

**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)	
)	

WITNESS STATEMENT OF STUART LAWLEY

I. Personal and Professional Background

1. My full name is Stuart John Lawley. I am the Chairman and President of ICM Registry, LLC ("ICM"), which was formed to serve as the registry operator for the .XXX top-level domain ("TLD"). I am an entrepreneur and an experienced chairman and chief executive, having been involved in a number of successful businesses in the United Kingdom and the United States relating to technology and the Internet. I graduated from Imperial College, part of the University of London, England in 1985 with a BSc in Engineering. I am a citizen of the United Kingdom, and I currently reside in Palm Beach, Florida.

A. Previous Business Ventures

2. My career has largely consisted of founding new businesses when I see an opportunity created by new technology. I like to start businesses from the ground up and be out in front of trends, breaking new ground, rather than playing catch-up with more established entities. My first such endeavour was a company called Eurofax, Ltd, which sold fax machines to small and medium sized businesses in England. Shortly after leaving university at the age of 23, somebody showed me a fax machine and I immediately recognized the potential—I knew every business would need to own one. I left my sales position, moved back from London to the West Midlands, and borrowed GBP 4,000 from my parents to start Eurofax. I served as the CEO of Eurofax from its inception in 1986 until its sale in 1997. During that time, the company grew from a single-person, local company to a large regional business: the company's revenue growth was consistent at a compound annual rate of over 40%, and by 1997 it employed approximately 70 people. Eurofax was so successful that I was able to identify and acquire, for cash, many other office equipment companies which were struggling, merging them with Eurofax to further grow the business.

3. Although Eurofax was not the largest business of its type, it was one of the best run and most profitable, by percentage, in the United Kingdom. For this reason, the Alto Group approached me in late 1996 about purchasing Eurofax. The Alto Group bought Eurofax in March of 1997 as part of a GBP 6.7 million transaction, and, because of my expertise and experience, I was made the CEO of Alto Group. I took part of my consideration for the Eurofax sale in the form of Alto Group shares. Alto Group, like Eurofax, was an office equipment company, but was national in scope. During my 18 month tenure as CEO of Alto Group, I helped the company double in size to over 250 employees, and the company's shares increased in value

from GBP 1 to GBP 5.50 per share. Whilst at Alto Group, I travelled to the United States to investigate expanding the business into the United States market. I did not think that the United States market was growing, and, since the United Kingdom market was generally a bit behind the United States market, I believed that the United Kingdom market for reprographic equipment had likely peaked or would soon peak.

4. During the time I spent in the United States in 1998, I realised how much the Internet was booming and decided to return to the United Kingdom and pursue a new challenge in the business-to-business (“B2B”) Internet space. I resigned my position with Alto Group and sold my shares at a profit of approximately GBP 1.5 million.

5. In early 1999, I founded Oneview.net, which has been, to date, my most successful business venture. Oneview.net was a B2B Internet service provider that encompassed web design and hosting and was dedicated to helping small businesses develop a presence on the Internet by offering one-on-one advice and services, including custom-tailored web pages ranging from simple designs to full blown, multimedia sites with secure e-commerce capabilities. At the time, small businesses were a very underserved section of the market for Internet services, frequently ignored by larger companies like IBM. When I founded Oneview.net, research showed that only 5 to 10 percent of small businesses in the United Kingdom had a website, let alone a domain name, despite the fact that web presence was, in my opinion, crucial for growing and expanding a company. Internet presence is a cost-mitigation exercise; small investments can very quickly create large returns. I saw an opportunity to help these businesses grow while profiting at the same time. Through founding and operating Oneview.net, I became even more aware of both the benefits and the pitfalls of the Internet, and of the importance of registering for a name and developing a “brand” on the Internet.

6. Oneview.net grew from four employees to over 440 in its first 15 months. Within 10 months of the founding, I took Oneview.net public, listing it on the Alternative Investment Market of the London Stock Exchange (a market similar to the NASDAQ in the United States) through an Initial Public Offering. Our placement price was GBP 0.86 per share, but by the end of the first day of trading, shares had risen in price to about GBP 1.43, putting the value of the company at GBP 31.7 million. Oneview.net was considered to be one of the most successful Internet companies in the United Kingdom.

7. After the IPO, the share price continued to climb, and peaked at GBP 7.70. During that time we received a few offers to sell the business. As I had previously started and built successful “bricks and mortar” businesses, I began to consider selling the business and starting something new, particularly considering the extremely high price at which Internet stocks were trading at that time. I suspected Internet companies were generally overvalued—thus I expected a downturn in the market in the near future. Although I was confident that Oneview.net had a solid business structure, as it had real, long term contracted revenue streams from business customers, it was too difficult to predict how the downturn I expected would affect the market and the company, so it seemed like a reasonable time to exit. Additionally, my long-term plan was to move to the United States, where I hoped there would be more business opportunities, and so I was eager to move on to something new (although, given my expertise, I wanted to remain involved in the Internet and/or technology sectors). Another important consideration was that my only son was born in 1999, and I wanted to take some time off to spend with him. When I sold Oneview.net in March of 2000, the company’s market capitalization was USD 204 million, or approximately GBP 136 million, and it had no debt. As a

50.1% shareholder, my share of these proceeds was valued at just over USD 100 million at the time.

