 154 (emphasis added).

<sup>718</sup> *Id.*

<sup>719</sup> *Id.* at para. 164.

<sup>720</sup> *Saluka Investments BV v. The Czech Republic*, UNCITRAL (Partial Award) (March 17, 2006).

applying this standard, the Tribunal will have due regard to all relevant circumstances.<sup>721</sup>

In *Saluka*, the tribunal found that the respondent violated the obligation of transparency, and acted discriminatorily, when, in the context of a failing bank belonging to the foreign investor, the respondent conducted negotiations with other failing banks and excluded the foreign investor from those negotiations.<sup>722</sup>

361. In *LG&E v. Argentina*, the tribunal also considered transparency as part of the fair and equitable treatment standard. Considering the sources of international law, the tribunal stated that the “fair and equitable standard consists of the host State’s *consistent and transparent* behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.”<sup>723</sup>

362. In *Metalclad Corp. v. United Mexican States*, the tribunal also addressed the principle of “transparency,” as included in Chapter One as one of the specific objectives of the North American Free Trade Agreement (“NAFTA”).<sup>724</sup> The tribunal held that the absence of a clear rule concerning whether a municipal permit for the construction of a hazardous waste landfill was required in Mexico amounted to a breach of the fair and equitable treatment standard under Article 1105. According to the tribunal, transparency includes the requirement that

all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of

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<sup>721</sup> *Id.* at para. 309.

<sup>722</sup> *Id.* at para. 407.

<sup>723</sup> *LG&E Energy Corporation, LG&E Capital Corporation, LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 (Decision on Liability of 3 October 2006), para. 131.

<sup>724</sup> North American Free Trade Agreement, Can.-Mex.-U.S., article 102, para. 1, Dec. 8 and 17, 1992 (“The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored nation treatment and transparency . . .”).

being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.<sup>725</sup>

The tribunal held that “Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment.”<sup>726</sup>

363. The obligation of “transparency” also exists in virtually every well-developed procurement system.<sup>727</sup> Indeed, as discussed below, it effectively has the same meaning as in the investor-state cases just discussed.

364. The World Trade Organization (“WTO”) Agreement on Government Procurement (“GPA”) is a plurilateral treaty covering government procurement by its party-

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<sup>725</sup> *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, para. 76 (Award) (August 30, 2000).

<sup>726</sup> The unanimous tribunal in *Metalclad* was chaired by Sir Elihu Lauterpacht, one of the foremost international lawyers and scholars in the world. The tribunal also included Benjamin Civiletti, a former Attorney General of the United States, and José Luis Siqueiros, a highly respected international lawyer and law professor in Mexico. Thus, although the Supreme Court of British Columbia later overturned this portion of the *Metalclad* decision, the Canadian court’s decision on this point has been widely criticized as having virtually no value in the international context. *See, e.g.*, Carl-Sebastian Zoellner, *Note: Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 MICH. J. INT’L L. 579, 617 (Winter 2006) (“In contrast to the tribunal’s interpretation, the judgment by the British Columbia Supreme Court is flawed for several reasons and consequently should have minimal impact. Moreover, because national courts cannot bind international tribunals and their conclusions on matters of law are therefore of limited value, the reasoning of the appeal should not function as a powerful precedent outside of British Columbia.”); Courtney N. Seymour, *The NAFTA Metalclad Appeal - Subsequent Impact or Inconsequential Error? . . . Only Time Will Tell*, 34 U. MIAMI INTER-AM. L. REV. 189, 199-200 (Winter 2002) (“It is important to note that the individuals chosen to lead NAFTA arbitration panels are world-renowned and respected international legal scholars, and experts in the field of international law. In contrast, Justice Tysoe’s expertise is most likely vested in judicial analysis of matters under Canadian law, particularly that of British Columbia.”); Todd Weiler, *Canadian Court’s Review of Decision by NAFTA Panel Against Mexico Raises More Questions than Answers: An Interview with NAFTA Legal Expert Todd Weiler*, 9 (5) LATIN AM. L. & BUS. REP. 18, 19 (May 31, 2001) (also noting that “[i]nternational lawyers argue ‘international law’ before expert international arbitrators. The report of what a local judge thinks ‘international law’ might mean is simply not very relevant to most international lawyers or arbitrators.”). In any case, the *Metalclad* decision reflects the views of a distinguished international arbitral panel as to its understanding of transparency.

<sup>727</sup> The norms adopted by the world’s public procurement markets are informative, especially as those procurement markets become increasingly integrated and a body of international procurement law emerges, with consistent principles and rules. Christopher R. Yukins and Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 GEO. J. INT’ L. 529 (2007).

members.<sup>728</sup> An overarching principle of the treaty is transparency,<sup>729</sup> and to that end, the treaty requires that parties ensure that contract awards are “made in accordance with the criteria and essential requirements specified in the tender documentation.”<sup>730</sup> Article XII(2) provides:

[t]ender documentation provided to suppliers *shall* contain *all information necessary* to permit them to submit responsive tenders, including . . . (h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders. . . .<sup>731</sup>

Thus, the requirement of transparency as set forth in the GPA cannot be satisfied by a post-hoc explanation of the actions taken by a party awarding a contract. Rather, transparency requires that the agency or organization articulate the ground rules for a potential award *before* submissions are received, and then follow those same ground rules (*e.g.*, evaluation criteria) when it makes a decision.

365. This same notion of transparency is found in the model procurement law of the United Nations Commission on International Trade Law (“UNCITRAL”).<sup>732</sup> For example, Article 28 of the model procurement law provides that “[t]he requests for proposals shall include, at a minimum, the following information: . . . (m) the criteria to be used in determining the successful proposal . . . and the relative weight of such criteria.” The World Bank and the

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<sup>728</sup> WORLD TRADE ORGANIZATION, AGREEMENT ON GOVERNMENT PROCUREMENT (in force 1 January 1996), available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm).

<sup>729</sup> *Id.* at Article XVII.

<sup>730</sup> *Id.* at XIII.

<sup>731</sup> *Id.* at XII (emphasis added).

<sup>732</sup> See UNCITRAL, UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES WITH GUIDE TO ENACTMENT (1994), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/1994\\_Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994_Model.html). The preamble to the model law identifies “[a]chieving transparency in the procedures relating to procurement” as a goal.

Organization for Economic Cooperation and Development (“OECD”) set forth the same requirements of transparency in their procurement guidelines.<sup>733</sup>

366. The transparency principle has been applied in courts in both Europe and the United States. For example, in its *Emm G. Lianakis AE v. Alexandroupolis* decision, the European Court of Justice embraced the transparency obligation, and the corresponding requirement that contracting authorities make known to potential bidders the existence, scope and relative importance of all factors which would be taken into consideration.<sup>734</sup> The ECJ held that *all* evaluation factors must be disclosed in advance. It elaborated that only in limited circumstances would subsequent refinement of those factors be allowed—specifically, where the refinement (a) did not alter the award criteria as set out in the contract documents; (b) did not contain elements which, had they been known when the proposals were being prepared, may have affected their preparation; and (c) were not adopted on the basis of matters likely to give rise to discrimination against one of the bidders.<sup>735</sup>

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<sup>733</sup> See WORLD BANK, PROCUREMENT GUIDELINES at § 2.52 (Revised October 2006), available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ProcGuid-10-06-ev1.doc> (“Bidding documents shall also specify the relevant factors in addition to price to be considered in bid evaluation and the manner in which they will be applied. . . .”); see also OECD, METHODOLOGY FOR ASSESSMENT OF NATIONAL PROCUREMENT SYSTEMS 14 (2006), available at <http://www.oecd.org/dataoecd/1/36/37130136.pdf> (in order to achieve the highest score, the legal framework of a procurement system must mandate that “the evaluation criteria are relevant to the decision, and precisely specified in advance in the tender documents so that the award decision is made solely on the basis of the criteria stated in the tender documents.”).

<sup>734</sup> Case C-532/06, *Emm G. Lianakis AE v. Alexandroupolis*, European Court of Justice (2008); see also Case C-87/94, *Commission v. Belgium*, European Court of Justice (1996), in which the ECJ held that the procedure for comparing tenderers had to comply at every stage with both the principle of equal treatment of tenderers and the principle of transparency.

<sup>735</sup> Case C-532/06, *Emm G. Lianakis AE v. Alexandroupolis*, E.C.J. (2008). In addition to the principle of transparency and the requirement that all evaluation factors be provided to potential offerors, the ECJ has held that the principle of equality of treatment is a fundamental principle of European Community law.

367. Similarly, it is a principal tenet of U.S. procurement law that agencies are required to identify major evaluation factors, and award contracts based on those factors.<sup>736</sup>

368. In view of the foregoing, ICANN's duty of transparency under the Articles, the Bylaws and the Core Values, required ICANN to:

- Define and publicize rules, standards, procedures and policies (including the goals of all relevant policies) that it intended to apply to the evaluation and processing of applications submitted in the 2004 TLD round;
- Ensure that the foregoing were stated with sufficient clarity and detail (i.e., free from ambiguity) to allow applicants to fully comprehend what was being required, and to allow them to put forward applications responsive to the rules, standards, policies and other criteria that ICANN had articulated;
- Only apply those rules, standards, policies, policy objectives and other criteria that it had made available to applicants;
- Not subsequently fashion and apply rules, standards, policies, policy objectives and other criteria, which, had they been known when the applications were being prepared, may have affected their preparation; and
- Not subsequently fashion and apply rules, standards, policies, policy objectives and other criteria likely to give rise to discrimination (i.e., have a discriminatory affect) against any one of the bidders.

**2. ICANN Did Not Act Openly and Transparently When it Failed to Adhere to the Selection Criteria Established by the RFP**

369. As set forth in detail above,<sup>737</sup> the final version of the RFP for the 2004 round was posted on 15 December 2003. By that date, the process of developing the RFP had lasted for over a year, and had included extensive opportunities for input from various ICANN constituencies, including the GAC and the public at large. The proposed criteria had been posted

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<sup>736</sup> See, e.g., *Human Resources Research Organization*, B-2033302, July 8, 1982, 82-2 CPD para. 31.

<sup>737</sup> See *supra* at para. 119.

for public comment in March 2003 (*i.e.*, nine months earlier), and a draft RFP had been posted for public comment in June 2003 (*i.e.*, six months earlier).<sup>738</sup> Thus, there was sufficient opportunity for the Board, the GAC, or any other constituency to raise matters of public policy to be addressed in the evaluation of the applications. The final RFP represented ICANN’s decision on what issues would and would not be considered as part of the evaluation process, and any matters excluded from the RFP should have been excluded from the evaluation process.

370. The final RFP posted in December 2003 stated that “[t]he selection procedure [was to be] based on principles of objectivity, non-discrimination and transparency.”<sup>739</sup> It set forth three categories of criteria: (1) financial and business plan information, (2) technical standards, and (3) sponsorship and community value.<sup>740</sup> None of the criteria addressed the issue of adult content, or of morality, or of offensive content—specifically or even generally—or provided that applications had to conform to other notions of public policy to be articulated by the GAC or ICANN itself. There was no indication whatsoever that the potential to generate “controversy” would have any bearing on a proposal. Again, according to the testimony of Dr. Williams, the Chair of the Sponsorship Evaluation Team, ICANN had ample “opportunity to create criteria or procedures to address and resolve” the concerns that might be raised by an application for an adult content TLD. “Nonetheless,” as Dr. Williams states, “the final criteria were completely silent on the subject of adult content, or morality or offensive content generally, and the related public relations controversy.”<sup>741</sup>

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<sup>738</sup> See *supra* at para. 112.

<sup>739</sup> sTLD RFP, Part A: Explanatory Notes, Cl. Exh. 45.

<sup>740</sup> For additional details, see Appendix E.

<sup>741</sup> Williams Witness Statement, para. 7.



371. Following the publication of the RFP, ICM carefully designed its application to ensure that its proposal met all of the stated criteria. ICM's application demonstrated that it was a stable, financially solid organization, which could provide appropriate staffing, including key personnel and operational capability. ICM also showed that it had developed a marketing plan for the sTLD, and that it would make registrar arrangements, develop a fee structure, and devote sufficient resources to ensure the operation of the sTLD.

372. The independent evaluation team responsible for the business and financial aspects of the application found that ICM met all of the business and financial criteria, and noted that “[m]anagement has strong relevant experience in growing businesses in the technology industry.”<sup>742</sup> The technical criteria were also fully satisfied, largely by ICM's appointment of Afiliás, a well-established entity with a good track record. The evaluators concluded that ICM's operations would “meet or exceed all ICANN standards.”<sup>743</sup> Finally, despite the erroneous conclusions of the Sponsorship Evaluation Team, ICM's application clearly satisfied the sponsorship criteria. There is a community of online providers of adult entertainment who desire to participate in the type of self-regulation and collaboration that an sTLD would allow, and many of those providers demonstrated their support for ICM's application by submitting letters or participating in ICM's pre-reservation program.<sup>744</sup>

373. On 1 June 2005, the ICANN Board specifically determined that ICM's application met the criteria when it approved the resolution allowing ICM to proceed to registry agreement negotiations. As discussed in detail above, all of the contemporaneous evidence

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<sup>742</sup> Confidential Independent Evaluation Report, Cl. Confid. Exh. A.

<sup>743</sup> *Id.*

<sup>744</sup> Burr Witness Statement at para. 70, Lawley Witness Statement at para. 43.

shows that the 1 June 2005 resolution constituted an approval of ICM's application.<sup>745</sup> Moreover, the approval was given without any caveats, reservations or special instructions. Yet, ICANN *now* claims that the resolution was not an approval, arguing instead that it was always intended in the case of ICM's application that registry agreement negotiations would be used to address issues of sponsorship. This argument is belied by the fact that, where there were residual concerns with other applications, such as with .JOBS, .MOBI, and .CAT, the Board's resolutions authorizing negotiations specifically included caveats directing discussions of the areas of concern. No such caveats were included in the resolution authorizing ICM's registry agreement negotiations. This fact, in addition to the statements and actions of ICANN Board members and senior staff, the treatment of all other applications approved to enter into negotiations, and ICANN's silence on the topic of sponsorship or other RFP criteria during the subsequent months of negotiation, clearly demonstrates that the 1 June 2005 vote was an unconditional approval of ICM's application as having fully satisfied the criteria set out in the RFP.

374. Despite the 1 June 2005 approval of ICM's application, after nearly two years of contract negotiations—during which ICM repeatedly acceded to ICANN's demands—ICANN reversed its earlier decision. On 30 March 2007, the ICANN Board rejected ICM's proposal, resting its reversal of its prior decision not only on sponsorship issues, but also on vague and previously *unannounced* criteria such as “public policy issues,” the GAC's concern for “offensive content,” “law enforcement compliance issues,” and “credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content.”<sup>746</sup>

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<sup>745</sup> See *supra* at paras. 183-94.

<sup>746</sup> See *supra* at para. 259. See also, Appendix E.

375. These reasons for the rejection of the .XXX application and registry agreement could never have been anticipated by ICM because they were not part of the stated evaluation criteria by which all applications were to be assessed.<sup>747</sup> As an initial matter, the question of compliance with the sponsorship criteria should have been definitively resolved by the 1 June 2005 vote; nothing in the process as established by ICANN allowed for the question to be reopened once it had been decided. Additionally, as already noted, ICM's application complied with the sponsorship criteria, as those criteria were applied to other applicants. The ICANN Board's final conclusion that ICM's application did not meet those criteria was based on a new and different definition of the sponsorship criteria, one that apparently required the applicant to have the full support of everyone who might possibly be a community member (unlike, say, .TEL (Telnic), who was not required to demonstrate the support of everyone who had a telephone number) and propose a universally accepted definition of the community (unlike, say, .CAT or .ASIA, who were not required to definitively determine what it meant to be "Catalan" or "Asian").

376. Furthermore, ICM was entitled to expect that ICANN would not reject its application based on previously unannounced criteria. ICM had submitted its application with the understanding that it would be evaluated and approved according to the criteria established in the RFP. Until May 2006, ICANN appeared to be adhering to the criteria, before unexpectedly rejecting ICM's Third Draft Registry Agreement for reasons outside the RFP. While the developments in May 2006 and the subsequent ten months indicated to ICM that the process was broken and ICANN had departed from the RFP criteria, the fact that ICM was aware of the deviation is not sufficient to constitute openness or transparency. ICANN announced the criteria

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<sup>747</sup> See *supra* at paras. 120-22.

to be used in the evaluation of applications, and then ultimately rejected ICM's applications for reasons not included in those criteria.

377. ICANN's reversal of its decision that ICM's application satisfied the RFP criteria, as well as its ultimate rejection of ICM's application based on new standards, are clear violations of the obligation to be open and transparent. In taking such actions, that ICANN acted inconsistently with its Articles and Bylaws is beyond peradventure.

### **3. ICANN Failed to Provide Procedural Fairness**

378. In addition to radically departing from the published evaluation criteria and thereby providing false and pretextual reasons for denying ICM's application and registry agreement, ICANN also failed to follow the procedures it had established for the 2004 RFP round, as discussed below.

379. To reiterate, ICANN's Bylaws require that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and *consistent with procedures designed to ensure fairness.*"<sup>748</sup> In international law, as in ICANN's Articles and Bylaws, the principle of transparency is linked to the fundamental international law principle of due process.<sup>749</sup>

380. The principle of procedural fairness in international law—which includes adhering to substantive and procedural rules, and which also arises out of the principle of good faith—has been addressed on numerous occasions by the Court of Arbitration for Sport (the "CAS").<sup>750</sup> The realm of international sports, much like the Internet's Domain Name System,

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<sup>748</sup> Bylaws, Art. III, § 1, Cl. Exh. 5.

<sup>749</sup> WTO Appellate Body Report: United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, paras. 182-183 (Oct. 12, 1998) .

<sup>750</sup> The CAS maintains its head offices in Lausanne, Switzerland. Created by the International Olympic Committee, and operating since 1984, the CAS hears a variety of sports disputes by consent of the parties.

also involves a “precious commodity” and “an internationally significant resource,”<sup>751</sup> the regulation of which is not easily confined to a single domestic legal system.

381. In *Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*, the GFA applied for membership in the UEFA.<sup>752</sup> A delegation of the UEFA initially issued a report recommending that the GFA be admitted to the UEFA on a provisional basis. In the meantime, however, the UEFA adopted a new rule to restrict membership to associations in countries that are recognized as independent states by the United Nations. The UEFA then denied GFA’s application on the grounds that Gibraltar was not recognized as an independent state by the United Nations. The tribunal held that the UEFA’s rejection of GFA’s application—based on a rule that had come into existence *after* the GFA had submitted its application—violated general principles of fairness and good faith. According to the tribunal:

Even if the New Rule was to be regarded as a rule dealing only with procedural aspects, the Panel is of the opinion that its application in this matter would entail a **violation of general principles of law which are widely recognized, particularly the principles of fairness and good faith. In particular, the Panel refers to the principle of *venire contra factum proprium*.** This principle provides that when the conduct of one party has led to raise legitimate expectations on the part of the second party, the first party is barred from changing its course of action to the detriment of the second party.<sup>753</sup>

Thus, the principles of fairness and good faith bar the denial of applications based on rules announced after the submission of the applications themselves.

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<sup>751</sup> Jan Paulsson, *Arbitration of International Sports Disputes*, Vol. 9 n. 4 ARBITRATION INTERNATIONAL 359 (1993).

<sup>752</sup> *Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*, Arbitration CAS 2002/O/410 (Award of 7 October of 2003), at 11 (emphasis added).

<sup>753</sup> *Id.* at para. 11 (emphasis added).

382. In *United States Olympic Committee v. International Olympic Committee and International Assn' of Athletics Federations*, the tribunal similarly explained the importance of “requiring clarity of rules” to members of the sport community:

The rationale for requiring clarity of rules extends beyond enabling athletes in given cases to determine their conduct in such cases by reference to understandable rules. As argued by the Appellants at the hearing, clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of the rules and the circumstances in which those rules apply.<sup>754</sup>

383. In *AEK Athens and SK Slavia Prague v. Union des Associations Européennes de Football (UEFA)*, the tribunal considered another new rule implemented by the UEFA. The new rule would have prevented football clubs with the same owner from taking part in the same competitions. The tribunal held that there was nothing wrong with the rule in and of itself. However, the tribunal concluded that the UEFA adopted the rule “too late, when the Cup Regulations for the 1998/99 season, containing no restriction for multiple ownership, had already been issued and communicated to the interested football clubs,” which were entitled to rely on the original regulations.<sup>755</sup> The tribunal therefore held that the new rule violated “the principle of procedural fairness.”<sup>756</sup> Significantly, the tribunal did not base its holding on any provisions contained in any of the UEFA’s constitutive or other documents, but solely on general principles of international law. The tribunal held that given the international activities of the UEFA, it was appropriate to apply general principles of international law:

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<sup>754</sup> *United States Olympic Committee v. International Olympic Committee and International Association of Athletics Federations*, Arbitration CAS 2004/A/725, award of July 20, 2005, at para. 20.

<sup>755</sup> *AEK Athens and SK Slavia Prague v. Union des Associations Européennes de Football (UEFA)*, Arbitration CAS 98/200, award of 20 August 1999, at para.158.

<sup>756</sup> *Id.* at 61. See also *Union Cycliste Internationale (UCI) v. Iñigo Landa Luce Intxaurrego & Real Federación Española de Ciclismo (RFEC)*, Arbitration CAS 2006/A/1119 (emphasising the importance of adhering to procedural rules in the context of cases involving doping allegations).

Due to the transnational nature of sporting competitions, the effects of the conduct and deeds of international federations are felt in a sporting community throughout various countries. Therefore, the substantive and procedural rules to be respected by international federations cannot be reduced only to its own statutes and regulations and to the law of the country where the federation is incorporated or of the country where its headquarters are.<sup>757</sup>

Rather, the tribunal held, general principles of international law were appropriately applied to UEFA's conduct because of the nature of UEFA's activities.<sup>758</sup>

384. Procedural fairness is also denied by arbitrary action. The facts underlying *Lauder v. Czech Republic* bear analogy to those of the present case.<sup>759</sup> In *Lauder*, the Media Council of the Czech Republic – an entity created by the Czech government to award media operating licenses – had determined to approve a broadcasting license to a Czech media company, CET 21. A foreign-owned company, CEDC, was to be a partial owner of CET 21. The Media Council “accepted the idea” that CEDC was going to have a direct investment in CET 21.<sup>760</sup> When the Media Council issued a press release announcing that CET 21 had been awarded the license, the press release stated: “A *direct participant in the application is the international corporation CEDC.*”<sup>761</sup> There was a strong, negative political reaction to the press release. The Media Council ultimately determined that CEDC could have a “contractual relationship” with – but not a direct ownership stake in – CET 21.

385. The *Lauder* tribunal looked to Black's Law Dictionary to define “arbitrary” as “depending on individual discretion; (. . .) founded on prejudice or preference rather than on

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<sup>757</sup> *Id.* at para. 156.

<sup>758</sup> *Id.* Similarly, ICANN oversees a global resource. But here, unlike in *AEK Athens and SK Slavia Prague*, ICANN's constitutive documents specifically state that ICANN will carry out its activities in conformity with principles of international law (including fairness and transparency).

<sup>759</sup> *Lauder v. The Czech Republic*, Final Award dated 3 September 2001 (UNCITRAL).

<sup>760</sup> *Id.* at para. 222.

<sup>761</sup> *Id.* at para 56 (emphasis in original).

reason or fact.”<sup>762</sup> The tribunal held that the Media Council’s “decision to move from a direct participation by CEDC . . . to a contractual relationship” was both arbitrary and discriminatory.<sup>763</sup> The tribunal found that the Media Council had “changed its mind because of its fear that the strong and rising political opposition to the granting of the License to an entity with significant foreign capital could lead to an attack on the entire selection process.”<sup>764</sup> According to the tribunal, “[t]he measure was arbitrary because it was not founded on reason or fact, nor on the law which expressly accepted ‘applications from companies with foreign equity participation’ . . . but on mere fear reflecting national preference.”<sup>765</sup> Thus, the Media Council did not provide procedural fairness.

386. As discussed in considerable detail above, ICANN established a two-step process, designed to ensure fairness, for evaluating the sTLD applications submitted in the 2004 round. First, all applications were to be evaluated to determine whether they satisfied the published RFP criteria. Second, applicants determined by the Board to meet the RFP criteria would then enter into good faith negotiations with ICANN staff with respect to a registry agreement. The process in no way contemplated that the ICANN Board would be able to revisit an earlier decision in which it had determined that the applicant had satisfied the criteria. Rather, the view consistently articulated by senior ICANN executives in ICANN public fora and in writing, including in correspondence to ICM, confirms that ICANN’s intention was to proceed according to its two-step process, and that it did in fact implement that process.<sup>766</sup>

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<sup>762</sup> *Id.* at para. 221 (emphasis in original) (quoting BLACK’S LAW DICTIONARY 100 (7th ed. 1999)).

<sup>763</sup> *Id.* at para. 230.

<sup>764</sup> *Id.* at para. 231.

<sup>765</sup> *Id.* at para. 232 (emphasis in original).

<sup>766</sup> *See supra* at paras. 126 – 137, for a description of the evidence regarding the two-step process.



387. In the case of ICM’s application, however, ICANN radically departed from the very process it had established to ensure fairness. On 1 June 2005, ICANN determined that the ICM application met the proposal criteria. That the 1 June 2005 vote was an approval is confirmed by ample evidence, including, for example, by the text of a press release approved by ICANN’s senior in-house counsel, stating that “ICANN’s board of directors today determined that the proposal for a new top level domain submitted by ICM Registry *meets the criteria established by ICANN.*”<sup>767</sup> The clear meaning of the 1 June 2005 vote was also noted by an ICANN Board member on his blog, where he stated “[o]ur approval of .XXX is a decision based on whether .XXX met the criteria and does not endorse or condone any particular type of content or moral belief.”<sup>768</sup>

388. Despite all of the evidence confirming that ICM had satisfied all of the RFP criteria, ICANN ultimately reversed its conclusions in March 2007. As stated by Professor Mueller, “[t]he record of this case leaves little room for doubt that the first Board vote was supposed to have resolved the question of whether ICM Registry met the sponsorship criteria.”<sup>769</sup> The Board’s March 2007 resolution constituted a reversal of an earlier determination—clearly signaling that there “was something more going on than the objective and neutral application of documented policies.”<sup>770</sup> This “something more” was the undue and improper political opposition from certain elements lobbying the United States government and the GAC—and not any change in ICM Registry’s conformance to documented criteria.<sup>771</sup>

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<sup>767</sup> Cl. Exh. 135 (emphasis added).

<sup>768</sup> Joichi Ito, Some Notes on the .XXX Top Level Domain (3 June 2005), *available at* <http://joi.ito.com/weblog/2005/06/03/some-notes-on-t.html> (emphasis added), Cl. Exh.142; *see also supra* para. 190.

<sup>769</sup> Mueller Report at 46.

<sup>770</sup> *Id.* at para. 47.

<sup>771</sup> *Id.*

389. It was not until ICANN received the 11 August 2005 email from the U.S. Department of Commerce that it decided to depart from the established process, delaying and stalling in its consideration of ICM's registry agreement, requesting further negotiations and assurances not asked of any other applicant, and ultimately re-opening the sponsorship issue that had been decided by the 1 June 2005 vote. Nothing in the previously established process permitted ICANN to do this. As in *Lauder*, ICANN's reversal was "not founded on reason or fact" (or, for that matter, on the RFP criteria), but rather on "fear" of the political pressure that had suddenly been brought to bear.

390. Moreover, ICANN applied new substantive criteria in evaluating ICM's application long after its proposal had been submitted. As discussed above, in rejecting ICM's application, ICANN's Board cited reasons—never before discussed in its RFP as factors to be considered in the evaluation of proposals—such as "public policy issues," the GAC's concern for "offensive content," "law enforcement compliance issues," and the possibility that "ICANN would be forced to assume an ongoing management and oversight role regarding Internet content."<sup>772</sup> From a process-perspective, ICANN could not fairly have rejected ICM's registry agreement based on these reasons, as they were not mentioned in ICANN's RFP. With respect to public policy for instance, there was no stated public policy regarding Internet content in place at the time that ICM applied for the .XXX sTLD. Yet "public policy issues" was cited as one of the reasons for denying ICM's proposed registry agreement. In order for this to have been procedurally fair, there should have been a policy addressing ICANN's concerns in place from the outset.<sup>773</sup>

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<sup>772</sup> See *supra* at para. 259.

<sup>773</sup> See *Van Duyn* Case, Case 41/74 (1974). The question referred to the European Court of Justice was whether British officials had violated the Treaty of Rome and Community law governing the free movement of people by denying van Duyn, a Dutch national arriving in the UK to take a position with the  
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391. Nor, as Professor Mueller has discussed in his report, were there any requirements that applicants be prepared to resolve whatever public policy concerns might be asserted by governments,<sup>774</sup> yet ICANN rejected ICM's application for failure to address all of the concerns raised by the GAC. In any case, the government participation came belatedly—after the crucial determination that ICM's application met the RFP criteria had already been made, and despite the GAC having foregone any number of earlier opportunities to provide advice or comment. As Professor Mueller notes:

implicit in any system of good governance is the idea that advice must be presented in a timely manner, according to a defined procedure. Not only is this a general rule of good governance, ICANN's Bylaws specifically require that the GAC's advice be timely if it is to be considered.<sup>775</sup>

Clearly, and improperly, ICANN applied new criteria after it had previously determined that ICM satisfied the proposal criteria.

392. ICANN also failed to act consistently with procedures designed to ensure fairness in the publication of the reports evaluating the applications. The independent evaluators had drafted reports summarizing their conclusions regarding each application and providing recommendations to the Board to approve or deny the applications.<sup>776</sup> The applicants were led to believe that the reports would not be made public until after all applicants had completed the

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Church of Scientology, entry into the United Kingdom. The ECJ ruled that reliance on the concept of public policy as a justification for derogating from a fundamental principle of Community law was to be interpreted strictly so that its scope would not be determined unilaterally by each Member. Ultimately, the ECJ ruled that the actions of British officials were permitted only because Britain had in place a stated public policy goal of preventing the spread of the activities of the Church of Scientology.

<sup>774</sup> Mueller Report at para. 49.

<sup>775</sup> *Id.* at para. 50.

<sup>776</sup> See Appendix D, sTLD Status Report, Cl. Exh. 110.

process.<sup>777</sup> Indeed, for many months, while the applications progressed at various speeds through the evaluation and approval process, the reports remained confidential. In July 2005, however, the GAC pressured the Board to make the reports publicly available. Bowing to this pressure, ICANN decided to publish the reports despite the fact that different applicants were at different stages in the process.<sup>778</sup> Eight of the ten applications had received negative reports from one or more of the evaluation teams, yet several of those applications had already entered into registry agreements with ICANN before the evaluations were published. Others, such as .XXX, had not yet entered into a registry agreement, and so the negative comments in the evaluation reports provided new ammunition against those applications. Had ICANN refrained from publishing the reports until all applications had completed the process, as the applicants had been lead to believe, the negative impact on certain applications could have been avoided. Dr. Williams, head of the Sponsorship Evaluation Team, also made clear that she “[did] not believe that the evaluations should have been published when the applications were at different stages [in the process],” such that the reports could still harm certain applicants while others were immune; publishing the reports at such a time “was contrary to the process as described to [her] and the other evaluators.”<sup>779</sup>

393. Moreover, when ICM had raised objections to the publication of the reports, explaining the negative consequences for the ICM registry agreement, it received assurances from the ICANN ombudsman that the posting would not occur until ICM had a chance to meet with ICANN to discuss the issue.<sup>780</sup> This assurance rang hollow, as documents were posted on

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<sup>777</sup> Burr Witness Statement, para. 48.

<sup>778</sup> *Id.* paras. 48-50; Lawley Witness Statement, para. 22.

<sup>779</sup> Williams Witness Statement at para. 22.

<sup>780</sup> Burr Witness Statement at para. 50.

ICANN's website before the promised meeting with ICANN took place.<sup>781</sup> ICANN's lack of a consistent procedure regarding the posting of evaluation reports, as well as its ultimate decision to post such evaluation reports while applicants were at varying stages in the process was far from fair.

394. Thus, in deviating from its stated evaluation criteria, deviating from its stated two-step process, and in its handling of the evaluation reports, ICANN acted in breach of its obligation to comply with its Bylaws and Articles requiring "open and transparent" actions "consistent with procedures designed to ensure fairness."

**B. ICANN Violated the Provisions of its Bylaws Requiring Non-Discriminatory Treatment.**

395. Article 2(3) of ICANN's Bylaws require it to act in a non-discriminatory manner.

This provision of its Bylaws states:

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

396. The above obligation is underscored by the requirement in the GAC's Operating Principles that: "ICANN's decision making should take into account public policy objectives including, among other things. . . . Transparency and non-discriminatory practices in ICANN's role in the allocation of Internet names and address[es]." It is further emphasized in ICANN's Core Values, which include the guidance that ICANN should make "decisions by applying documented policies neutrally and objectively, with integrity and fairness."

397. All of the foregoing is consistent with the principle of non-discrimination under international law. Although the principle originally arose in the context of a state's differential treatment of aliens, its application has become much broader, particularly where, as here, a party

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<sup>781</sup> *Id.* at para. 48-50; Lawley Witness Statement at para. 22.

has affirmatively taken on a duty of non-discrimination. Discriminatory conduct has been described as follows in the context of an international investment dispute: “(i) similar cases are (ii) treated differently (iii) and without reasonable justification.”<sup>782</sup> Put simply, “in order for discrimination to exist, . . . there must be different treatments to different parties.”<sup>783</sup>

398. There is more than ample evidence demonstrating that ICANN failed to uphold its obligation to act non-discriminatorily. It did exactly what it was *not* supposed to do by applying its standards, policies, procedures and practices inequitably and unjustifiably singling out ICM for disparate treatment.<sup>784</sup>

399. For example, as laid out in Appendix E hereto, ICANN applied different evaluation criteria to the ICM application than it did to any of the other applications. The latter were approved on the basis of the original criteria, or even more lenient versions thereof. Unlike the others, however, ICM’s application was subjected to, and ultimately rejected on the basis of, new and previously unstated criteria.

400. Moreover, ICM was required to comply with a different standard of what constitutes a sponsored community. Other applications were approved with “self-selecting”

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<sup>782</sup> *Saluka*, at para 313.

<sup>783</sup> *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16 (Award of 2 October 2006) para. 442. The principle of non-discrimination is found throughout numerous legal systems. For example, it is treated under the rubric of equality of treatment by the European Court of Justice. The ECJ has held that the principle of equality of treatment is a fundamental principle of European Community law. The principle of equal treatment means that comparable situations may not be treated differently unless the difference in treatment is objectively justified. *See* Joint Cases 117/76 and 16/77 *Ruckdeschel* 1977 E.C.R. 1753; *see also* Case 810/79 *Uberschar v. Bundesversicherungsanstalt für Angestellte* 1980 E.C.R. 2747, para. 16. The EC, like the United States and most other jurisdiction with developed procurement systems, has particularly emphasized the importance of non-discrimination in the awarding of public contracts. *See, e.g.*, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Work Contracts, Public Supply Contracts and Public Service Contracts, OJ 2004 L 134 at 114.