8. To be clear: I am not, and never have been, involved in the adult-entertainment industry. I have never been a provider of adult content, nor will I ever be a provider of such content, regardless of the outcome of the .XXX proposal. My role, and the role of ICM, in the .XXX sTLD will be limited to the administration of the sponsored Top Level Domain (“sTLD”). To that end, I have engaged in significant outreach to the adult-entertainment industry, as well as stakeholders in the child protection and free speech advocacy communities, to ensure that the proposed .XXX sTLD would suit the needs of the sponsored community and other affected stakeholders, and have garnered substantial support from these communities as a result.

B. Investigating ICANN’s New TLD Round

9. I moved to the United States in late 2001. My first business involvement in the United States was with Definitive Electronics, a cutting edge, award-winning home technology company. I still serve as the Chairman of Definitive Electronics, and revenue has grown over 600% under my stewardship. However, this position was never my passion, and I was constantly looking for new opportunities. In 2002, I happened, by chance, to meet an individual who was then serving as the Chair of ICANN’s Generic Names Supporting Organization (and who was later, in June 2003, made a full Board Director of ICANN). We were discussing the Internet and technology when he mentioned that ICANN had long been planning a new round of applications for TLDs. I was aware, through my experience of securing domain names for our customers at Oneview.net, that the first opportunity to become a registrar had passed, so I was not interested in entering the market late to compete with already established companies operating in the

existing domains. The new TLD round, however, offered the possibility to get in on the ground floor of something new, and I was intrigued. Additionally, I knew of the importance of developing an online “brand” from my Oneview.net days, and so was fascinated by the opportunity presented by new TLDs. A carefully thought-out TLD could offer significant branding advantages by clearly conveying information about the likely nature or content of the websites registered to the domain.

10. I began doing my own research about ICANN’s only previous round of TLD proposals in the year 2000, reading the materials posted on the ICANN website and reviewing the applications submitted. I found ICM Registry’s 2000 application for the .XXX TLD particularly interesting. Even without much knowledge of the market, I knew that a TLD targeted at the adult-entertainment industry would be extremely successful. On further investigation of the adult-entertainment industry I was truly astonished by how large the industry is. In fact, with further research, I learned that the adult-entertainment industry had been one of the main drivers of technological developments, including broadband and high-speed Internet services.¹ Despite the huge potential business opportunity, I was initially wary of being involved in an industry that is often perceived as unsavoury, even though my intention was to work with only reputable providers, and I would not be involved in creating or providing content.

11. As I continued reviewing the 2000 application process, however, I began to see the potential true value to all impacted stakeholders in the idea of a carefully thought-out and

¹ See, e.g., Arlidge, John, “The dirty secret that drives new technology: it's porn,” The Observer, 3 March 2002, available at <http://www.guardian.co.uk/technology/2002/mar/03/internetnews.observerfocus> (“As one senior industry figure put it: ‘For years it has been a dirty secret that one of the key drivers of new consumer technology is sex, pornography.’”) (attached as Lawley Exh. 1).

well-implemented .XXX domain. As a father, I was, and still am, very aware of the need to protect children from adult content. In 2000, ICM Registry had applied for both the .KIDS and .XXX TLDs. I could see that the .KIDS concept would never succeed (in fact, the .KIDS.US domain created later has failed abysmally)—because a “walled garden” space for children will never be popular enough to prevent most children from exploring the rest of the Internet. Operated correctly, however, as a *sponsored* TLD, a concept such as .XXX could be part of the solution, by making it easier for users or parents who wished to avoid the content in the .XXX domain to do so, without interfering with—and even benefiting—users who wish to view such content. In fact, I learned that there was significant support among the general public when they were asked for their opinion on the utility of an adult content domain. Thus, when I created a short list of applications from the 2000 round that I thought had the potential to succeed in a possible future round, .XXX was at the top. I tracked down and introduced myself to Jason Hendeles, who was the founder and head of ICM, some time in early 2003. ICM was basically “in hibernation” when I met Mr. Hendeles, and had been so, effectively, since 2001, but he was interested in my ideas, reputation, and business acumen, and we began to think in earnest about formulating and implementing an .XXX sTLD.