<sup>784</sup> ICM reserves its rights to respond to any factual and legal submissions that ICANN may attempt to put forward to justify its discrimination of ICM. There can be little argument that ICANN’s actions resulted in ICM being treated discriminatorily. The burden, however, rests with ICANN to demonstrate that this was justified.

communities, and were not required to have a universal, regulatory definition of the community to be served by the proposed sTLD.<sup>785</sup> Most notably, the communities of .MOBI and .TEL (Telnic) were largely defined by those interested in participating in the TLDs; that is, because they wanted their content to be in a format accessible by mobile devices or because they wanted their communication information stored online. Both of these applications were approved by ICANN. .JOBS, like .XXX, required users to agree to a code of conduct regulating their profession. The application for .JOBS was also approved. Yet the transcripts of the final Board meetings in which the .XXX registry agreement was discussed demonstrate that certain Board members, based their negative vote, at least in part on their understanding that registrants in .XXX would have to choose to identify themselves as part of the community, or that they would have to choose to identify themselves as “responsible.” ICM was never given any legitimate reasons as to why these somehow triggered unique issues not also present in any of the other TLDs with a self-selecting or self-defining community.

401. A different standard for community support was also applied to ICM. Despite sufficient support to make the sTLD viable, as demonstrated by the letters of support received and the pre-reservation requests for domain names, ICANN focused on the fact that some adult entertainment webmasters were opposed to the application – even though other applications had been approved in the face of opposition.<sup>786</sup>

402. ICM was also faced with different requirements for contract terms. While all other registry agreements were negotiated and finally executed on the basis of ICANN’s standard terms, ICM was asked to add numerous guarantees, assurances, and policy commitments not

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<sup>785</sup> Lawley Witness Statement, para. 42, Burr Witness Statement, para. 62.

<sup>786</sup> Burr Witness Statement, paras. 72-74, n. 32; Lawley Witness Statement, para. 57, 63.

required of any other application.<sup>787</sup> With the other applications, if ICANN was satisfied that those applicants met the criteria, those applications were approved and were not asked to continue proving, through contract terms, that the sTLD would comply with all of the commitments in the applications. In ICM’s case, however, ICANN demanded additional—and in many respects completely unachievable—“guarantees” that ICM would comply with all of its contractual commitments. No such guarantees were required, in any measure, of any of the other applicants. With other applicants, the expectation was that the sponsored communities would develop policies governing the sTLD once it was approved; but in ICM’s case, ICANN expected ICM to guarantee certain policies even before the agreement was approved.<sup>788</sup>

403. ICM was also treated differently from all of the other applicants in terms of ICANN’s process for evaluating applications. Its application was the only one that was subjected to two rounds of voting with regard to whether or not the application satisfied the RFP criteria.

404. In short, ICANN applied its standards and procedures with respect to ICM’s application in a discriminatory manner, by not only requiring ICANN to satisfy different standards and criteria, but also by subjecting ICM’s application to a different approval procedure than was applied to all of the other applicants. This “singling out” of ICM was not justified by any “substantial reasonable cause.” As discussed in detail above, the reasons that ICANN cited as the basis for its denial of ICM’s proposed registry agreement were far from reasonable.<sup>789</sup> Rather, they were false and arbitrary pretexts for the real reason why ICANN denied ICM’s application—political pressure from the U.S. government and the GAC.

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<sup>787</sup> See Burr Witness Statement, Appendix A.

<sup>788</sup> Burr Witness Statement, paras. 39, 60, 65, 68-69.

<sup>789</sup> Goldsmith Expert Report at 21-23; Mueller Expert Report at 50, 52-54.



**C. ICANN Violated its Articles of Incorporation and Bylaws by Acting in Excess of its Purpose and Mission**

405. ICANN's Articles of Incorporation and Bylaws define ICANN's purpose and mission. Article 3 of ICANN's Articles of Incorporation provides that:

[ICANN] shall, except as limited by Article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the **operational stability** of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).<sup>790</sup>

406. Article 4 of its Articles of Incorporation specifies that ICANN is mandated to "operate for the benefit of the Internet community as a whole..." and that its activities should be conditioned by and geared towards the objectives of "enabl[ing] competition and open entry in Internet-related markets."

407. ICANN's Bylaws set forth ICANN's "Mission" as follows:

The mission of [ICANN] is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the **stable and secure operation** of the Internet's unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are:
  - a. Domain names (forming a system referred to as "DNS");

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<sup>790</sup> Bylaws, Article I, § 1, Cl. Exh. 5. The quoted provisions have not changed from the date the RFP was published (*see* Bylaws (as amended effective 13 Oct. 2003), *available at* <http://www.icann.org/general/archive-bylaws/bylaws-13oct03.htm>), through the date of this filing (*see* Bylaws as amended effective 15 Feb. 2008).

- b. Internet protocol (“IP”) addresses and autonomous system (“AS”) numbers; and
  - c. Protocol port and parameter numbers.
2. Coordinates the operation and evolution of the DNS root name server system.
  3. Coordinates policy development reasonably and appropriately related to these **technical functions**.<sup>791</sup>

408. Moreover, ICANN’s “Core Values” clarify that in performing its mission, ICANN should be guided by the following values:

1. Preserving and enhancing the *operational stability, reliability, security, and global interoperability* of the Internet.
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by *limiting ICANN’s activities to those matters within ICANN’s mission* requiring or significantly benefiting from global coordination.

409. Thus, based on the terms of its founding documents, ICANN’s purpose is a technical one – to promote the global public interest in the **operational stability** of the Internet. Even its policy development activities are limited to what is “reasonably and appropriately related” to its coordinating role over technical functions. And its Core Values make it clear that ICANN is to limit its activities to “those matters within ICANN’s mission . . . .” In short, there can be no doubt, on the face of its founding documents, that ICANN is categorically and specifically prohibited from acting beyond the scope of its mission and purpose, as defined therein.<sup>792</sup>

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<sup>791</sup> ICANN Bylaws, Article I, § 1 (Mission). The quoted provisions have not changed from the date the RFP was published (*see* Bylaws as amended effective 13 Oct. 2003, *available at* <http://www.icann.org/general/archive-bylaws/bylaws-13oct03.htm>) through the date of this filing (*see* Bylaws as amended effective 15 Feb. 2008).

<sup>792</sup> This requirement that ICANN act on matters within its mission is echoed by the international law principle of abuse of rights, discussed in greater detail below. The abuse of rights doctrine requires the  
(continued...)

410. ICANN violated its Articles and Bylaws by rejecting ICM’s application and registry agreement on the basis of a litany of vague and unspecified “public policy issues,” not even remotely related to the limited technical mandate given to ICANN in its governance documents. In rejecting ICM’s application, ICANN ultimately made a substantive judgment about Internet content—clearly in excess of its mission. ICANN’s mission is limited to technical functions—and ICANN did not have any technical concerns about ICM’s application, which met the requirements of an sTLD. Any other considerations that ICANN cited as reasons for rejecting ICM’s application—whether its own unspecified public policy considerations or the GAC’s “concern for offensive content”—were outside of ICANN’s mission and mandate, and were arbitrary and pretextual.

411. In the final analysis, there can be little debate that, by rejecting ICM’s application and denying to grant it a registry agreement on the same or similar terms as the other applicants, ICANN not only acted inconsistently with its Articles of Incorporation and Bylaws, it also transgressed its core values of “[r]especting the creativity, innovation, and flow of information made possible by the Internet.” Furthermore, it undercut one of the GAC’s specified public policy principles with respect to the governance of the Internet, namely, that of promoting freedom of expression.

**D. ICANN Violated Those Provisions of its Bylaws Governing the GAC**

412. Finally, ICANN violated its Articles of Incorporation and Bylaws by being overly deferential to the views of the GAC, which ICANN’s Bylaws specify is to have only an advisory,

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exercise of discretion pursuant to a legal instrument or enabling legislation, lest it be considered *ultra vires*. The abuse of rights principle also requires that the exercise of a given right, authority, or discretion be undertaken for the end for which the right or discretion is conferred.

as opposed to a mandatory or decision-making, role with respect to ICANN's activities. Article XI, Section 2 of ICANN's Bylaws address the GAC and state, in pertinent part:

1. Governmental Advisory Committee

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

\* \* \*

- h. The Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment, and shall take duly into account any **timely response** to that notification prior to taking action.
- i. The Governmental Advisory Committee may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.
- j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
- k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.

413. Thus, in general, the Bylaws state (1) that the GAC shall consider and provide advice to the ICANN Board; (2) that the GAC shall respond in a **timely** manner to issues raising

public policy concerns; and (3) that the GAC and the Board should try to reach agreement as to public policy matters. Ultimately, however, it is the ICANN Board that has the final decision on whether to follow the GAC's advice.

414. Nevertheless, ICANN accorded unwarranted deference to the GAC's views, thereby essentially giving the GAC a *de facto* veto over ICM's application. Thus, instead of merely having to satisfy the Board and ICANN staff during negotiations, ICM was forced to attempt to satisfy a plethora of different parties with different agendas and opinion, all vague, effectively making it impossible to succeed. Unlike any other applicant, ICM was held to an unattainable GAC-imposed standard of having to satisfy, in advance, unspecified and yet-to-materialize concerns and eventualities. Rather than pressing the GAC to render advice more in consonance with the expressly stated public policy principles in its Operating Principles, ICANN instead acquiesced to political pressure.<sup>793</sup> It took the route of expediency over strict adherence to its Articles and Bylaws.

**E. ICANN Failed To Act in Conformity with Other Relevant Principles of International Law.**

415. There are additional principles that govern ICANN's conduct because of ICANN's determination to carry out its activities in conformity with relevant principles of international law. These principles also apply to ICANN's activities independent of the separate requirements imposed by the Articles of Incorporation and Bylaws, but nonetheless govern the construction and application of the terms contained in the Articles and Bylaws taken together as a whole. Specifically, ICANN breached the principles of (1) good faith, (2) abuse of rights, (3) legitimate expectations, and (4) estoppel, as discussed in greater detail below.

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<sup>793</sup> For example, the GAC's Operating Principles provide that "ICANN's decision making should take into account public policy objectives including, among other things: ... **transparency and non-discriminatory practices in ICANN's role in the allocation of Internet names and address[es];** ... and "freedom of expression."

## 1. ICANN Breached the Principle of Good Faith in its Negotiations with ICM

416. Again, the principle of good faith is one of the most basic general principles of international law, and indeed, of virtually all domestic bodies of law. In essence, all of ICANN's legal obligations under "relevant principles" of international law arise from the fundamental requirement of good faith.

417. Put simply, the good faith principle requires that ICANN comply with its obligations, including those in its Articles and Bylaws, "honestly and fairly."<sup>794</sup> The principle of good faith is important to every aspect of legal relations, including negotiations.<sup>795</sup> It "applies not only to the actual performance of legal obligations properly undertaken but also to any other part of legal relations such as the earliest stages of negotiations and, indeed to any conduct to which legal significance could reasonably be attached by other subjects of international law."<sup>796</sup>

418. The obligation to conduct negotiations in good faith has been widely recognized in the context of state-to-state relations. In the *North Sea Continental Shelf Case*, the ICJ asserted that states were required to enter into meaningful negotiations with the objective of reaching an agreement, and cautioning that the requirement of good faith will be violated when either party "insists upon its own position without contemplating any modification of it."<sup>797</sup> Similarly, in *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*

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<sup>794</sup> Goldsmith Expert Report at para. 19.

<sup>795</sup> See also Goldsmith Expert Report at 23-24. ICANN's obligation to conduct negotiations in good faith also arises from the requirement in its Articles and Bylaws that it act openly and transparently, but it also exists separately as a relevant principle of international law.

<sup>796</sup> HERMANN MOSLER, *THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY*, RECUEIL DES COURS (1974) Vol IV 145.

<sup>797</sup> *North Sea Continental Shelf Cases*, (Ger. v. Den.), 1969 I.C.J. 1 at 47 (20 Feb.).

Case, the ICJ recognized the “mutual obligations to co-operate in good faith” and declared that negotiations were to be “undertaken in an orderly manner and with a minimum of prejudice.”<sup>798</sup>

419. The obligation to conduct negotiations in good faith, as a general principle of law, has also been widely recognized in the context of international commercial law as well as public international law. As explained by the tribunal in the award in ICC Case No. 5953, scholars of international commercial law as well as arbitrators uniformly agree that good faith is a requirement in the negotiation, interpretation, and performance of contracts.<sup>799</sup>

420. “The obligation of good faith is expressed in particular by the necessity of cooperating and of behaving fairly, which exists even before a contract is entered into.”<sup>800</sup> Thus, for example, in ICC Case No. 6519, the tribunal enforced the arbitration clause in a memorandum of understanding (the “MOU”) relating to the creation of a holding company in order to consider claims that the respondent was liable for damages resulting from the ultimate failure of the deal. The tribunal held that the respondent was at fault for having withdrawn from the arrangement before the conditions precedent to performance of the MOU could be met. The tribunal rejected the respondent’s argument that there was no jurisdiction because the MOU had never taken effect, holding that the respondent was nevertheless bound by its commitments.<sup>801</sup>

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<sup>798</sup> Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 95 (20 Dec.).

<sup>799</sup> RECUEIL DES SENTENCES ARBITRALES DE LA CII 1986-1990 (Award in Case No. 5953) 437, 441 (1989) (“La bonne foi . . . doit présider à la négociation des contrats et à leur interprétation comme à leur exécution. La doctrine est unanime et les sentences publiées qui sont la source de droit privilégiée des arbitres le confirment, sans exception.”) (“Good faith . . . must govern the negotiation and interpretation of contracts as well as their performance. Legal scholarship is unanimous on this point and published awards, which are the preferred source of law for arbitrators, confirm this without exception.”).

<sup>800</sup> Marc Henry, *The Contribution of Arbitral Case Law and National Laws in TOWARDS A UNIFORM ARBITRATION LAW* at 45-46 (citing 1993 Award in ICC Case No. 7105, 127 J.D.I. 1062 (2000) and 1991 Award in ICC Case No. 6519, 118 J.D.I. 1065 (1991)).

<sup>801</sup> Award in ICC Case no. 6519, 118 J.D.I. 1065, 1072-73 (1991) (“Attendu, néanmoins, que, d’un strict point de vue juridique qui rejoint d’ailleurs la simple équité, on ne saurait faire abstraction de ce que des engagements ont été pris par YA à l’égard de M. XA...[et] que ces engagements, même s’ils ne sont  
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By withdrawing from the deal and failing to make efforts to bring about the conditions precedent required for the performance of the MOU, the respondent had violated both the obligations it had accepted in the MOU and the general obligation of good faith in international commercial dealings. As explained by a commentator:

C'est en effet une violation de l'obligation de faire son possible en vue de l'accomplissement des conditions nécessaires à l'entrée en vigueur du contrat, principe général, confirmé en l'espèce par une disposition du Protocole. ***Plus généralement, c'est un manquement à l'obligation de coopérer de bonne foi, que la jurisprudence arbitrale fait peser sur les opérateurs du commerce international.***<sup>802</sup>

421. Similarly, ICC Case No. 7105 involved a complex transaction involving a memorandum of understanding and requiring the completion of several contracts between the parties, of which only the MOU and one sales contract were ultimately executed. The tribunal concluded that it was particularly appropriate to consider principles of good faith in determining the obligations of the parties in the context of a transaction that involved a series of interrelated agreements.<sup>803</sup> Good faith, moreover, was a factor that the tribunal considered in the context of a

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pas entrés en vigueur en raison de la défaillance de la condition suspensive qui y était prévue, ne peuvent pas être ignorés en tant que fait.... YA a fait preuve d'une légèreté blâmable constitutive d'une faute dont elle doit assumer les conséquences dommageables.")(“Whereas, nevertheless, from a strictly legal point of view which is confirmed by equity, the fact that YA made certain commitments with respect to Mr. XA cannot be disregarded...[and] that these commitments, even if they never entered into force because of the failure of the condition precedent which had been envisioned, cannot be ignored.... YA demonstrated a blameworthy frivolity constituting a fault and must assume responsibility for resulting damages.”).

<sup>802</sup> Observations on Award in ICC Case No. 6519, 118 J.D.I. 1065, 1072-73 (1991) (emphasis added). The portion quoted above translates as: “It is a violation of the obligation to make one’s best efforts to bring about the conditions necessary to the entry into force of a contract, a general principle confirmed by one of the provisions of the MOU. ***More generally, it is a failure to abide by the obligation to cooperate in good faith, which arbitral caselaw imposes on international commercial actors.*** »

<sup>803</sup> Award in ICC Case No. 7105, 127 J.D.I. at 1065 (“La pluralité des contrats envisagés pour la réalisation de l’opération prévue par le protocole...et le lien qui les unit nécessitait de la part de chaque participant à cet ensemble pluripartite qu’il coopère de bonne foi...au parachèvement d’une opération dont on rappelle qu’elle avait donné lieu à un accord en bonne et due forme”) (“The multiplicity of

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transaction process that was far advanced, but never came to fruition: “il revient donc au tribunal arbitral d’apprécier au regard des exigences de la bonne foi dans la conclusion et l’exécution des contrats les raisons pour lesquelles un processus contractuel parvenu à un tel degré d’avancement n’a finalement pas abouti.”<sup>804</sup> The tribunal concluded that the respondent was liable for violating the obligation to cooperate in good faith in the completion of the transaction.<sup>805</sup>

422. In this case, ICANN failed to negotiate with ICM in good faith. Once ICM’s application was approved by the Board, it began negotiations with ICANN – a process fraught with delay and hidden motives.

423. Prior to the Board’s 1 June 2005 vote, the major issue in the Board’s deliberations over ICM’s application had been the existence of the sponsored community, as required by the RFP criteria; if that issue had not been resolved to the Board’s satisfaction, there would have been no purpose to moving into contract negotiations.<sup>806</sup> The Board discussed this issue at a number of meetings before approving the application; including during the 24 January 2005 Board meeting, the 2 April 2005 meeting during which ICM made a presentation to the Board, the 3 May 2005 meeting, and the 1 June 2005 meeting preceding the approval vote.<sup>807</sup> Moreover, in proceeding with contract negotiations, ICANN’s senior in-house lawyer, Mr. John

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contracts also have necessary for the realization of the project outlined in the MOU...and the ties that bound them required that each participant cooperate in good faith in bringing about the completion of a project that it should be recalled had given rise to an agreement in due form”).

<sup>804</sup> *Id.* 1064 (“[I]t is up to the arbitral tribunal to judge, in light of the requirements of good faith in the conclusion and execution of contracts, the reasons for which a contractual process that had advanced so far was never completed.”).

<sup>805</sup> *Id.* at 1065.

<sup>806</sup> *See* Williams Witness Statement, para. 24; *see also* Burr Witness Statement, paras. 14, 32.

<sup>807</sup> Special Meeting of the Board: Minutes (24 Jan. 2005), Cl. Exh. 132; Special Meeting of the Board: Minutes (3 May 2005), Cl. Exh. 134.

Jeffrey, *gave absolutely no indication* to ICM that he was expecting them to discuss the RFP criteria; rather, he explicitly stated that the negotiations would be “straightforward” and ICM would only be called upon to make minor changes to the standard agreement used by ICANN.<sup>808</sup> In actuality, the negotiation process with ICM was anything but straightforward or similar to the process that the other applicants experienced.

424. Once the negotiations began, ICANN never questioned ICM about any of the sponsorship criteria.<sup>809</sup> If ICANN had unresolved questions about the criteria, those questions should have—and would have—been asked during the negotiations. Negotiations which failed to address such a crucial outstanding issue would have been doomed to failure and a waste of time and effort for both ICANN and ICM, in clear breach of the good faith principle of international law. There is surely no reason why ICANN would have engaged in lengthy, detailed negotiations with ICM over the commercial and technical terms of the registry agreement and yet neglect to mention something as fundamental to the process as questions about the RFP criteria. According to ICM’s attorney, ICM “would never have spent the time and money involved in [the] frustrating, drawn-out negotiation process if [they] had not believed—and been told—that the 1 June 2005 vote was an approval of the application and negotiations for the registry agreement would be related to purely commercial and technical terms.”<sup>810</sup>

425. Yet, now ICANN asserts that the 1 June 2005 vote was not an approval of ICM’s application.<sup>811</sup> Even if ICANN is correct in this assertion (despite the clear evidence demonstrating that the Board’s resolution approving the commencement of registry agreement

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<sup>808</sup> Email from John Jeffrey to Becky Burr, 13 June 2005, Cl. Exh. 150.

<sup>809</sup> Burr Witness Statement, para.34.

<sup>810</sup> Lawley Witness Statement, para. 57; *see also* Mueller Expert Report at 37.

<sup>811</sup> ICANN Response, paras. 57-79.

negotiations constituted a decision by the ICANN Board that ICM's application had satisfied all of the requisite RFP criteria),<sup>812</sup> it simply confirms that ICANN did not engage in good faith negotiations with ICM for a registry agreement.

426. The lack of good faith in the negotiations process is further demonstrated by the "guarantees" that ICANN expected ICM to provide. Short of providing iron-clad assurances that the contract would be performed in accordance with its terms, ICM provided all of the assurances it was able to. If its assurances were not met, ICANN would still have been able to attempt enforcement through the same methods as in any other contract, but ICANN still expected more.<sup>813</sup> Indeed, ICM went to significant lengths to accommodate every reasonable request from ICANN staff, notwithstanding the fact that certain of the conditions being imposed upon ICM had not been required of any of the other applicants. Indeed, ICM's representatives had repeatedly informed the ICANN negotiators that there was effectively no reasonable amendment to the agreement that ICM would not accept. Nevertheless, on 30 March 2007, when the proposed agreement and ICM's application for the .XXX sTLD were put to a vote, the Board voted by 9 votes to 5 to reject the proposed agreement and to turn down ICM's application. In short, ICANN required ICM to agree to contractual terms based on vague concerns of public policy that had been articulated by the GAC, and other issues that ICANN felt were needed in the .XXX registry agreement. Irrespective of the fact that no other applicant had been required to agree to such terms, ICM acquiesced to ICANN's demands in the good faith belief that this was what was needed in order for it to obtain its registry agreement. ICANN, however, then proceeded to reject ICM's draft registry agreement, in no small measure because of the very

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<sup>812</sup> See Burr Witness Statement, paras. 13-15; Lawley Witness Statement, paras. 38-40; Williams Witness Statement, para. 23; Mueller Expert Report at 39.

<sup>813</sup> Burr Witness Statement, para. 58.

terms that ICANN had insisted ICM include in its agreement. There should be no question here that ICANN's conduct in this regard constituted bad faith.

## **2. ICANN Failed to Act in Conformity With the Principle of Abuse of Rights**

427. The general principle of abuse of rights (*abus de droit*) has been described “as an omnibus term to describe certain ways of exercising a power which are legally reprehensible.”<sup>814</sup> Abuse of rights forbids an entity from exercising a right either in a way which impedes the enjoyment by other entities of their own rights, or for an end different from which the right was created. It essentially deals with the exercise of a discretionary right in an unreasonable or dishonest manner, or without due regard for the interests of other. ICANN abused its discretion for not having acted in good faith; having taken account of irrelevant factors; failing to take account of relevant ones; and acting for an improper purpose in a fictitious manner.

428. The abuse of rights principle is “adequately demonstrated in practice.”<sup>815</sup> “A survey of international practice, particularly in the jurisprudence of the courts and claims commissions, clearly shows that at least the basic principle of the prohibition of abuse of rights is applicable in international relations.”<sup>816</sup> In *Free Zones of Upper Savoy and the District of Gex* (France v. Switzerland), the PCIJ found a violation of the abuse of rights principle by referring to a state's use of a police cordon at a political border as a guise for a customs barrier in contravention of a treaty obligation to maintain a custom free zone.<sup>817</sup> In the *United States*

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<sup>814</sup> GDS Taylor, *The Context of the Rule Against Abuse of Rights in International Law*, 46 BRIT. Y.B. INTN'L L. 323, 325 (1972-1973).

<sup>815</sup> F.V. Garcia-Amador, “International Responsibility”, 5<sup>th</sup> report (UN Doc. A/CN.4/125) in Yearbook of the International Law Commission 1960, vol. 2 (New York: United Nations 1961) 41 at paras. 70, 73

<sup>816</sup> *Id.* at para. 33.

<sup>817</sup> *Free Zones of Upper Savoy and the District of Gex* (Fr. v. Switz), 1932 P.C.I.J. (ser. A/B) No. 46 (7 June).

*Nationals in Morocco Case*, the ICJ invoked the abuse of rights doctrine and stated that the power at issue in that case, making valuations of U.S. goods, was a “power which must be exercised reasonably and in good faith.”<sup>818</sup>

429. In the *Barcelona Traction Case*, after considering Belgian allegations against Spain, Judge Ammoun declared as follows:

Abuse of right, like denial of justice, is an international tort, contrary to the opinion which the Spanish Government seems to espouse. This is enshrined in a general principle of law which emerges from the legal systems of all nations. The Applicant further sees in certain of these manifestations a misuse of power (détournement de pouvoir) of which international law should take account, on the ground that the rights the abuse of which is condemned by international case-law are, as in municipal administrative law, powers or competences. The doctrine cannot but be endorsed.<sup>819</sup>

430. Most recently, the doctrine of abuse of rights was referred to as a well-established area of international law in the *Gabcikovo-Nagymaros Case*, in which the ICJ considered Slovakia’s treaty rights vis-à-vis environmental concerns raised by Hungary.<sup>820</sup> In light of such extensive use of the doctrine it is not surprising that the abuse of rights principle is widely considered a part of international law, whether as a general principle of law or as part of customary international law.<sup>821</sup>

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<sup>818</sup> Rights of Nationals of the United States of American in Morocco (Fr. v. U.S), 1952 I.C.J. 176, 212 (27 Aug.).

<sup>819</sup> *Barcelona Traction, Light and Power Co., Ltd.* (Belg. v. Spain), 1970 I.C.J. 286, 324 (5 Feb.).

<sup>820</sup> See separate opinion of Judge Weeramantry, *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 88, 95 (25 Sept.).

<sup>821</sup> As acknowledged in the Special Rapporteur’s Third Report on the Law of the Non-Navigational Uses of International Watercourses to the International Law Commission in 1982, “at least at the international level its [the abuse of rights principle’s] repeated espousal, in one formulation or another, can rightly be said, as with *sic utere tuo*, to constitute a general principle recognized as binding upon all members of the international community.” The repeated invocation of abuse of rights principles as noted in the report are wide spread around the world, and the early formulations of the practice of equitable participation (what the abuse of rights doctrine is commonly referred to in the context of environmental

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431. Given the utility of the abuse of rights principle in placing limits on the exercise of discretionary rights, and the doctrine's ability to flexibly weigh conflicting interests, it is not surprising that the principle has been widely applied in domestic administrative law.<sup>822</sup> In the context of international law, the development of the abuse of rights principle has been most extensive where rights remain undivided and the need for discretionary limits has been recognized. For instance, the abuse of rights doctrine commonly arises in the context of transboundary disputes<sup>823</sup> and disputes concerning shared resources, such as in the context of the law of the sea or the demarcation of international rivers and lakes, which necessitate the establishment of certain restrictions such as the right of navigation.<sup>824</sup> As such, certain recent treaties contain provisions expressly referring to the principle of abuse of rights. Article 300 of the United Nations Convention on the Law of the Sea reads as follows:

State parties shall fulfill in good faith the obligations assumed under this convention and shall exercise the rights, jurisdiction and

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law) can be traced to the U.S. Supreme Court decision in *Kansas v. Colorado*, 206 U.S. 46 (1907); 2 Y.B. Intn'l L. Comm'n 65, 75, U.N. Doc. No. A/CN.4/348.

<sup>822</sup> The abuse of rights doctrine exists in U.S. law in which its various manifestations may be deemed to exist under such principles as nuisance, duress, good faith, economic waste, public policy, misuse of copy right and patent rights, and extortion among others. Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37, 40 (1995-1996).

<sup>823</sup> R.Park, *An Examination of International Environmental Racism Through the Lens of Transboundary Movement of Hazardous Wastes*, 5 IND. GLOBAL LEGAL STUD. 659, 680 (1998).

<sup>824</sup> Alexander C. Kiss, *Abuse of Rights* 7 ENCYCLOPEDIA OF INTERNATIONAL LAW 1, 3 (1984); Hermann Mosler, *The International Society as a Legal Community*, IV RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 153 (1974) ("What might be called substantive fundamental principles, as opposed to structural ones, would include those of the freedom of the high seas, the exploration of space and certain humanitarian rules.

The freedom of the seas principle is one of those which has changed in the course of history and has developed recently with the exploration of the continental shelf under the high seas leading to the creation of certain restrictions on the right of navigation").

freedoms recognized in this Convention in a manner which would not constitute an abuse of right.<sup>825</sup>

432. The applicability of the abuse of rights doctrine to the facts of this case is particularly appropriate in that the doctrine is often invoked when the use of a resource affects the general interests of the community and concerns an important social interest.<sup>826</sup> ICANN exercises control over an essential and global shared resource.<sup>827</sup> ICANN has been given authority over a global shared resource. When ICANN fails to exercise its powers in good faith, as it did with respect to ICM, it violates the general principle of abuse of rights.

433. There are two main requirements that the abuse of rights doctrine imposes: (a) that there be a right to exercise discretion, (b) that discretion be exercised fairly and for the proper ends.

**a. Ultra Vires**

434. As an initial matter, the abuse of rights doctrine implies that there must be a right, pursuant to a legal instrument or enabling legislation, to exercise discretion. The control of discretionary powers and the review of certain acts on the basis that they have been exercised in

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<sup>825</sup> United Nations Convention on the Law of the SEA, 10 December 1982, UN Doc. A/CONF.62/122, 21 I.L.M. 1261, online: United Nations [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm) (date accessed: (11 January 2002)).

<sup>826</sup> H. Lauterpacht, THE FUNCTION OF THE LAW IN THE INTERNATIONAL COMMUNITY 286 (1966). *See, e.g.*, Lake Lanoux Arbitration (Fr. v. Spain), 12 U.N.R.I.A.A. (1957), in which the Tribunal stated, “the upper riparian state, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own.”

<sup>827</sup> *See* Article 3 of ICANN’s Articles of Incorporation (stating that it is dedicated to “promoting the global public interest in the operational stability of the internet.”). “This organization [ICANN] will be unique in the world—a non-governmental organization with significant responsibilities for administering what is becoming an important global resource.” Letter from Jon Postel, Director, Information Science Institute, University of Southern California, to William M. Daley, U.S. Secretary of Commerce (2 October 1998) available at <<http://www.ntia.doc.gov/ntiahome/domainname/proposals/icann/letter.htm>> (Visited December, 2008).

bad faith or unreasonably are rooted in notions similar to the doctrine of ultra vires. Ultra vires has been defined as follows:

The term ultra vires in its proper sense denoted some act or transaction on the part of a corporation, which although not unlawful or contrary to public policy if done by an individual, is yet beyond the legitimate powers of the corporation as defined by the statute under which it is formed or the statutes which they are applicable to it by its charter or memorandum of association.<sup>828</sup>

435. Thus any action undertaken in the absence of rights expressly provided in ICANN's Bylaws may be deemed ultra vires and an abuse of ICM's rights. ICANN's actions that exceeded its mission and purpose, as defined by its founding documents, were already discussed above.

**b. Fictitious Use of Discretion (*Detournement De Pouvoir*)**

436. The abuse of rights principle also prohibits the misuse of powers granted to an authority. Powers must be exercised reasonably and diligently.<sup>829</sup> This includes a prohibition on the fictitious exercise of a right, meaning that parties are precluded from providing legal justification for what is in fact an unlawful act. In other words, an entity exercising discretionary powers must have bona fide reasons for what it does.<sup>830</sup>

437. The abuse of rights principle requires that the exercise of a given right, authority, or discretion be undertaken for the end for which the right or discretion is conferred. The Appellate Body of the World Trade Organization ("WTO") relied on the abuse of rights principle

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<sup>828</sup> HALISBURY'S LAWS OF ENGLAND 404 (1932).

<sup>829</sup> JB MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1, 572-573 (1889) ("... a diligence proportioned to the magnitude of the subject and to all the dignity and the strength of the power which is exercising it.").

<sup>830</sup> For example, the ECJ has consistently held that a misuse of powers occurs when a community institution adopts a measure with the exclusive or main purpose of achieving an end other than that stated or to evade a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case. *See, inter alia*, Case C-84/94, United Kingdom v. Council, 1996 E.C.R. I-5755, para. 69; Case C-48/96 P Windpark Groothusen v. Commission, 1988 E.C.R. I-2873, para. 52.



when considering the article XX argument advanced by the United States to exempt itself from an obligation relating to the conservation of exhaustible natural resources. Referencing Bin Cheng, the Appellate Body held as follows:

The chapeau of Article XX, is in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.' An abusive exercise by a member of its own treaty right thus results in a breach of the treaty rights of the other members and, as well, a violation of the treaty obligation of the member so acting.<sup>831</sup>

438. Rights may not be exercised in a manner utterly different than that for which the right was originally granted. WTO Tribunals have consistently held that while the exceptions to WTO Agreements may be invoked as a legal right they should not be applied in a disguised manner. In the *Standard for Reformulated and Conventional Gasoline* the WTO Appellate Body noted as follows with respect to the proper invocation of exceptions:

While the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied so as to frustrate or defeat the legal obligation of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling with the particular exception must be applied reasonably with due regard to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.<sup>832</sup>

Thus, the abuse of rights doctrine requires that there be a legal right to exercise discretion, and that the discretion be exercised reasonably for the proper ends.

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<sup>831</sup> Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, para. 158, WT/DS58/AB/R (1998).

<sup>832</sup> Appellate Body Report, *United States - Standard for Reformulated and Conventional Gasoline and Like Products of National Origin*, para. 22, WT/DS58/AB/R (1996).

439. ICANN's actions were in violation of the abuse of rights principle. As already discussed in greater detail above, ICANN not only exercised its powers to regulate content on the Internet (in excess of its mission and purpose), but it also provided fictitious reasons for its denial of ICM's proposed agreement. In sum, ICANN failed to exercise its discretion reasonably and for the proper purposes – in breach of the international abuse of rights principle.