II. The Benefits of .XXX and the Importance of Sponsorship

12. As previously mentioned, one of the reasons that I first became interested in the idea of an .XXX sTLD was that it struck me as a possible “win-win” solution, benefiting both the online adult-entertainment industry and the other impacted stakeholders in the broader Internet community, including child protection advocates, free speech advocates, and consumers of online adult-entertainment. As ICM later noted in its 2004 application for .XXX, “as with many industries, some of the online adult-entertainment community have engaged in illegal

and/or questionable business practices, such as unlawful redialers, credit-card fraud, breaches of consumer privacy, email spoofing, [and] SPAM.”² Responsible online adult-entertainment providers have never managed to organise themselves to self-regulate against these practices, or to provide a reliable method for distinguishing responsible providers. An .XXX *sponsored* TLD would provide one mechanism for such self-regulation. For example, the community would be able to organise, through the sponsoring organisation, to create best practices and policies that every website registered in the sTLD would agree to follow.

13. Additionally, a voluntary sTLD would be a form of self-regulation. Efficient and effective self-regulation would, in my view, help avoid the imposition of more onerous, top-down, governmental regulations. In an sTLD environment, responsible providers would be involved in the policy-making process, which would help ensure that the policies created are more carefully crafted to address the needs of the community. Moreover, aside from the total prohibition of child pornography, the policies would not be a restriction on content, and participation in the domain would be completely voluntary. Thus, this form of self-regulation would not interfere with the free speech rights of anyone in the sponsored community.

14. An .XXX sTLD would also help responsible providers comply with existing laws and regulations. For instance, the United States requires that the domain names used for websites with adult content to be not misleading. An address string ending with “.XXX” would be one way of ensuring the domain name was not misleading, as it clearly indicates the type of content that the user can expect to find, and the policies developed for the domain would include

² ICM Registry, Inc., New sTLD RFP Application, 16 Mar. 2004, p.8 (“ICM Application”) (attached as Lawley Confidential Exh. A). **CONFIDENTIAL**

policies on electronic meta tag labelling. Even so, I never envisioned that the policies for the domain would relate to the laws or regulations of any particular jurisdiction, or that the domain would bear any unique responsibility for enforcing particular laws or regulations of any specific jurisdiction.

15. I believed (and continue to believe) that the .XXX sTLD would be a significant step toward the goal of protecting children from adult content, and would 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.

16. Given the option to utilize websites that clearly indicate in the address string that they comply with the best practices and policies of an .XXX sTLD, in my view, many consumers of online adult content would choose such websites over non-labelled ones. This would make the TLD attractive to providers, because it would give them a competitive advantage in attracting and retaining customers. The best practices policies, instead of being an undesirable restriction on the content of adult websites, would be a benefit. Thus, while it is unlikely that adult content will ever disappear from other domains, an .XXX sTLD would result in content that would otherwise be posted elsewhere being posted on .XXX—where it would be clearly labelled and identified, therefore allowing Internet users and parents to select or avoid adult content.

17. As I considered all of these benefits, I became increasingly determined to apply for the .XXX sTLD. I saw this as a real opportunity in technology, not just to profit from a new

business venture, but to do some good. After successfully growing a series of local, regional, and then national businesses, I was excited by the possibility of something with an international, even global scope, especially something as worthwhile as the .XXX sTLD.

18. For all of these reasons, in applying for the .XXX sTLD, it was extremely important to me that .XXX be a *sponsored* TLD. All of the benefits I envisioned to the sponsored community and the broader Internet community were wholly dependent upon the existence of a sponsoring organisation to develop and implement best practices for the registrants. An adult-content *general* TLD, although probably more lucrative in terms of the extra registrations that an unrestricted space would attract, would, in my opinion, provide negligible benefit for the online adult-entertainment industry and the wider Internet community as a whole.

III. Preparation

A. Gathering the ICM “Team”

19. I became Chairman and CEO of ICM in mid 2003. Before that time, Jason Hendeles was the head of ICM. Jason, a Canadian citizen, was the founder and President of ATECH Company Inc., one of the first privately owned and operated domain-name registrars to be licensed by ICANN. He was a long-standing participant in the development of the Internet infrastructure. When I became involved in ICM, Jason took the position of Vice President. It was very important to me that we submit the best application we possibly could, and part of that process was, in my opinion, making ICM itself a strong, solid, stable, and well-run organisation. To accomplish this, I went out and recruited additional people to join ICM.

20. Stuart Duncan, a fellow native of the United Kingdom, was made the Chief Operating Officer of ICM. I had known Mr. Duncan for many years. I first met him through Eurofax. He was head of an office equipment leasing company that was a subsidiary of General Electric. I liked and trusted Stuart, and so brought him on as Chief Operating Officer at Oneview.net, where he recruited over 400 people and opened 10 new offices for the company in 15 months. When we worked together, at Oneview.net and later at ICM, I viewed myself as the “ideas man,” and Stuart as the one who was able to execute our plans.

21. Len Bayles, who had been at ICM with Mr. Hendeles, was made the Chief Technology Officer. Len had previously been Chief Technology Officer and Vice President at SnapNames.com in Portland, Oregon, and had served as a consultant to Afilias Ltd. during the .ORG transition. Len later became a member of ICANN’s Registry Services Technical Evaluation Panel, which was formed to provide advice and recommendations regarding the effect of proposed new registry services on the security and stability of the Internet. Len is generally regarded as a “top techie.”