### **3. ICANN Failed to Act in Conformity With the Principle of Legitimate Expectations**

440. The proposition that the conduct of one party in any legal relationship may create reasonable and justifiable expectations on the part of the other party is an uncontroversial one. Legitimate expectation has been recognized as an important general principle—often discussed in connection with or as a component of the principle of good faith—guiding the interpretation of obligations which may arise in any legal relationship. In the main, the objective behind the application of the principle has been to emphasize predictability and security that are the mainstay of legal relations, and are meant to ensure that conduct or undertakings by one party do not occur to the detriment of another so as to undermine the very spirit or purpose of a legal bond. As explained by Professor Brownlie, “the applicable law should be applied in a manner which is compatible with the shared expectations of the parties.”<sup>833</sup>

441. In the *India Patents* case, the WTO tribunal acknowledged that “the protection of legitimate expectations of Members regarding the conditions of competition is a well established

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<sup>833</sup> Ian Brownlie, *Some Questions Concerning the Applicable Law in International Tribunals*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21<sup>ST</sup> CENTURY, ESSAYS IN HONOR OF KRZYSTOF SKUBISZEWSKI 768* (J. Makarczyk, ed., 1996).

GATT principle.”<sup>834</sup> The Tribunal also noted that although the GATT was agreed to by States, such agreements were undertaken for the benefit of individuals and corporations.<sup>835</sup>

442. The concept of legitimate expectations is also one of the most important and commonly invoked general principles of European Community law.<sup>836</sup> The concept of legitimate expectations – promoting greater certainty – can be found in every member country of the European Union. The protection of legitimate expectation in the context of the EC has been summarized as follows:

First, the protection of legitimate expectations in EC law developed initially in relation to the revocation of administrative decisions. It has however been extended to representations, as opposed to formal decisions. The applicant will have to show that the representation gave rise to a legitimate expectation, but such an expectation can, in principle, be based on a representation as well as a former decision.<sup>837</sup>

443. In *EC Classification of Certain Computer Equipment*, the panel accepted that legitimate expectations are a “vital element in the interpretation of Article II (National Treatment) and tariff schedules.”<sup>838</sup> The panel agreed to invoke the substantive concept of legitimate expectations in assessing whether the European Community classified certain equipment under one heading of the tariff schedule rather than another on the basis of the U.S.

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<sup>834</sup> Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, para. 7.22, WT/D50/R (1997).

<sup>835</sup> Panel Report, *United States - Sections 301-310 of the Trade Act of 1974*, para. 7.77-7.81 WT/DS152/R (22 Dec. 1999), in which the panel endorsed the view that although the GATT was agreed to by States, such agreements were undertaken for the benefit of individual citizens and corporations.

<sup>836</sup> TAKIS TRIDMAS, *GENERAL PRINCIPLES OF COMMUNITY LAW*; SOREN SCHONBERG, *LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW*. The principle of legitimate expectations is also rooted in U.S. jurisprudence under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendment to the U.S. Constitution. Elizabeth Snodgrass, *Protecting Investor’s Legitimate Expectations – Recognizing and Delimiting a General Principle*, 21(1) ICSID FILJ 1, 28.

<sup>837</sup> P. CRAIG AND G. DE BURCA, *EU LAW: TEXT, CASES AND MATERIALS* 282-284 (2003).

<sup>838</sup> *European Communities – Customs Classification of Certain Computer Equipment*, para. 8.24, WT/DS62/R (1998).

contention that it reasonably expected the EC to treat the equipment as falling into a more favorable category. The U.S. argued that such an understanding was reasonable by referring to the negotiating history between the two parties and what had been agreed to regarding tariff concessions.

444. The doctrine of legitimate expectations has been relied upon by World Bank Administrative Tribunals to ascertain the right of individuals. In *Bigman*, the Tribunal held that surrounding circumstances may create rights. The tribunal upheld a promise by an administrator to undertake to convert an individual employee's appointment to a permanent position.<sup>839</sup> In the more recent *Prescott* case, the Tribunal similarly found that a legitimate expectation had been established when a staff member had been repeatedly assured that his regularization would be considered and such representations ultimately proved untrue.<sup>840</sup>

445. The doctrine of legitimate expectations was also relied upon by the CAS in the previously discussed case, *Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*. In it, the UEFA adopted a new rule restricting membership after it had already issued a report recommending that the GFA be admitted to the UEFA on a provisional basis. The tribunal found the UEFA's rejection of GFA's application based on the new rule to be a violation of the general principles of good faith and fairness. It stated that "when the conduct of one party has led to raise legitimate expectations on the part of the second party, the first party is barred from changing its course of action to the detriment of the second party."<sup>841</sup>

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<sup>839</sup> World Bank Administrative Tribunal, Decision No. 209 (1999).

<sup>840</sup> World Bank Administrative Tribunal Reports, Prescott (2001), Decision No. 253 par. 25.

<sup>841</sup> *Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*, Arbitration CAS 2002/O/410 (Award of 7 October of 2003)(emphasis added).

446. A number of investor-States tribunals have concluded that interference with legitimate expectations constitutes a denial of fair and equitable treatment.<sup>842</sup> In *Tecmed*, the tribunal was required to examine the justifications presented by the Mexican Government for denying the issuance of a permit. It concluded that the decision to deny the investor the requisite license was not, as ostensibly stated, prompted by a public health, environmental concerns, but represented the government's response to "community pressure" and political circumstances. The Tribunal invoked the investor's legitimate expectations when considering whether the government's actions were justified. The starting point for determining whether legitimate expectations have been violated is the set of laws in place at the time of investment. This principle, applied in the investor-State context, was expressed by the *Saluka v. Czech Republic* tribunal as follows:

An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.<sup>843</sup>

447. In addition to the applicable rules or laws at the time of investment, any assurances provided to the investor (or in this case, the applicant) should also be considered. As stated by the *Waste Management* tribunal, "In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on

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<sup>842</sup> See e.g., *International Thunderbird Gaming Corp. v. United Mexican States* (NAFTA) Separate Opinion of Thomas Walde (26 Jan. 2006) (accepting that the "the principle of legitimate expectations forms part, i.e. a subcategory, of the duty to afford fair and equitable treatment" to investors).

<sup>843</sup> *Saluka* at para. 301.

by the claimant.”<sup>844</sup> Finally, the protection of legitimate expectations is balanced by the regulators right to regulate (usually the host State, here ICANN).<sup>845</sup>

448. The principles highlighted by the tribunals in the cases cited above are applicable here. In *Tecmed*, for example, the tribunal found that, upon making its investment, the “fair expectations of the Claimant were that the Mexican laws applicable to such investment . . . would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws.”<sup>846</sup> Instead, the government’s refusal to renew the claimant’s permit in *Tecmed* was “*actually* used to permanently close down a site whose operation had become a nuisance due to political reasons relating to the community’s opposition. . . .”<sup>847</sup> Accordingly, the *Tecmed* tribunal held that Mexico’s behavior amounted to a violation of the duty to accord fair and equitable treatment.<sup>848</sup>

449. Like the claimant in *Tecmed*, ICM expected that ICANN would use its powers for purposes consistent with its Articles and Bylaws, namely to coordinate at a technical level the allocation of top-level domains and to coordinate policy development related to that technical function. Instead, ICANN used its discretion to reject Claimant’s application in order to foreclose the possibility of a .XXX top level domain for political reasons.

450. The Tribunal in *CMS v. Argentina* concluded that Argentina had “breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon

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<sup>844</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 (Award of 30 April 2004), para. 98

<sup>845</sup> *See Saluka* at para. 306.

<sup>846</sup> *Tecmed* at para. 157.

<sup>847</sup> *Tecmed* at para. 164 (emphasis added).

<sup>848</sup> *Tecmed* at para. 174.

[which] the foreign investor was induced to invest.”<sup>849</sup> In *MTD v. Chile* the Tribunal highlighted the Government’s approval of the project and referred to it as “a key element in the consideration of whether the Respondent fulfilled its obligation to treat the Claimant fairly and equitably.”

451. Moreover, there is no particular form of conduct that gives rise to a reasonable or legitimate expectation. In *SPP v. Egypt*, the tribunal held that “whether legal ... or not *these acts* created expectations protected by established principles of law.”<sup>850</sup> In *Tecmed*, the Tribunal identified a legitimate expectation based on an unwritten agreement between the investor and the authorities.<sup>851</sup> Similarly, in *Azurix v. Argentina*, the Tribunal concluded that protected expectations “are not necessarily based on a contract but on assurances explicit or implicit, or on representations made by the State which the investor took into account in making the investment.”<sup>852</sup>

452. ICM’s well founded expectations that ICANN would adhere to its declared procedures were reinforced by the Explanatory Notes issued by ICANN as part of the 2004 RFP. The ECJ has considered the significance of such guidelines and similar documents outlining an organization’s approach to regulatory procedures and has confirmed that such devices may provided the basis for the reasonable development of a legitimate expectation. In the *Louwage v. Commission* case the ECJ held as follows:

[A]lthough an internal directive has not the character of a rule of law which the administration is always bound to observe, it nevertheless sets forth a rule of conduct indicating the practice to be followed, from which the administration may not depart without

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<sup>849</sup> *CME Czech Republic BV (The Netherlands) v. Czech Republic*, UNICTRAL (Partial Award) at para. 392.

<sup>850</sup> *Tecmed* at paras. 82-83.

<sup>851</sup> *Id.* at para. 160.

<sup>852</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 (Award of 23 June 2006), para 318.

giving the reasons which have led it to do so, since otherwise the principle of equality of treatment would be infringed.<sup>853</sup>

These cases confirm that little in the way of formal requirements are necessary to create legitimate expectations.

453. It should also be emphasized that the protection of legitimate expectation need not be necessarily based on fully acquired rights. In the *Schufeldt* case, the government was held to its commitment even though the parties had not entered into a legally binding agreement.<sup>854</sup> Similarly, in *Biloune v. Ghana*, the subject property was not a full-fledged going concern given the absence of his receipt of a formal approval. The tribunal held that the reality that the administrative authorities were aware of the efforts of the investor to establish a concession was sufficient to ensure the application of legitimate expectation type analysis.<sup>855</sup>

454. In this case, based on ICANN's description of the application process, the ICANN Board's approval of ICM's application on 1 June 2005, and the manner in and alacrity with which other applicants and applications were treated, ICM had a legitimate and well founded expectation that its proposed registry agreement would be approved. In light of the procedural safeguard of a two step approval process, ICM could not have known that its approval for having met the RFP criteria could later be reversed. This was particularly the case given the private assurances that ICM received from ICANN confirming that ICANN would faithfully adhere to its procedures and refrain from deviating from its previous practice. By rejecting ICM's application on the basis of subsequently defined criteria that were not part of the original RFP,

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<sup>853</sup> Case No. 148/73, 1974 E.C.R. 81, para. 12 *recited in* LINDA SENDEDE, SOFTLAW IN EUROPEAN COMMUNITY LAW 412 (2004).

<sup>854</sup> *Schunfeld Case* (U.S. v. Guatemala), II Rep. Intn'l. Arb. Awards 1081 (1930).

<sup>855</sup> *Biloune and Marine Drive Complex Ltd. v. Ghana Investment Centre and the Government of Ghana*, UNCITRAL (Award of 1989 and 1990) in XIX Y.B. Comm. Arb. 11 (A.J. van den Berg, ed. 1994).



having previously approved it, and by denying ICM a registry agreement, notwithstanding ICM's good faith participation in negotiations following the approval of its application, ICANN violated ICM's legitimate expectations. In so doing, it acted inconsistently with its Articles of Incorporation and Bylaws, in particular Article 9 of ICANN's Articles of Incorporation.

#### **4. ICANN Should be Estopped From Withholding Approval of ICANN's Application**

455. The Tribunal in *Amco Asia v. Indonesia* examined the concept of estoppel, noting that it is "based on the fundamental requirement of good faith, which is found in all systems of law, national as well as international."<sup>856</sup> The Tribunal stated as follows:

A State must not be permitted to benefit by its own inconsistency to the prejudice of another State (Vice-President Alfaro in the case concerning Temple of Preah Vihear, Cambodia v. Thailand, 1962 I.C.J. Rep. 6, 39-51).

Although this dictum refers to activities of States, *the Tribunal is of the view that the same general principle is applicable in international economic relations where private parties are involved*. In addition, the Tribunal considers that, in particular for its applications in international relations, the whole concept is characterized by the requirement of good faith.<sup>857</sup>

Thus, there is no doubt that parties such as ICANN are subject to the principle of estoppel and cannot be permitted to benefit by its own inconsistency, as ICANN seeks to do.

456. Good faith and estoppel also protect a party's reliance on the statements of another party:

Representations . . . may be made expressly or impliedly where, upon a reasonable construction of a party's conduct, the conduct presupposed a certain state of act to exist.

Assuming that another party to whom the statement is made acts to its detriment in reliance upon that statement or from that statement

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<sup>856</sup> *Amco*, Decision on Jurisdiction of September 25, 1983, I.L.M. vol. 23 (1984), p. 551, para. 47 (emphasis added).

<sup>857</sup> *Id.*

the party making the statement secures some advantage, the principle of good faith requires that the party adhere to its statement whether it be true or not. It is possible to construe the estoppel as resting upon a responsibility incurred by the party making the statement for having created an appearance of act, or as a necessary assumption of the risk of another party acting upon the statement.<sup>858</sup>

Thus, the good faith and estoppel principles are closely linked to the binding nature of unilateral statements. Where a party relies to its detriment on the statements of another party, good faith requires that the party adhere to its statement.

457. Similarly, the *Land, Island and Maritime Frontier Dispute* described the concept of estoppel as “a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it.”<sup>859</sup> In *Phillips Petroleum Co. Iran v. The Islamic Republic of Iran*, the Iran-U.S. Claims Tribunal relied upon the general principle of estoppel in a case regarding the nationalization of an American company’s oil concession.<sup>860</sup> The Iranian Government argued that it was within its right to expropriate the subject company since Phillips was liable for breaching a contract by carrying out bad oil field practices. The tribunal held that Iran was estopped from claiming that the companies’ practices, which had previously been acquiesced to, were now alleged to violate the agreement. These cases demonstrate the potentially binding nature of statements made by a party that are relied upon, as well as the inability of a party to benefit from its own inconsistent positions.

458. In this case, ICANN has failed to act in conformity with good faith in its evaluation and ultimate rejection of ICM’s application. As detailed above, ICANN went through

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<sup>858</sup> D.N. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 Brit. Y.B. Intn’l. Law 176 (1957).

<sup>859</sup> Application by Nicaragua to Intervene, (El Sal. v. Hond.) 1990 ICJ Rep 92, 118.

<sup>860</sup> *Phillips Petroleum Co. v. Iran*, 21 Iran-U.S. Claims Tribunal Rep. 79 (1989).

a lengthy process in developing the RFP which included multiple opportunities for input from the GAC or any other interested governments. During this process, the possibility of a TLD for adult content was on the radar. Not only had ICM applied for such a TLD before, but it was discussed as a possibility for the 2004 round. At no time did the GAC ever provide any input and nor did ICANN develop any special rules governing the treatment of an application for an adult-content TLD. In short, there were no special rules governing the evaluation of an adult-content TLD at the time that ICM submitted its application for the .XXX sTLD. Accordingly, ICM submitted its application based on the selection criteria defined in the sTLD application that were to be applied objectively to all applications, regardless of the content of the websites which were to be registered in the domain. ICM was assured by ICANN throughout the negotiations that the process was on track and that the application criteria had been met. ICM was in fact encouraged to withdraw its Request for Reconsideration and continue negotiations.<sup>861</sup> Nevertheless, ICANN rejected ICM's application based on concerns about public policy – which was not one of the stated criteria for evaluation. In doing so, ICANN acted in breach of the principles of good faith and estoppel and should be barred from benefiting from its own inconsistency. ICM was justified in relying, to its detriment, on the statements that ICANN would evaluate applications based on objective criteria and that its application was on track.

459. Not only did ICANN stray from the stated criteria for evaluation of sTLD applications, but it also strayed from its two-step process for the consideration, approval, and implementation of the submitted applications.<sup>862</sup> The process was to first involve a review of the application by a panel of independent evaluators, and then, once “having passed that hurdle, the applicant would enter into technical and commercial negotiations with the target of establishing

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<sup>861</sup> Burr Witness Statement, paras. 41, 46, 68; Lawley Witness Statement, paras. 49, 60.

<sup>862</sup> *See supra* paras. 114-119.

the new sponsored top-level domains.”<sup>863</sup> ICM, however, passed to the second stage of entering negotiations, but was ultimately rejected by ICANN for not satisfying the criteria in the first stage – notwithstanding that ICANN’s Board had unconditionally approved ICM’s application by vote on 1 June 2005. ICANN’s upheaval of its two-step process with respect to its evaluation of ICM’s application was inconsistent with its stated process, in complete breach of the good faith principle. ICANN cannot benefit from its inconsistencies to the detriment of ICM under the international law principles of good faith and estoppel.

**X. ICANN’S ACTIONS WERE INCONSISTENT WITH ITS ARTICLES OF INCORPORATION AND BYLAWS UNDER RELEVANT PRINCIPLES OF CALIFORNIA LAW**

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460. ICANN’s actions were also inconsistent with its Articles of Incorporation and Bylaws under relevant principles of California law.

461. Given that the issues presented by this case involve an international regulatory authority exercising plenary control over a global resource, it is understandable that the relevant California precedents are fewer in number – and are based on facts that are generally less analogous – than the relevant precedents under international law. But the fundamental principles are essentially the same.

462. Thus, under California law, as under international law, ICANN’s Articles and Bylaws must be interpreted and enforced according to their terms. Under California law, as under international law, ICANN must act within the scope of, and according to the principles and procedures set forth in, ICANN’s Articles of Incorporation and Bylaws. Under both bodies of law, ICANN must carry out its activities in a manner that is rationally related to its purpose, as

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<sup>863</sup> See supra at para. 117, citing Kurt Pritz, sTLD Update, ICANN Public Forum—Part 1, Cape Town, South Africa, 3 Dec. 2004: Real-Time Captioning, *available at* <http://www.icann.org/meetings/capetown/captioning-public-forum-1-03dec04.htm>.

set forth in its Articles and Bylaws, and in a manner that is procedurally fair. And under both bodies of law, ICANN must act in a manner that is nondiscriminatory.

463. The interaction between the provisions of ICANN’s Articles and Bylaws on the one hand, and relevant principles of California law on the other, is similar to that between the provisions and relevant principles of international law. That is, many of the provisions – *e.g.*, that ICANN is to apply “documented policies neutrally and objectively, with integrity and fairness, “to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness,” and to avoid discriminatory treatment “unless justified by reasonable cause” – are consistent with and reinforced by relevant principles of California law.

464. In ICANN’s brief discussion of law in its Response to ICM’s Request for Independent Review, ICANN fails to mention any of these principles, and instead attempts to hide behind the California business judgment rule and the related doctrine of judicial deference,<sup>864</sup> both of which are entirely inapplicable to these proceedings. Before turning to the principles of California law that properly bear on the interpretation and application of ICANN’s Articles and Bylaws, we first explain why the business judgment rule and the doctrine of judicial deference have no place in this Independent Review Process – and why ICANN’s invocation of them is just another attempt by ICANN to evade the accountability and transparency provisions of its own governing documents.

**A. California’s Business Judgment Rule and Doctrine of Judicial Deference Have No Application to this Independent Review Process**

465. According to ICANN’s Response,

American jurisprudence has consistently applied a presumption of good faith to the decision-making process of a corporation’s board

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<sup>864</sup> See ICANN Response at 85-93.

of directors. Indeed, this presumption ordinarily “precludes *judicial* inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.” If the good faith presumption is not rebutted, a *court* will not substitute its judgment for that of the board.<sup>865</sup>

ICANN proceeds to invoke the business judgment rule and the doctrine of judicial deference, asserting that the “courts of California are clear that not-for-profit corporate decisions are protected from *judicial* scrutiny because of the good faith presumption that applies to the board’s activities.”<sup>866</sup>

466. As ICANN’s own assertions demonstrate, the business judgment rule and the doctrine of judicial deference were designed to insulate corporate directors from liability in *court* proceedings, to prevent the uninvited intrusion of *courts* into the day-to-day activities of corporate boards, and to prevent *courts* from “second-guessing” the good faith decisions of corporate directors.

467. The present proceedings are not taking place in court. Rather, they have been established *by ICANN itself* in order to serve ICANN’s stated principles of accountability and transparency. In ICANN’s Bylaws, the purpose of the “**ACCOUNTABILITY AND REVIEW**” provisions – including the IRP provisions – is set forth as follows:

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 1 of these Bylaws. The provisions of this Article, creating processes for reconsideration and *independent review* of ICANN actions and periodic review of ICANN’s structure and procedures, *are intended to reinforce the various accountability mechanisms* otherwise set forth in these Bylaws, *including the transparency provisions of Article III* and

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<sup>865</sup> ICANN Response at 91(emphasis added) (citing 18B Am. Jur. *Corporations* § 1476) (other footnotes omitted).

<sup>866</sup> ICANN Response at 92 (emphasis added).

the Board and other selection mechanisms set forth throughout these Bylaws.<sup>867</sup>

Again, ICANN's President, Paul Twomey, testified before the U.S. Congress that the Independent Review Process is intended to be the "*final method of accountability* . . . under the bylaws."<sup>868</sup>

468. Unfortunately, the argument that ICANN now puts before this Panel – that the Panel must be “deferential” to the Board’s decisions, which “should not be questioned absent a showing of bad faith”<sup>869</sup> – is yet another attempt to eviscerate the high standards of accountability that ICANN’s Articles and Bylaws establish for the ICANN Board, and which ICANN has widely trumpeted to support its assertion that it is not exercising plenary authority over a global resource without any independent mechanism to ensure its accountability. The principle that ICANN must be “accountable to the community for operating in a manner that is consistent with [its Articles and Bylaws]” (as set forth in Article IV of the Bylaws) – and the notion that ICANN’s decisions should never be questioned absent an affirmative showing that the Board acted in “bad faith” in reaching those decisions (as argued in ICANN’s Response) – cannot be reconciled.

469. ICANN is effectively asking the Panel to ignore the plain language of its constitutive documents in favor of rules that have no applicability to these proceedings – proceedings which ICANN itself established as a “final method of accountability” for the ICANN Board. The irony is that ICANN’s attempt to escape its accountability provisions – if successful – will only leave ICANN more vulnerable to the undue influence of whatever

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<sup>867</sup> ICANN Bylaws, Article IV, sec 1.

<sup>868</sup> *Hearing Before the H. Subcommittee on Commerce, Trade, and Consumer Protection and Subcommittee on Telecommunications and the Internet of the Committee on Energy*, 109th Cong. 19 (2006).

<sup>869</sup> ICANN Response at 40.

governmental (and perhaps other) forces happen to be in a position to exert pressure on ICANN at any given time, on any given issue.

470. Moreover, while relying on judicial rules that have no applicability to these proceedings, ICANN fails even to represent accurately those rules as they would be applied in the California courts. Thus, while ICANN cites cases invoking the “business judgment rule,”<sup>870</sup> that rule would have no application to this case even if it were in court, because it applies only to protect individual directors from liability. As the California Supreme Court held in *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n* (the lead case cited in ICANN’s Response):

[W]hat we have previously identified as the “business judgment rule” . . . does not apply directly to this case . . . , as no individual directors are defendants here.<sup>871</sup>

Moreover, the Court held, the business judgment rule does not apply when only declaratory or injunctive relief, as opposed to liability, is sought.<sup>872</sup> As this Independent Review Process obviously does not seek to establish liability against individual directors, the business judgment rule has no application in any event.

471. Nor does the rationale behind the business judgment rule have any application in this case. As the Court explained in *Lamden*, the business judgment rule has been justified primarily on two grounds. First, “directors should be given wide latitude in their handling of corporate affairs because the hindsight of the judicial process is an imperfect device for evaluating business decisions.”<sup>873</sup> But here, ICANN’s Bylaws established an Independent

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<sup>870</sup> ICANN Response at 29.

<sup>871</sup> *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 980 P.2d 940, 945 (Cal. 1999).

<sup>872</sup> *Id.* Although arising from the common law, the business judgment rule is codified by statute in California, both for profit corporations (Cal. Code. sec. 309) and nonprofit corporations (Cal. Code. sec. 7231). The presumption of good faith meant to protect directors from actions for liability is contained within these statutory provisions, which have no application to these proceedings.

<sup>873</sup> *Lamden*, 980 P.2d at 946.



Review Process for the specific purpose of providing an independent mechanism for evaluating the Board's decisions to ensure that they are in compliance with ICANN's Articles and Bylaws (including the relevant principles of international and local law that are incorporated therein).

472. The second justification for the business judgment rule is that “shareholders to a very real degree voluntarily undertake the risk of bad business judgment; investors need not buy stock, for investment markets offer an array of opportunities less vulnerable to mistakes in judgment by corporate officers.”<sup>874</sup> This justification on its face is inapplicable to this case, and was obviously never intended for the regulatory/standard-setting function that ICANN is charged with carrying out.

473. The related doctrine of judicial deference also has no application to these proceedings, and would not have any application even if these proceedings could somehow be transposed to a court. The doctrine was articulated by the California Supreme Court in *Lamden*, which involved claims for injunctive and declaratory relief against a homeowners' association. The *Lamden* Court set forth a limited doctrine under which, with respect to ordinary, day-to-day activities affecting an entity's “economic decisions” – and where the entity's board has otherwise acted in good faith, in accordance with its governing documents, with fair procedures, and in a nondiscriminatory manner – the “courts should defer to the board's authority and presumed expertise.”<sup>875</sup> At issue in *Lamden* was whether the board of directors of a homeowners association had chosen the appropriate method of termite remediation with respect to one of the homeowner's condominiums. The Court explained its rationale for the holding:

Common sense suggests that judicial deference in such cases as this is appropriate, in view of the relative competence, over that of

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<sup>874</sup> *Lamden*, 980 P.2d at 946 (quoting *Frances T. v. Village Green Owners Ass'n*, 723 P.2d 573 (Cal. 1986)).

<sup>875</sup> *Lamden*, 980 P.2d at 950.

courts, possessed by owners and directors of common interest developments to make the detailed and peculiar economic decisions necessary in the maintenance of those developments.<sup>876</sup>

474. Even if it were possible somehow to draw an analogy from the setting of *Lamden* to that of these proceedings, the rationale behind *Lamden* does not remotely apply here: ICANN's ultimate rejection of the ICM application was not a day-to-day "economic decision" rendered by the ICANN Board, but one of enormous and far-ranging consequence that goes far beyond the parties to this proceeding. As recently observed by the California Court of Appeal in *Ritter & Ritter, Inc. v. Churchill Condominium Ass'n*,

[t]he *Lamden* decision was restricted to 'ordinary' decisions involving repair and maintenance actions that were 'clearly within the board's discretion under the development's governing instruments. The case gives no direction as to what standards should apply when faced with a challenge to a board action involving . . . [a situation] not pertaining to repair and maintenance actions, e.g., a decision to deny approval to an improvement project desired by an owner.<sup>877</sup>

Thus, the Court of Appeal in *Ritter* declined to apply the judicial deference rule to the comparatively larger decision of "whether to undertake building improvement projects."<sup>878</sup>

475. Moreover, not only is the judicial deference doctrine narrow, but the *Lamden* holding specifically recognized that "the role of judicial deference to board decision-making can be limited" by the association's or corporation's "governing documents."<sup>879</sup> In other words, the constitutive documents "might more narrowly circumscribe association or board discretion."<sup>880</sup>

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<sup>876</sup> *Id.* at 954.

<sup>877</sup> *Ritter & Ritter, Inc. v. Churchill Condominium Ass'n*, 166 Cal. App. 4th 103, 122 (Cal. App. 2008) (quoting SPROUL & ROSENBERY, ADVISING CONDOMINIUM AND HOMEOWNERS ASSOCIATIONS sec. 2:16, at 23 (May 2002)).

<sup>878</sup> *Ritter*, 166 Cal. App. at 124.

<sup>879</sup> *Ritter*, 166 Cal. App. 4th at 122 (citing *Lamden*, 980 P.2d at 952).

<sup>880</sup> *Lamden*, 980 P.2d at 952.

Again, that is precisely what ICANN's Bylaws have done: they more narrowly circumscribed the board's discretion, by establishing an Independent Review Process to ensure that ICANN is "accountable to the community for operating in a manner that is consistent with" its Articles and Bylaws.

476. Accordingly, neither the California business judgment rule nor the judicial deference doctrine has any application to these proceedings. The propositions asserted by ICANN in its Response – that "there must be a strong presumption that the Board's decisions are not at odds with the Bylaws or Articles," that ICANN's decisions "should not be questioned absent a showing of bad faith," and that the IRP should otherwise be deferential to the ICANN Board actions at issue – have absolutely no application to this Independent Review Process. Those propositions find no support in the language of the Article and Bylaws and no support in California law as applied to this case.<sup>881</sup>

**B. ICANN Violated Its Articles and Bylaws under Relevant Principles of California Law.**

477. Putting aside California's business judgment rule and doctrine of judicial deference which, for the reasons explained above, are inapplicable to these proceedings, the relevant and applicable principles of California law are similar to the relevant and applicable

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<sup>881</sup> Similarly, the other cases cited in ICANN's Response, both from California and other American jurisdictions, are inapplicable to these proceedings. *See, Lee v. Interinsurance Exchange* 50 Cal. App. 4th 694, 714 (1996) (applying the business judgment rule to protect directors of a reciprocal insurer, who were sued in their personal capacity; the issue was the insurer's maintenance, management, and disbursement of surplus funds); *Frances T. v. Village Green Owners Assn.* 42 Cal. 3d 490 (1986) (rejecting the application of the business judgment rule to a cause of action for negligence brought by plaintiff who was raped and robbed in her dwelling); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (applying the business judgment rule in a case brought by minority shareholder challenging the validity of a corporation's self-tender for its own shares, which excluded the shareholder from making a hostile tender offer for the company's stock); *Sonny Boy L.L.C. v. Asnani*, 879 So. 2d 25 (Fla. App. 2004) (applying the business judgment rule in case brought against the board of directors of a condominium association by condominium owners; the issue was whether the board had properly maintained the condominium's common areas); *Black v. Fox Hills North Community Ass'n*, 599 A.2d 1228 (Md. App. 1992) (applying the business judgment rule to case involving a property association's decision to approve the construction of a fence).

principles of international law discussed above. Under California law, provisions in articles of incorporation and bylaws (including those of non-profit corporations) are interpreted like contract terms – according to their plain and ordinary language.<sup>882</sup> Thus, the actions of a board of directors must represent ““good faith efforts to further the purposes”” of the corporation and must be ““consistent with the [corporation’s] governing documents.””<sup>883</sup> Moreover, decisions must be made according to procedures that are ““fair and applied uniformly,”” and not in an ““arbitrary and capricious manner.””<sup>884</sup>

478. These principles of California law overlap with and reinforce many of the provisions already contained in ICANN’s Articles and Bylaws, including the provisions that require ICANN to apply “documented policies neutrally and objectively, with integrity and fairness”<sup>885</sup> and “to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”<sup>886</sup> And they are consistent with the provision in ICANN’s Bylaws that provides: “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”<sup>887</sup>

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<sup>882</sup> See, e.g., *Central Coast Baptist Ass’n v. First Baptist Church of Los Lomas*, 154 Cal. App. 4th 586, 604 (Cal. App. 2007) (interpreting a not-for-profit’s articles of incorporation, constitution, and bylaws by “applying well established rules of contract interpretation”) (citing *Concord Christian Center v. Open Bible Standard Churches*, 132 Cal. App. 4th 1396, 1408 (Cal. App. 2005)).

<sup>883</sup> *Lamden*, 980 P.2d at 949 (quoting *Nahrstedt v. Lakeside Village Condominium Ass’n*, 878 P.2d 1275 (Cal. 1994)).

<sup>884</sup> *Id.*

<sup>885</sup> ICANN Bylaws Art. I(8).

<sup>886</sup> *Id.* at Art. III(1).

<sup>887</sup> *Id.* at Article II(3).

479. Applying the principles to this case, ICANN’s actions with respect to ICM were inconsistent with ICANN’s Articles and Bylaws, under relevant principles of California law, in three general respects: (1) they were not rationally related to ICANN’s purpose and were not made in accordance with fair procedures; (2) they discriminated against ICANN; and (3) they exceeded the provisions of the Articles and Bylaws in other respects that prejudiced ICANN.

**1. ICANN’s Treatment of ICM Was Not Rationally Related to ICANN’s Purpose and Was Not Made in Accordance with Fair Procedures.**

480. As stated above, because of ICANN’s unique status as a California non-profit corporation acting as the international regulator of a critical global resource, there are no California cases involving an analogous entity. The line of California cases most analogous to the issue before the IRP involves professional associations and entities that impact the public interest.

481. In a case that reached the California Supreme Court twice, *Pinsker v. Pacific Coast Society of Orthodontists*, the Court set forth the principles that govern the admission of members to a professional association of public importance.<sup>888</sup> The Court observed that judicial review was particularly warranted given that the defendant organization held a “unique position” and an effective “monopoly” in a field that that affected the public at large.<sup>889</sup> Relying on common law principles, the Court held in *Pinsker II* that the decision on whether to admit a member had to be (1) rationally related to the association’s stated goals; and (2) made in accordance with a “fair procedure.”<sup>890</sup> Thus, a decision to reject an applicant would be reversed

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<sup>888</sup> *Pinsker v. Pacific Coast Soc’y of Orthodontists*, 526 P.2d 541 (Cal. 1974) (“*Pinsker II*”); *Pinsker v. Pacific Coast Soc’y of Orthodontists*, 460 P.2d 495 (1969) (“*Pinsker I*”).

<sup>889</sup> *Id.* at 544, 552.

<sup>890</sup> *Pinsker II*, 536 P.2d at 550 and 550 n.7. The Court specifically used the term “fair procedure” rather than “due process” “[i]n an attempt to avoid confusing the common law doctrine involved in the instant case with constitutional principles.” *Id.* The Court further observed that “[t]his requirement of

(continued...)

if “the reason underlying the rejection is irrational or . . . the organization has proceeded in an unfair manner.”<sup>891</sup>

482. In reaching its holding in *Pinsker II*, the California Supreme Court examined a line of precedent extending back to 19th century England. It specifically cited the case of *Dawkins v. Antrobus*, where an English court of appeal held in 1881 that a court would provide relief to any individual expelled from a private association who could demonstrate (1) that the society’s rules were contrary to “natural justice”; (2) that the society had not followed its own procedures; or (3) that the expulsion was maliciously motivated.<sup>892</sup> In its unanimous decision, the California Supreme Court concluded that it was especially appropriate to apply similar rules against the defendant orthodontists’ society in *Pinsker* based in significant part on its “public service” status and the fact that the society’s decisions on membership would impact the public at large.<sup>893</sup>

483. In the case of *Ascherman v. Saint Francis Memorial Hospital*, the California Court of Appeal followed the *Pinsker* decisions in considering the question of whether a bylaw of a private hospital was substantially rational and procedurally fair.<sup>894</sup> *Ackerman* involved a physician who applied to the hospital seeking staff privileges. The physician’s application was rejected without consideration because his application did not have three letters from hospital staff members, as required by a provision of the hospital’s bylaws, even though his application

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(continued ...)

procedural fairness has been an established part of the California common law since before the turn of the [19th] century.” *Id.* at 553 (citations omitted).