22. In addition to the internal make-up of ICM, it was important to me that we have outside support to aid us in our application and, later, in our operations. In fact, I was not willing to go forward in the process unless we were able to obtain solid advice and supporters, namely, J. Beckwith (“Becky”) Burr (a partner at the law firm WilmerHale LLP), Robert Corn-Revere (a partner at the law firm Davis, Wright, Tremaine LLP), and individuals like Parry Aftab (an executive at WiredSafety) and Stephen Balkam (an executive at the Internet Content Rating Association).

23. I knew Becky Burr was a top lawyer. She also had a wealth of experience and credibility, having been responsible for many aspects of the establishment of ICANN while at the Department of Commerce, and had served as the U.S. representative to ICANN's Governmental Advisory Committee ("GAC"). I also knew that she would only agree to work with us if she was convinced of the value of our proposal and believed that we were taking the right approach under ICANN's processes and procedures. Retaining her demonstrated that we were serious about our proposal, and that we intended to follow through and do things right.

24. Additionally, we sought the support of Robert Corn-Revere, one of the pre-eminent free speech lawyers and advocates in the United States; Parry Aftab, the head of WiredSafety and a leading child protection advocate; and Stephen Balkam, the founder and head of the Internet Content Rating Association, an international organisation whose aim is to identify and promote best practices, tools, and methods in the field of online safety. With their input, we could be sure that our application was the best it could be, and we further ensured that they and members of their constituencies would be willing to participate in the needed policy formulation for the sTLD.

B. Outreach to the Community and Stakeholders

25. ICM was and is owned by the ICM management team and a small number of outside investors who are personally known to the ICM management team. None of ICM's owners or investors are providers of adult entertainment, and no industry participant has any financial interest in ICM, ensuring that ICM will remain able to operate the sTLD in the best interests of all stakeholders according to the policies established by the sponsored community. As ICM had no direct connection to the adult entertainment industry, we engaged in significant

consultations with the adult-entertainment industry before beginning the application process, in order to ensure that the proposed sTLD would meet the community's needs. After ICM had applied for the .XXX gTLD in 2000, and was not selected, Vinton Cerf (ICANN's Chairman at the time) told Jason Hendeles to "go build your community" and then try again. As I became involved in ICM, my opinion was similar—ICM needed to continue to reach out to the adult-entertainment industry. Before we submitted the application, I wanted to be sure that we had sufficient support among responsible providers who could benefit from the .XXX proposal. Jason and I therefore decided that he would go out and "build the community," and in ICM's outreach throughout 2003 and later, Jason often served as the link between ICM and the adult-entertainment community.

26. Our dialogue with the industry demonstrated to us that there was a significant need for coordination among the industry, and between the industry and stakeholders in the child safety and free speech communities. Without such coordination, the industry could never really develop the needed policies and practices for credible self-regulation. These communities had traditionally remained isolated from each other, but we felt that a framework could be developed to bring them together. Responsible providers of adult-entertainment felt that they could benefit from working with these other stakeholders. They also would benefit both by separating themselves from those who engage in less than desirable business practices, and by assuring customers that their websites are safe and free from malicious programmes—and these goals would be better achieved through voluntary action rather than top-down regulation. Our discussions with the adult-entertainment industry convinced us that there would be a large number of adult-entertainment providers who were willing to register for domain names in the .XXX sTLD.

27. Before filing our application, we received letters of support from a number of different, prominent providers of adult-entertainment, based in the United States, the United Kingdom, Canada, Europe, and other parts of the world, but many with a global reach. Among ICM's supporters were some of the largest and most well-known content and programme providers, video producers, online stores for adult material, distributors, portals, industry news and information providers, consultants, marketing websites, affiliate programme providers, and payment processing and billing websites, more particularly described in the application itself.³ Together, the supporters represent a wide variety of participants in the sponsored community.⁴ The letters from these supporters not only showed interest in registering in the .XXX sTLD, but also in participating in policy formulation for the .XXX sTLD.

28. We also directly engaged members of various well-respected child online safety individuals and organisations in face to face meetings around the world. In addition to ICRA and Parry Aftab, ICM was able to obtain the support of, *inter alia*, UNESCO's Innocence in Danger Project, Charles Jennings (the founder of TRUSTe), Jean Amour Polly (the founder of Net Mom), and the Association of Sites Against Child Pornography.⁵ Additionally, ICM consulted with noted civil liberties and free expression lawyers, and ensured that organisations involved in free expression advocacy would be willing to provide input in the development of policies for the .XXX sTLD.