<sup>891</sup> *Id.*

<sup>892</sup> *Id.* (citing *Dawkins v. Antrobus* [1881] 17 Ch.D. 615).

<sup>893</sup> *Id.* at 561.

<sup>894</sup> *Ascherman v. Saint Francis Memorial Hospital*, 45 Cal. App. 3d 507, 119 Cal. Rptr. 507 (Cal. App. 1975).

was supported by twenty-two letters of reference from physicians who were not on its staff. The Court first examined the bylaws' statement of purpose, which was "[t]o insure that all patients admitted to the hospital or treated in the out-patient department, receive the best possible care."<sup>895</sup> The Court considered the requirement of obtaining letters of recommendation from the hospital's staff in the light of that purpose, together with the absence of any mechanism for challenging the hospital's determination. The Court concluded that the physician's application could not be rejected solely because of his failure to procure such endorsements "without a concurrent right in the applicant to challenge such summary action by an appropriate consideration and hearing as to his actual qualifications. . . . [T]here is too great a danger that the necessary endorsements may be arbitrarily and discriminatorily withheld."<sup>896</sup> The Court concluded that the bylaw was not substantively rational and "also violated the minimal common law standards of a fair procedure."<sup>897</sup>

484. Although ICANN is not a membership corporation or association, it is a "monopoly" that affects the "public interest." It is the world's sole gatekeeper to the enormously important and valuable TLD space. It is entirely appropriate, therefore, to require that ICANN's actions be substantively rational and based on fair procedures. That requirement is both set forth in ICANN's Articles and Bylaws as well as in California law.<sup>898</sup>

485. The principles of substantive and procedural fairness have also been applied to California non-profit entities in contexts outside of entities that affect the larger public interest.

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<sup>895</sup> 45 Cal. App. 3d at 512 (quoting Article II, section 1 of the hospital's bylaws).

<sup>896</sup> *Id.*

<sup>897</sup> *Id.* at 512-14.

<sup>898</sup> Whether and to what extent the membership and similar cases discussed in this section would be applicable to ICANN in a court action brought by ICM is not, of course, a question that needs to be addressed by the IRP. But the principles discussed in this section may assist the IRP fulfill its mandate to determine whether ICANN's Board acted consistently with the Articles and Bylaws consistent with relevant principles of California law.

*Ironwood Owners Association IX v. Solomon* involved a dispute between a homeowner and a homeowners' association, arising from the former's failure to secure the latter's approval to plant certain trees.<sup>899</sup> The Court required the homeowners' association to demonstrate, before it could take action against the homeowner, that it "followed its own standards and procedures . . . , that those procedures were *fair and reasonable* and that its substantive decision was made in *good faith*, and is *reasonable, not arbitrary or capricious*."<sup>900</sup>

486. Similarly, the dispute in *Laguna Royale Owners Ass'n v. Darger* arose when the owners of a leasehold condominium assigned their interests in the property to others.<sup>901</sup> The assignment violated the bylaws of the owners' association, which prohibited the assignment or transfer of any property interest without the consent and approval of the association. The Court held that "in exercising its power to approve or disapprove transfers or assignments, [the] Association must act *reasonably*, exercising its power in a *fair and nondiscriminatory* manner and withholding approval *only for a reason or reasons rationally related* to the protection, preservation and proper operation of the property and *the purposes of the Association as set forth in its governing instruments*."<sup>902</sup> The Court concluded that the association's refusal to consent to the transfers was unreasonable as a matter of law.<sup>903</sup>

487. The relevant facts relating to ICANN's failure to treat ICM in a manner rationally related to ICANN's goals, and to provide ICM with procedural fairness, are set forth and will not be repeated in their entirety here. In sum, ICANN did not act in a manner that was rationally related to its purpose of "overseeing operation of the authoritative Internet DNS root server . . .

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<sup>899</sup> *Ironwood Owners Association IX v. Solomon*, 178 Cal. App. 766 (Cal. App. 1986).

<sup>900</sup> *Id.* at 772 (emphasis added).

<sup>901</sup> *Laguna Royale Owners Ass'n v. Darger*, 119 Cal. App. 3d 670 (Cal. App. 1981).

<sup>902</sup> *Id.* at 680.

<sup>903</sup> *Id.*



through open and transparent processes that enable competition and open entry in Internet-related markets.”<sup>904</sup> ICANN is supposed to be charged with overseeing the technical and functional aspects of the root. Instead, ICANN based its ultimate determination on vague and unsupported assertions of “public policy” – which were introduced *after* ICM had submitted its proposal based on the technical factors, and *after* ICANN had concluded that ICM met those factors. Moreover, the “public policy” and related factors provided for by ICANN cannot withstand scrutiny (as demonstrated above). They do not have *any* rational basis, let alone a rational basis that would further ICANN’s mission as stated in ICANN’s governing documents.

488. As for procedural fairness, ICANN issued an RFP with specified criteria and a two-step procedure for the addition of new TLDs to the root. Having done so, ICANN then

- failed to follow the criteria;
- failed to follow the procedure;
- conducted contract negotiations with ICM in bad faith;
- rejected ICM’s application based on political pressure (after having previously concluded that the application met all of the RFP criteria);
- and offered reasons for rejecting the application that not only were *not* specified in the RFP, but that were plainly false and pretextual.<sup>905</sup>

489. Each of ICANN’s actions as summarized above – both collectively and individually – were inconsistent with ICANN’s Articles and Bylaws under relevant principles of California law.

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<sup>904</sup> ICANN Articles of Incorporation, Articles 3-4.

<sup>905</sup> *See supra* at para. 259.

## 2. ICANN's Actions Discriminated Against ICM.

490. As the California Supreme Court stated in *Lamden*, a board's procedures must be "fair" and they must be "applied *uniformly*."<sup>906</sup> Indeed, the California cases reviewing the actions by boards of nonprofit entities consistently hold that the boards may not act discriminatorily against members, potential members, or others who might be directly affected by board actions.

491. Thus, the Court in *Ascherman* stated the hospital could not be allowed to act "arbitrarily and discriminatorily" against applicants for hospital privileges.<sup>907</sup> The Court in *Laguna* held that the criteria for testing the reasonableness of an exercise of power by an owners' association are (1) whether the exercise of power is rationally related to the purposes of the association as set forth in its governance instruments; and (2) "whether the power was exercised in a fair and *nondiscriminatory manner*."<sup>908</sup> In *MaJor v. Miraverde Homeowners Ass'n*, the Court concluded that a homeowners association had "discriminated" between resident and nonresident members in a manner that was not authorized in its governing instruments.<sup>909</sup> Here, of course, ICANN affirmatively took on the obligation "*not . . . to single out any particular party for disparate treatment, unless justified by substantial and reasonable cause . . .*"<sup>910</sup>

492. Again, the facts demonstrating that ICANN unreasonably discriminated against ICM are set forth at length above. In sum,

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<sup>906</sup> *Pinsker*, 980 P.2d at 949 (emphasis added).

<sup>907</sup> *Ackerman*, 45 Cal. App. 3d at 512.

<sup>908</sup> *Laguna*, 119 Cal. App. 3d at 683-84 (emphasis added).

<sup>909</sup> *MaJor v. Miraverde Homeowners Ass'n*, 7 Cal. App. 4th 618,

<sup>910</sup> *Id.* at Art. II(3). California courts have recognized the concept of discrimination outside the context of discrimination based on race, religion, and similarly illegal bases. The test is straightforward: whether similarly situated persons are subject to different treatment, without any rational basis for such different treatment. For example, in the context of determining whether a tax operates in a discriminatory manner, the test is simply whether "similarly situated taxpayers are assessed at different tax rates." *City of Medesto v. National Med, Inc.*, 128 Cal. App. 4th 518, 525 (Cal. App. 2005).

- ICANN applied different evaluation criteria to the ICM application than it did to other applications, which were approved using the initially stated criteria under the RFP (or even more lenient versions thereof);
- ICANN applied the new and unstated criteria only to ICM;
- ICANN applied a different standard for defining “community” to ICM;
- ICANN applied a different standard for “community support” to ICM;
- ICANN imposed different requirements for contract terms on ICM;
- ICANN departed from the two-step procedure only with respect to ICM;
- ICANN required ICM, and only ICM, to undergo a second board vote as to whether ICM met the proposal criteria (with the board voting “yes” the first time and “no” the second time).

493. This discriminatory treatment was not justified by any “substantial reasonable cause.” There is nothing in the ICANN Articles and Bylaws that would allow ICANN to treat ICM differently because certain elements asserted that the ICM proposal was “controversial.” Moreover, as discussed in detail above, the reasons that ICANN cited as the basis for its denial of ICM’s application were false and pretextual – a mere cover for ICANN’s bowing to undue political pressure.

494. Here, too, ICANN’s actions were inconsistent with ICANN’s Articles and Bylaws, and with relevant principles of California law.

**3. ICANN’s Actions Impermissibly Exceeded the Provisions of the Articles and Bylaws in Other Key Respects that Prejudiced ICANN.**

495. California nonprofit corporations have significant freedom to define their governing principles.<sup>911</sup> Indeed, “[t]he articles of incorporation may set forth . . . [a]ny other provision, not in conflict with law, for the management of the activities and for the conduct of the affairs of the corporation . . . .”

496. However, once an organization defines its scope, it must not act in excess of it. In determining whether a board has exceeded or acted inconsistently with its authority, courts in California have looked to “the governing instruments for guidance in determining whether the association has acted within its authority.”<sup>912</sup> “Actions taken in excess of the association’s power are unenforceable . . . .”<sup>913</sup> In *MaJor v. Miraverde Homeowners Ass’n*, the California Court of Appeal held that “where an association exceeds the scope of its authority, any rule or decision resulting from such an ultra vires act is invalid whether or not it is a ‘reasonable’ response to a particular circumstance.”<sup>914</sup>

497. The term “ultra vires . . . ‘refers to an act which is beyond the powers conferred upon a corporation by its charter or by the laws of the state of incorporation.’”<sup>915</sup> The ultra vires doctrine has historically applied to a corporate act that is “wholly outside the scope of the

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<sup>911</sup> Cal. Corp. Code § 5132(c)(5) (West 1990).

<sup>912</sup> *MaJor*, 7 Cal. App. 4th at 627.

<sup>913</sup> *Id.*

<sup>914</sup> *Id.* at 628 (discussing at 627-28 a Florida case, *Beachwood Villas Condominium v. Poor*, 448 So. 2d 1143, 1144 (Fla. Dist. Ct. App. 1984) stating as follows: “[w]hen a court is called upon to assess the validity of a rule enacted by a board of directors, it first determines whether the board acted within its scope of authority, and second, whether the rule reflects reasoned or arbitrary and capricious decision making.”).

<sup>915</sup> *Sammis v. Stafford*, 48 Cal. App. 4th 1935, 1942 (Cal. App. 1996) (quoting *Marsili v. Pacific Gas & Elec. Co.*, 51 Cal. App. 3d 313, 322 (1975)). Regardless of whether ICM could assert “ultra vires claims” against ICANN under current California law, the doctrine is nonetheless instructive in determining whether ICANN has acted consistently with its Articles and Bylaws.

purposes for which the corporation was formed or has its being, and which it has no authority to perform under any circumstances or in any way or mode,” but also to “when the corporation is not authorized to perform [the act] for the specific purpose or in the particular manner involved, notwithstanding it may be within the scope of its general powers.”<sup>916</sup>

498. The latter application of the ultra vires doctrine is particularly applicable here. While it is within the general scope of ICANN’s powers to coordinate top-level domains, ICANN was not authorized to exercise its discretion in doing so to achieve a purpose other than that stated in its founding documents or to do so in the discriminatory and arbitrary manner that it did with regards to ICM’s application and registry agreement. Moreover, the doctrine of ultra vires, as recognized and established under California law, is similar to that of the abuse of rights doctrine under international law, which similarly forbids an entity from exercising a right for a purpose different from that for which the right was created.

499. All of ICANN’s actions, as discussed above, were ultra vires because they were inconsistent with ICANN’s Articles of Incorporation and Bylaws. In addition, ICANN acted ultra vires by acting in excess of its purpose and mission, and by violating the provisions of its Bylaws governing the GAC.

500. Again, ICANN’s actions in these regards, and the sections of ICANN’s Articles and Bylaws that ICANN violated by undertaking them, are set forth in detail above. In sum, ICANN’s purpose is a technical one. According to its Articles of Incorporation, ICANN is supposed to promote the “global public interest in the *operational stability* of the Internet by:”

- (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing *functions* related to the coordination of

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<sup>916</sup> *Wykes v. City Water Co.*, 184 F. 752, 755 (Circuit Court, N.D. CA, 1911) (emphasis added), *aff’d*, 202 F. 357 (9th Cir. 1913). *See also Colley v. Chowchilla Nat’l Bank*, 255 P. 188, 191 (1927) (citing *National Bank & Loan Co. v. Petrie*, 189 U.S. 423).

the Internet Protocol (“IP”) address space; (iii) performing and overseeing *functions* related to the coordination of the Internet domain name system (“DNS”), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing *operation* of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (v).<sup>917</sup>

Where ICANN is authorized to engage in “the development of policies,” it is within the context of “performing and overseeing functions related to the coordination of the . . . DNS.”

Given its *operational* and *functional* purposes, ICANN plainly acted ultra vires by rejecting ICM’s application based on reasons that were outside of ICANN’s mission to protect the “operational stability,” and to coordinate the technical functions of the DNS root server system. Instead, ICANN ultimately rested its decision on undefined and unsupported “public policy issues.” In doing so, ICANN ultimately made a subjective judgment (heavily influenced, no doubt, by the subjective judgments of others) about what *content* is appropriate for a TLD, instead of carrying out its operational and functional mission.

501. With respect to its Bylaw provisions concerning the GAC, ICANN is supposed to *consider* advice that the GAC provides in a *timely* manner. Ultimately, however, the ICANN Board is the authority that has to make the decision – applying principles that are consistent with its Articles and Bylaws – as to which new TLDs are added to the DNS root system. However, contrary to its Bylaws, ICANN allowed the GAC to raise “public policy” issues in an untimely fashion and notwithstanding the untimeliness of the GAC’s advice, deferred to it. Instead, the GAC raised “public policy” issues years into the application process – and after ICANN had already determined that ICM met the criteria that ICANN had set forth (after a lengthy notice and comment period) in the RFP. Moreover, ICANN gave unwarranted deference to the

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<sup>917</sup> ICANN Articles of Incorporation, Art. 3.

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

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

## **XI. RELIEF REQUESTED**

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

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

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

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



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

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

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

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

Respectfully submitted,

**CROWELL & MORING LLP**

By: /s/ Arif H. Ali

Arif H. Ali  
Alexandre de Gramont  
John L. Murino  
Emily Howard  
Ashley Riveira  
Sobia Haque  
1001 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Telephone: 202.624.2500  
Facsimile: 202.628.5116

**Counsel for Claimant**

22 January 2009

## Appendix A: Conclusions of the Independent Evaluators

	.ASIA	.CAT	.JOBS	.MAIL	.MOBI	.POST	.TEL (TELNIC)	.TEL (PULVER)	.TRAVEL	.XXX
<b><u>Technical Criteria</u></b>										
	Passed	Passed	Failed (but further review suggested)	No position; further review suggested	Failed	Passed	Failed	Failed	Passed (with caveats)	Passed
<b><u>Business and Financial Criteria</u></b>										
	Passed	Passed	Passed	Failed	Passed	Passed	Failed	Failed	Passed	Passed
<b><u>Sponsorship Criteria</u></b>										
	Failed, but further discussion suggested	Passed	Failed, but further discussion suggested	Failed	Failed	Passed	Failed	Failed	Failed, but further discussion suggested	Failed
<b><u>Part 1: Sponsorship Information</u></b>										
<b>A. Definition of sponsored community</b>	Failed	Passed	Failed	Failed	Failed	Passed	Failed	Failed	Passed	Failed
<b>B. Evidence of support from Sponsoring Organization</b>	Passed	Passed	Passed	Passed	Passed	Passed	Passed	Passed	Passed	Passed
<b>C. Appropriateness of Sponsoring Organization</b>	Failed	Passed	Failed	Passed (with caveats)	Failed	Passed	Failed	Failed	Failed	Failed
<b>D. Community Support</b>	Failed	Passed	Failed	Failed	Failed	Passed	Failed	Failed	Failed	Failed
<b><u>Part 2: Community Value</u></b>										
<b>A. Addition of new value to Internet name space</b>	Failed	Passed	Failed	Failed	Failed	Passed	Failed	Failed	Failed	Failed
<b>B. Protecting rights of others</b>	Failed	Passed	Passed (with caveats)	Failed	Passed	Passed	Failed	Passed	Passed	Passed
<b>C. Charter-compliant registrations, avoidance of abusive registration</b>	Failed	Passed	Passed	Passed	Passed	Passed	Passed	Passed	Passed	Passed
<b>D. Dispute resolution mechanisms</b>	Passed	Passed	Passed	Passed	Passed	Passed		Passed	Passed	Passed
<b>E. WHOIS service</b>	Passed	Passed	Passed	Passed	Passed	Passed	Passed	Passed	Passed	Passed