³ ICM Application, pp. 40-41. **CONFIDENTIAL**

⁴ Memorandum from ICM to ICANN Board, 7 Dec. 2004 (attached as Lawley Confidential Exh. B). **CONFIDENTIAL**

⁵ See ICM's Responses to Questions from Evaluators, pp. 13-44 (attached as Lawley Confidential Exh. C). **CONFIDENTIAL**

29. All told, during this preparation period from early 2003 through the time we filed the application in March 2004, ICM incurred costs of approximately USD 500,000, including the application fee, expenses incurred in travelling and meeting with the adult-entertainment industry and other stakeholders, and costs for ICM's employees. When the application was submitted, shareholders of ICM had either provided or committed a total of USD 1.5 million in start-up capital.⁶

IV. Criteria and Application

30. ICM and its team carefully reviewed the requirements of the Request for Proposals ("RFP") posted by ICANN in December 2003, and crafted its application to demonstrate, as clearly as possible, that its proposal met the criteria, that it had a business model that would be successful, and that it was capable of ensuring the necessary technical functionality. I knew that our application would receive a great deal of attention, and I wanted to make sure that it was "bullet proof." I still believe that, despite the best efforts of some of our opponents, no one has ever demonstrated a serious flaw in our application.

A. Business and Financial Criteria

31. To comply with the business and financial criteria, applicants for an sTLD had to demonstrate that they could provide appropriate staffing, including key personnel and operational capability, that there was a marketing plan for the sTLD, and that the applicant would make registrar arrangements, had developed a fee structure, and had sufficient technical

⁶ ICM Application, p. 39. **CONFIDENTIAL**

resources to ensure the operation of the sTLD.⁷ Additionally, applicants had to show that the application was unique, and that the applicant had engaged with the sponsoring organisation. In evaluating the applications, the independent evaluation teams considered the applicant's plans for introducing and implementing the proposed sTLD.⁸

32. As the registry operator, ICM was a stable, financially solid organisation. As I have already discussed, significant thought and care went into the selection of the original four members of ICM's senior management team. In fact, the independent evaluation team responsible for the business and financial aspects of the application noted that "[m]anagement has strong relevant experience in growing businesses in the technology industry."⁹ ICM also committed to hiring at least 11 additional employees in positions supporting the management, and the sTLD application fully described the responsibilities and salaries for each position.¹⁰ Again, the evaluators felt that this staff level was not only adequate, but high, which they felt would be a "plus."¹¹

33. ICM also devoted a great deal of thought and care to the formation and composition of IFFOR. The structure of IFFOR was modelled after ICANN, with a seven-person Board of Directors, appointed by the various constituencies to staggered terms. The

⁷ ICANN, Request for Proposals for New Sponsored Top-Level Domains, 15 Dec. 2003, available at <http://www.icann.org/tlds/new-stld-rfp/new-stld-application-part-a-15dec03.htm> ("sTLD RFP") (attached as Lawley Exh. 2).

⁸ New sTLD Applications: Independent Evaluation Report, 27 Aug. 2004, p. 8 ("Independent Evaluation Report") (attached as Lawley Confidential Exh. D). **CONFIDENTIAL**

⁹ *Id.* **CONFIDENTIAL**

¹⁰ ICM Application, pp. 43-44. **CONFIDENTIAL**

¹¹ Independent Evaluation Report, p. 10. **CONFIDENTIAL**

stakeholder communities were to be represented in IFFOR through several supporting organisations: the Top-Level Domains Supporting Organization (similar to ICANN's GNSO); the Free Expression Supporting Organization; the Privacy, Security, and Child Advocacy Organization; and the Online Adult Entertainment Supporting Organization. Each supporting organisation was to advise the Board on the issues affecting its constituency. IFFOR was also to include a Manager of Public Participation, an Ombudsman, and a full-time Administrator. IFFOR was to be independent of ICM, and the two entities would share only one board member (myself, at least initially).¹²

34. ICM also presented a detailed policy-formation process for IFFOR, including a period for public comment, input from and consultation with each of the Supporting Organizations, and a Board vote. Proposed or adopted policies could be reconsidered through the appointment of an Ombudsman, the creation of a reconsideration committee, or through an independent review panel; in short, the same procedures for accountability as ICANN.¹³ The business and financial evaluation team acknowledged that this structure was complex, but also that it “seem[ed] well thought through and appear[ed] to have enough traction to be implementable.”¹⁴

¹² ICM Application, pp. 4-5. **CONFIDENTIAL**

¹³ ICM Application, pp. 5-6. **CONFIDENTIAL**. *Compare with* ICANN Bylaws, Art. IV-XII, as amended effective 29 May 2008, *available at* <http://www.icann.org/general/bylaws.htm> (“ICANN Bylaws”) (attached as Lawley Exh. 3).

¹⁴ Independent Evaluation Report, p. 12. **CONFIDENTIAL**

35. For the technical functions, ICM entered into a letter of intent with Afiliás, “an established organisation with highly relevant experience . . . and qualified staff.”¹⁵ In addition, ICM had comprehensive financial resources to serve as backup in the event of registry failure. ICM proposed an appropriate fee structure for registrants: USD 60 wholesale and USD 75 retail. ICM would pay Afiliás a variable fee of USD 5 per registration per year; and USD 10 of each fee paid to ICM would be allocated for IFFOR.¹⁶ The independent evaluation team concluded that the proposed fee structure was justified and “in line with specialized TLD market trends.”¹⁷

36. ICM provided several different projections for revenues, based on three different estimates of the number of registrants expected: a low estimate of 70,000; a medium estimate of 125,000, and a high estimate of 250,000. Each model was based on a set of conservative assumptions, but nonetheless showed positive pre-tax cash flow from year one.¹⁸ ICM was confident that these projections could be met; the evaluators also felt confident “in the applicant’s ability to reach projected sales levels.”¹⁹ The evaluators also noted with approval ICM’s ability to fund the sTLD until it reached profitability, especially given the generous level of capital which ICM estimated would be needed in the first year.²⁰

37. The business and financial evaluation team also noted that “[t]he target community is precisely defined,” and that ICM had already engaged in extensive outreach to that

¹⁵ *Id.* at p. 11. **CONFIDENTIAL**

¹⁶ ICM Application, p. 26. **CONFIDENTIAL**

¹⁷ Independent Evaluation Report, p. 11. **CONFIDENTIAL**

¹⁸ ICM Application, pp. 35-36. **CONFIDENTIAL**

¹⁹ Independent Evaluation Report, p. 11. **CONFIDENTIAL**

²⁰ *Id.* at p. 12. **CONFIDENTIAL**

community, including obtaining letters of support “from a number of major potential customers.”²¹ The evaluators did feel that projections for marketing expenditures in future years might have been a bit low, but nonetheless were satisfied with ICM’s financial projections and business model. The panel noted that “[t]he investment of money and time to date suggests that dot-xxx has the staying power to see this initiative through to successful implementation,”²² and noted that “[t]he plan reflects a significant amount of background work and detailed thinking about how to establish the business.”²³

38. The business and financial team concluded that the .XXX application met the RFP criteria, and recommended that the application be approved.²⁴

B. Technical Criteria

39. In order to meet the technical criteria, applicants were required to present evidence of their ability to ensure stable registry operation, evidence of their ability to ensure that the registry conforms with best practice technical standards for registry operations, evidence that they can provide a full range of registry services, and assurances of continuity of registry operation in the event of business failure of the proposed registry.²⁵

40. The technical criteria were satisfied primarily by ICM’s appointment of Afilius. Because Afilius was well-established with a good track record, the evaluators concluded that

²¹ *Id.* at pp. 10-11. **CONFIDENTIAL**

²² *Id.* **CONFIDENTIAL**

²³ *Id.* at p. 10. **CONFIDENTIAL**

²⁴ *Id.* at p. 13. **CONFIDENTIAL**

²⁵ sTLD RFP.

ICM's operations would "meet or exceed all ICANN standards."²⁶ ICM's proposal for backup in the event of a registry failure was "reasonable," with escrow to be established before the TLD was to "go live."²⁷ Nor did the evaluators expect any problem with ICM's proposal for enhanced privacy mechanisms with regard to WHOIS facilities and capabilities, although they noted that it might slow down responses to WHOIS inquiries.²⁸ In short, the evaluators concluded that the ICM proposal did not have "any major impact on stability of the Internet."²⁹ This is especially noteworthy to me, understanding that ICANN's mission is to ensure the stability and security of the DNS—once it was clear that the proposal was no threat to the Internet, there was no valid reason for ICANN to reject it.³⁰

C. Sponsorship and Other Issues Criteria

41. Applicants were also required to demonstrate: the existence of a clearly defined sponsored community, which would benefit from the new sTLD; evidence of both support from the Sponsoring Organization and the appropriateness of that organisation to serve as the sponsor and establish policy; and support from the sponsored community.³¹ The applicants were also

²⁶ Independent Evaluation Report, p. 6. **CONFIDENTIAL**

²⁷ *Id.* at p. 7. **CONFIDENTIAL**

²⁸ *Id.*

²⁹ *Id.*

³⁰ See ICANN Bylaws, Art. I, § 2(1) (Core Values).

³¹ sTLD RFP.

asked to show that they had policies in place to avoid abusive registrations, protect the rights of others, resolve disputes, and comply with ICANN's WHOIS policy.³²

42. There can be no doubt that there is a clear community of responsible online providers of adult-entertainment who would be well-served by the .XXX sTLD. As I have already described, ICM had engaged in extensive consultation with members of the online adult-entertainment industry, to understand what the targeted community needed and how it could be accomplished. ICM described all of this in its application, and noted the letters of support it had received from members of the sponsored community.³³ ICM was very clear that the community need not be defined in a regulatory sense; because participation in the TLD was voluntary, ICM did not have to create a universally accepted definition of adult content or any concept, any more than .CAT had to create the universally accepted definition of what it means to be ethnically or culturally Catalan, or .ASIA had to create the universally accepted definition of the geographic or cultural identity of Asia.³⁴ There is a clear community of responsible providers of online adult-entertainment in existence, regardless of whether the sTLD is created or not, and the significant numbers of webmasters who have expressed their interest in participating in .XXX demonstrates both the existence of the community and the community's support for ICM's proposal. Nothing in the criteria prohibited the community from being defined through self-selection. In fact, because participation is voluntary, the community for an sTLD will *always* be self-selected. The communities of certain other applications which were ultimately approved had little or no independent existence, and were only "communities" in the sense that even very