**Appendix B: The Board's Review of the 10 sTLD Applications**

	<b><u>.ASIA</u></b>	<b><u>.CAT</u></b>	<b><u>.JOBS</u></b>	<b><u>.MAIL</u></b>	<b><u>.MOBI</u></b>	<b><u>.POST</u></b>	<b><u>.TEL (TELNIC)</u></b>	<b><u>.TEL (PULVER)</u></b>	<b><u>.TRAVEL</u></b>	<b><u>.XXX</u></b>
<b><u>Public Forum postings</u></b>	36	26	8	74	79	12	13	28	49	63
<b><u>Evaluation results</u></b>	Failed 1— sponsorship— but further discussion suggested	Passed	Failed 2— technical and sponsorship— but further review and/or discussion suggested	Failed 2— business and sponsorship— technical team took no position and recommended further review	Failed 2— technical and sponsorship	Passed	Failed all 3— technical, business, and sponsorship	Failed all 3— technical, business, and sponsorship	Failed 1— sponsorship— but further discussion suggested; passed technical but with caveats	Failed 1— sponsorship
<b><u>Letters of support submitted</u></b>	31 official, plus about 30 emails	At least 5 – plus 60,000 letters in response to on-line petition	12	Not published	11+ (the 11 are members of sponsoring organization); 20 supporters who posted to ICANN	Not asked for letters	Not asked for letters	35 industry executives already declared public support	No responses submitted	20
<b><u>Approved to enter negotiations</u></b>	4 Dec. 2005	18 Feb. 2005	13 Dec. 2004	Application terminated in April 2005	13 Dec. 2004	27 October 2004	28 June 2005	Application did not proceed following the results of the Independent Evaluations.	18 October 2004	1 June 2005
<b><u>Draft Agreement Posted</u></b>	18 July 2006	9 Aug. 2005	24 Mar. 2005		3 June 2005		16 Mar. 2006		24 Mar. 2005	9 Aug. 2005; 18 April 2005; 5 Jan. 2007
<b><u>Official Public Comment Period for Draft Agreement</u></b>	28 July 2006 to 31 Aug. 2006	None	None		None		7 Apr. 2006 to 10 May 2006		None	Aug 2005; 18 Apr. 2006 to 10 May 2006; 5 Jan. 2007 to 5 Feb. 2007; 15 Feb. 2007 to 9 Mar. 2007
<b><u>Agreement Approved</u></b>	18 Oct. 2006	15 Aug. 2005	8 April 2005		28 June 2005		10 May 2006		8 Apr. 2005	

### **Appendix C: Chronology of Key Events**

<b>DATE</b>	<b>EVENT</b>
30 September 1998	ICANN is formally incorporated under California law.
25 November 1998	ICANN and the U.S. Department of Commerce sign the Memorandum of Understanding regarding the transition of the DNS to private management.
February 1999	ICANN assumes responsibility for the technical coordination of the DNS.
15 August 2000	ICANN posts the criteria to be used in the “proof of concept” round for assessing TLD applications. ICM Registry applies for the .XXX and the .KIDS TLDs.
16 November 2000	ICANN selects seven applications for contractual negotiations. Registry agreements are later approved for all seven, and the new TLDs are added to the DNS. .XXX is not selected but ICM’s application is praised for its well-developed marketing strategy, strong financial support, intellectual property expertise, and technical partnerships.
Mid-2003	Stuart Lawley joins ICM Registry as Chairman and CEO.
24 June 2003	ICANN posts for public comment the draft RFP for a new round of sTLD applications.
31 October 2003	The ICANN Board considers the draft RFP and the issues raised through public comments. The Board directs ICANN’s President to finalize and post an RFP for an expedited round of new sTLDs.
15 December 2003	ICANN posts the final RFP and begins accepting applications.
16 March 2004	ICM Registry submits its application for the .XXX sTLD, along with mandatory application fee of US\$ 45,000.
19 March 2004	The ICM application, and the other sTLD applications, are posted on ICANN’s website. Public comments are accepted on the applications between 2 April and 17 May. ICM’s application receives comments similar in numbers to those received by other applications; the majority of the comments to ICM’s application are positive.

DATE	EVENT
12 July 2004	The independent evaluation teams submit to ICANN the drafts of their reports on the sTLD applications. The report on ICM Registry's application finds that the application meets the business/financial criteria and the technical criteria, but not the sponsorship criteria. The Sponsorship Evaluation team concludes that seven other applications should be failed for reasons similar to their conclusions about .XXX.
31 August 2004	ICANN transmits the reports from the independent evaluation teams to the applicants. Most of the applicants fail at least one set of evaluation criteria, and ICANN requests that those applicants provide additional information. ICM Registry is asked to address the issues raised by the sponsorship evaluation team. ICM provides the ICANN Board with additional information over the next several months.
18 October 2004	.TRAVEL is approved to enter into registry agreement negotiations with no caveats.
27 October 2004	ICANN announces that .POST has entered into registry agreement negotiations.
1 December 2004	ICANN President and CEO Dr. Paul Twomey writes to GAC Chairman Mohamed Sharil Tarmizi requesting input from the GAC on public policy with regard to the sTLD process and several other issues.
13 December 2004	The ICANN Board approves .JOBS and .MOBI to enter into registry agreement negotiations, but with caveats. The .JOBS resolution directs that, during negotiations, "special consideration be taken as to how broad-based policy-making would be created for the sponsored community, and how this sTLD would be differentiated in the name space." The .MOBI resolution directs that, during negotiations, "special consideration be taken as to confirm the sTLD applicant's proposed community of content providers for mobile phones users, and confirmation that the sTLD applicant's approach will not conflict with the current telephone numbering systems."
24 January 2005	The ICANN Board engages in extensive discussion of ICM's application during its meeting, and decides to accept ICM's offer to make a presentation to the Board explaining the application.
18 February 2005	The ICANN Board approves .CAT to enter into registry agreement negotiations, but directs that negotiations occur "in conjunction with consultation with the appropriate governmental authorities."

DATE	EVENT
3 April 2005	<p>Prior to the ICANN meetings in Mar del Plata, Argentina, representatives of ICM Registry make a detailed presentation to the ICANN Board regarding the proposed sTLD. GAC Chairman Mohamed Sharil Tarmizi is present for at least part of the meeting.</p> <p>GAC Chairman Tarmizi responds to the 1 December 2004 letter from ICANN President and CEO Dr. Paul Twomey. The response states “[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round.”</p>
8 April 2005	<p>The .JOBS and .TRAVEL registry agreements are approved by the ICANN Board.</p> <p>The ICANN Board notes that there has been extensive discussion of ICM’s application, and states it will attempt to decide the issue within 30 days. GAC Chairman Mohamed Sharil Tarmizi is present for all or part of the meeting.</p>
3 May 2005	<p>The ICANN Board engages in “broad” discussion of ICM’s application, particularly the question of the sponsored community. GAC Chairman Mohamed Sharil Tarmizi is present for part or all of this meeting. The Board decides to continue the discussion at the forthcoming meeting on 1 June 2005.</p> <p>ICANN Counsel John Jeffrey approves a press release to be used by ICM Registry in the event the Board approves registry agreement negotiations with ICM. The first sentence of the approved press release states “ICANN’s board of directors today determined that the proposal for a new top level domain submitted by ICM Registry meets the criteria established by ICANN.”</p>
1 June 2005	<p>The ICANN Board discusses the ICM Registry application, then approves .XXX to enter into registry agreement negotiations, with no caveats.</p>
3 June 2005	<p>ICANN Board Member Joichi Ito writes in his blog that the Board’s “approval of .XXX is a decision based on whether .XXX met the criteria and does not endorse or condone any particular type of content or moral belief.”</p>
13 June 2005	<p>ICANN Counsel John Jeffrey assures ICM that registry agreement negotiations “should be . . . fairly straightforward.”</p>

DATE	EVENT
14 June 2005	<p>Meredith Attwell, senior policy advisor at the Department of Commerce, is trying to gather talking points on “why [.XXX] is a good thing and why we support it.”</p> <p>Political pressure on the U.S. government regarding .XXX increases, as the Department of Commerce begins monitoring letters and emails received and meets with the Family Research Council, Concerned Women For America, and other groups.</p>
28 June 2005	<p>.TEL (Telnic) is approved to enter into registry agreement negotiations.</p> <p>The .MOBI registry agreement is approved by the ICANN Board.</p>
11 July 2005	<p>ICANN President and CEO Dr. Paul Twomey and Board Chairman Dr. Vinton Cerf discuss ICM Registry’s application with the GAC at the GAC plenary meeting in Luxembourg City, Luxembourg, and remind the GAC that the application had been publicly available since March 2004. Dr. Vinton Cerf informs the GAC “[t]he [.XXX] proposal this time met the three main criteria, financial, technical, sponsorship.”</p> <p>The U.S. Representative to the GAC states that “it would be very difficult to express some views at this late stage. The process had been public since the beginning,” and also notes that the GAC had already had “several opportunities to raise questions” about the application.</p>
12 July 2005	<p>The GAC issues the “Luxembourg Communiqué,” which encourages the ICANN Board to engage in more extensive consultation with the GAC regarding matters of public policy in the future, but does not express any concern about the substance of the ICM Registry application.</p>
1 August 2005	<p>ICM and ICANN agree on the terms for the draft registry agreement – this is the First Draft Registry Agreement.</p>
9 August 2005	<p>The First Draft Registry Agreement between ICM Registry and ICANN is posted on the ICANN website for public comment. This is the first time a draft of the .XXX registry agreement is posted.</p>

DATE	EVENT
11 August to 15 August 2005	<p>The U.S. government changes its policy on .XXX and sends a letter from the head of the U.S. National Telecommunications and Information Administration (“NTIA”), discussing letters received by the NTIA opposing ICM Registry’s application and requesting ICANN delay any decision on the application.</p> <p>A similar letter is sent by GAC Chairman Mohamed Sharil Tarmizi, indicating that certain governments might be opposed and requesting more time for those governments to express their concerns.</p> <p>Evidence shows that ICANN receives the U.S. letter first, but the GAC letter is posted first, and more prominently, on the ICANN website.</p>
15 August 2005	The .CAT registry agreement is approved by the ICANN Board.
15 September 2005	<p>The ICANN Board approves a resolution directing ICANN staff to discuss with ICM additional contract provisions to ensure ICM will implement policies consistent with their application.</p> <p>ICM responds the same day with proposed revisions, but no action is taken until March 2006.</p>
4 December 2005	.ASIA is approved to enter into registry agreement negotiations, with no caveats in the resolution.
19 March 2006	ICM and ICANN staff reach agreement on a new draft of the registry agreement, the Second Draft Registry Agreement, largely based on ICM’s proposed revisions submitted on 15 September 2005. Without explanation, the Second Draft is not posted to the ICANN website.
20 March 2006	U.S. Department of Commerce, in a letter to GAC Chairman Mohamed Sharil Tarmizi, criticizes the outdated First Draft Registry Agreement, posted 9 August 2005, for failing to incorporate all of the commitments previously made by ICM.
28 March 2006	The GAC issues the “Wellington Communiqué” expressing concern that First Draft Registry Agreement, posted 9 August 2005, did not include enforceable provisions relating to the public policy commitments in ICM’s application.
31 March 2006	ICM submits further revisions to the 19 March 2006 Second Draft Registry, in response to the Wellington Communiqué. Later the same day, without reviewing any of the proposed revisions, the ICANN Board approves a resolution directing further contract negotiations.



DATE	EVENT
18 April 2006	<p>ICANN responds to the revisions to the Second Draft Registry Agreement proposed by ICM on 31 March 2006, resulting in the Third Draft Registry Agreement. A provision regarding registrants' obligations to follow "all applicable law" is added to this draft at ICANN's request.</p> <p>The Third Draft Registry Agreement is discussed by the ICANN Board and posted to the ICANN website for public comment. This is the second time a draft of ICM's registry agreement is posted.</p>
10 May 2006	<p>The ICANN Board approves a resolution rejecting the .XXX registry agreement.</p> <p>The .Tel (Telnic) registry agreement is approved by the ICANN Board.</p>
19 May 2006	ICM files a Request for Reconsideration.
30 May 2006	ICM begins a pre-reservation program, allowing web masters to pre-reserve a domain name within .XXX, entitling them to preferential registration once the domain is created. In under a year, ICM receives over 76,000 total pre-reservation requests, 71,000 of which were for unique strings. More pre-reservation requests are received even after ICANN's vote in March 2007 to reject the application, for a to-date total of over 100,000 names, over 92,000 of which are unique.
18 October 2006	The .ASIA registry agreement is approved by the ICANN Board.
29 October 2006	ICM withdraws the Request for Reconsideration, after a discussion with senior ICANN staff, citing a desire to work constructively with ICANN by submitting additional materials.
November and December 2006	ICM and ICANN continue negotiating revisions to the Third Draft Registry Agreement. During these discussions, ICM and ICANN agree to remove the provision regarding registrants' obligations to follow "all applicable law."
5 January 2007	The revised draft registry agreement, the Fourth Draft Registry Agreement, is posted on the ICANN website for public comment. This is the third time a draft of the registry agreement is posted.
2 February 2007	A letter from the GAC reaffirms that the Wellington Communiqué is the only official statement from the GAC on ICM's application or proposed registry agreement.

DATE	EVENT
12 February 2007	The ICANN Board discusses the Fourth Draft Registry Agreement and decides that, due to minor revisions to Appendix S, the registry agreement must be posted for a further public comment period of not less than 21 days; the revised agreement (the Fifth Draft Registry Agreement) is posted 16 February 2007. This is the fourth time a draft of the registry agreement is posted.
30 March 2007	The ICANN Board approves a resolution rejecting the proposed registry agreement and denying ICM's application, based on vague "public policy" and offensive content concerns, among others.

**Appendix D: Record of Board Votes on .XXX Resolutions\***

	<b>1 June 2005</b>	<b>10 May 2006</b>	<b>30 March 2007</b>
<b>Cerf, Vinton</b>	For	Against	Against
<b>Hultsch, Hagen</b>	For	Against	No longer on Board
<b>Ito, Joichi</b>	For	For	For
<b>Markovski, Veni</b>	For	For	No longer on Board
<b>Scartezini, Vanda</b>	For	Against	Against
<b>Twomey, Paul</b>	For	Against	Abstain
<b>Raimundo, Beca</b>	Against	Against	Against
<b>Pisanty, Alejandro</b>	Against	Against	Against
<b>Qian, Hualin</b>	Against	Against	No longer on Board
<b>Getschko, Demi</b>	Abstain	Against	Against
<b>Palage, Michael</b>	Abstain	No longer on Board	No longer on Board
<b>Dengate-Thrush, Peter</b>	Not Present	For	For
<b>Diop, Mouhamet</b>	Not Present	For	No longer on Board
<b>Niles, Thomas</b>	Not Present	No longer on Board	No longer on Board
<b>Rionge, Njeri</b>	Not Present	Against	Against
<b>Crawford, Susan</b>	Not yet on Board	For	For
<b>Gaetano, Roberto</b>	Not yet on Board	Not yet on Board	Against
<b>Goldstein, Steve</b>	Not yet on Board	Not yet on Board	Against
<b>Rodin, Rita</b>	Not yet on Board	Not yet on Board	Against
<b>Wodelet, Dave</b>	Not yet on Board	Not yet on Board	For
<b>Ramaraj, Rajasekhar</b>	Not yet on Board	Not yet on Board	For

\* Where “for” means in favor of approving ICM’s application or registry agreement and “against” means opposed, regardless of the wording of the resolution before the Board.

## Appendix E: Comparison of RFP Criteria and Excuses for Rejection

RFP Criteria	30 March 2007 Resolution
<ul style="list-style-type: none"> <li>• <b>Technical Standards:</b> <ol style="list-style-type: none"> <li>1. Ability to ensure stable registry operation;</li> <li>2. Ability to comply with best practice technical standards for registry operations;</li> <li>3. Provision of a full range of registry services; and</li> <li>4. Assurances of continuity of registry operation in the event of business failure of the proposed registry.</li> </ol> </li> <li>• <b>Business Plan Information:</b> <ol style="list-style-type: none"> <li>1. Financial model; and</li> <li>2. Business plan (including staffing, marketing plan, registrar arrangements, fee structure, technical resources, uniqueness of application, and engagement with and commitment to the Sponsoring Organization).</li> </ol> </li> <li>• <b>Sponsorship Information:</b> <ol style="list-style-type: none"> <li>1. Definition of a sponsored community;</li> <li>2. Support by a Sponsoring Organization;</li> <li>3. The appropriateness of the Sponsoring Organization and the policy formulation environment (to operate in the best interests of the sTLD community and have the appropriate policy-formulation role); and</li> <li>4. Evidence that the application had broad-based support from the community to be represented.</li> </ol> </li> <li>• <b>Community Value (also called “Other Issues”):</b> <ol style="list-style-type: none"> <li>1. Addition of value to the Internet name space;</li> <li>2. Protection of the rights of others;</li> <li>3. Assurances of charter-compliant registrations and procedures to avoid abusive registration practices;</li> <li>4. Assurances of adequate dispute-resolution mechanisms; and</li> <li>5. Provision of ICANN-policy compliant WHOIS services.</li> </ol> </li> </ul>	<ol style="list-style-type: none"> <li>1. ICM’s Application and the Revised Agreement fail to meet, among other things, the Sponsored Community criteria of the RFP specification.</li> <li>2. Based on the extensive public comment and from the GAC’s communiqués that this agreement raises public policy issues.</li> <li>3. Approval of the ICM Application and Revised Agreement is not appropriate as they do not resolve the issues raised in the GAC Communiqués, and ICM’s response does not address the GAC’s concern for offensive content, and similarly avoids the GAC’s concern for the protection of vulnerable members of the community. The Board does not believe these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant.</li> <li>4. The ICM Application raises significant law enforcement compliance issues because of countries’ varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct.</li> <li>5. The Board agrees with the reference in the GAC communiqué from Lisbon, that under the Revised Agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.</li> </ol>