³² *Id.*

³³ ICM Application, p. 40. **CONFIDENTIAL**

³⁴ *Id.* at p. 4. **CONFIDENTIAL**

diverse groups of people might choose to post similar types of information online. For instance, the community of .TEL (Telnic) could include everybody who has a mailing address, telephone number, e-mail address, fax number, pager number, or website; the community is only limited based on who chooses to participate by posting that information in the domain. Similarly, the community for .MOBI could be anyone who wants to post content on the Internet, and is only limited based on the registrant's choice to format the content in a way that is accessible to mobile Internet devices. In each of these cases, the community is self-selecting: it is the decision of the registrant to request a website in the domain that makes the registrant part of the community. There is no reason that the .XXX community cannot be composed of individuals and entities who choose to identify themselves as responsible providers of online adult-entertainment who believe that a system of self identification would be beneficial.

43. Nonetheless, the evaluation team improperly based its recommendation that ICM's .XXX application did not meet the sponsorship criteria on the ground that there is no single, universal, globally accepted definition of adult content. Moreover, despite the letters of support from various providers and other impacted stakeholders, the evaluation team questioned whether the sTLD would add value to the namespace or had the support of the community. ICM never claimed to have the unanimous support of the industry, but the fact that significant providers were keenly interested (and still are), and were willing to participate in the policy formulation environment, should have been sufficient to demonstrate both that there was more than enough community support to ensure the sTLD would be a successful business proposition, and to show that the community of responsible providers of online adult content saw value in the application. In fact, even the opponents of ICM's application acknowledged that the sTLD would be successful from a business perspective, as a significant number of the complaints

focused on the amount of money ICM Registry would earn as registry operator.³⁵ When I learned of these complaints, it was clear to me that some members of the adult-entertainment industry (who did not wish to be part of the sponsored community) opposed ICM's application because they would have liked to profit from an adult-entertainment TLD themselves, and were annoyed that ICM had applied for the concept first. Despite this financial motive for opposition, and the later delays in the process, which understandably frustrated many of ICM's supporters, and even despite ICANN's rejection of the application, the community support remains strong. This support is clearly demonstrated by the substantial response to ICM's pre-reservation programme. ICM created the pre-reservation programme in May 2006, in response to Paul Twomey's belated questions about support for the TLD. The programme allowed web masters to pre-reserve a domain name within .XXX which would entitle them to preferential registration once the domain was created. In under a year, ICM received over 76,000 total pre-reservation requests, 71,000 of which were for unique strings—far more than have registered in many of the existing TLDs.³⁶ Even since ICANN's vote in March 2007 to reject the application, the pre-reservation system has resulted in an additional 25,000 pre-reservations, for a to-date total of over 100,000 names, over 92,000 of which are unique. This limited duplication is consistent with actual registration patterns, indicating that the pre-reservations are not merely speculative or defensive.

44. Finally, despite the extensive policy formulation environment to be created by IFFOR, the evaluators questioned whether the diverse interests of various stakeholders could be

³⁵ See, e.g. Free Speech Coalition Press Release, 17 July 2005 (noting the “financial benefit to ICM Registry and its investors” of the .XXX sTLD) (attached as Lawley Exh. 4).

³⁶ Letter from Stuart Lawley to ICANN Board, 23 Mar. 2007 (attached as Lawley Exh. 5).

represented through IFFOR. ICM pointed out that ICANN itself is run through collaboration of various stakeholders, sometimes with conflicting interests.³⁷ Moreover, the interests of the stakeholders overlapped in crucial ways. Finding a way for the industry to improve its practices, through voluntary action instead of regulation, would help towards accomplishing the goals of everyone involved, even if there were occasional conflicts about the best way to achieve this. IFFOR was envisioned precisely as the entity which could help these stakeholders negotiate the best means for achieving these shared goals.

D. The Evaluators' Final Conclusion

45. Ultimately, the evaluators found that the .XXX application satisfied all of the criteria except for those relating to sponsorship. To the best of my knowledge, once the evaluators concluded that an applicant had met the business and financial and the technical criteria, those conclusions were accepted by ICANN. No applicant which was initially judged to have met the business and financial and the technical criteria was later rejected, although, conversely, applicants that had not met all of the technical or business and financial criteria were allowed to continue working with the evaluators or with the Board to provide additional information demonstrating that the application satisfied the criteria in these categories. Several such applications were later approved: the .JOBS and .MOBI, applications failed to meet both the sponsorship and the technical criteria, and the .TEL (Telnic) application failed to meet all three sets of criteria, but, again, all were eventually approved.

³⁷ ICM's Responses to Questions from Evaluators, p. 44. **CONFIDENTIAL**

46. As eight of the 10 applications failed, in the evaluators' opinion, to meet the sponsorship criteria, all of these eight applicants were invited by the Board to submit additional information regarding sponsorship, if they wished. It was clear to me, and I believe to others, that the Board felt the evaluators had been mistaken in their application of the sponsorship criteria, and therefore intended to evaluate the applications itself using a more objective interpretation of those criteria as originally envisioned. All of the other applications which had been failed by the Sponsorship Team, but chose to continue, were eventually approved by the Board, including .ASIA, .JOBS, .MOBI, .TEL (Telnic), and .TRAVEL. Aside from .XXX, the only applicants for which the Board did not reverse the findings of the sponsorship evaluation team were .MAIL and .TEL (Pulver), neither of which, to my knowledge, responded to the Board's request for additional information.

IV. The Board's Review of the Application

A. Initial Consideration and 1 June 2005 Approval

47. When I began the process of applying for the .XXX sTLD, I expected that it would be relatively short, especially after the way John Jeffrey, Kurt Pritz, and Paul Twomey had always described the process. I understood that the independent evaluators would complete their work and report to the Board within a few months; and the Board would act on the evaluators' suggestions, approving or rejecting the applications accordingly. Contract negotiations for the exact terms of the registry agreement would follow, but would be relatively brief and straightforward, as the agreements would be similar to those already in effect.³⁸ Given

³⁸ Email from John Jeffrey to J. Beckwith Burr, 13 June 2005 (attached as Lawley Exh.6).

the erroneous recommendations in the independent evaluators' report, I was pleased that the Board decided to come to its own decision, but hopeful that the process would not be extended for too long. Thus, when ICM was given the opportunity to reply to the Evaluation Report, we acted quickly, submitting our complete response within about six weeks. I recall that, after our submission, we frequently pressed ICANN executives to act on our application.

48. Importantly, no part of the evaluation process involved changing or altering ICM's proposal, but only providing additional clarification or additional commitments to fulfil the obligations we had assumed throughout the application process. The same was true for all the other applicants. The issue was never whether ICM could somehow alter its proposal so that it would meet the requirements, but rather if the Board was convinced that, based on all of the information and discussions, the application, as originally submitted, met the requirements.

49. On 1 June 2005, after significant correspondence with the Board, and even an in-person presentation to the Board by ICM and certain supporters at an ICANN meeting in Mar del Plata, Argentina, the Board voted to approve ICM's application and begin commercial negotiations for the registry agreement. Following this vote, I believed—and was assured by ICANN executives—that the question of whether ICM had satisfied the RFP criteria had been settled. Following the 1 June vote, John Jeffrey, Kurt Pritz, and others at ICANN congratulated us on our success in getting the application approved and confirmed in public that our application met the criteria. None of them made any mention of substantive issues related to sponsorship or community support still to be overcome, or gave any indication that there were criteria that had not been fully and completely satisfied.

50. The 1 June 2005 resolution was an unreserved statement of the Board’s approval of ICM’s application, with no suggestion that there were unanswered questions about the application. It simply authorised “negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain,” with no conditions or caveats³⁹—unlike other resolutions that did contain conditions. For instance, the .MOBI resolution requested “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,”⁴⁰ and the .JOBS resolution requested 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.”⁴¹ Had questions remained about whether ICM’s application met the selection criteria, the Board should have expressed them at that time. Instead, the Board approved the .XXX application without any restrictions, qualifications, or conditions. This outcome was, in fact, reflected in various ICANN executives’ contemporaneous words and actions.

51. Others also believed that the 1 June 2005 vote constituted a determination that we had met the selection criteria. Following the vote, ICANN Board member Joichi Ito posted to his blog describing the reasons the Board decided to approve .XXX and noting “ICANN has been mandated with trying to increase the TLD space and the .XXX proposal, in my opinion, has

³⁹ ICANN Board Resolution on .XXX sTLD Approval to Enter into Contractual Negotiations, ICANN Board Meeting, 1 June 2005: Minutes, *available at* <http://www.icann.org/minutes/minutes-01jun05.htm> (attached as Lawley Exh. 7).

⁴⁰ ICANN Board Resolutions on .JOBS and .MOBI sTLD Negotiation, ICANN Board Meeting, 13 Dec. 2004: Minutes, *available at* <http://www.icann.org/en/minutes/minutes-13dec04.htm> (attached as Lawley Exh. 8).

⁴¹ ICANN Board Resolutions on .JOBS and .MOBI sTLD Negotiation, 13 Dec. 2004.

met the criteria set out in the RFP. Our 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.”⁴² Additionally, in light of the 1 June vote, ICANN’s gTLD Registries Constituency emailed me, congratulating me on the vote and inviting ICM to participate in the constituency group, despite the fact that ICM had not yet formally executed a registry agreement.⁴³

52. Due to the worldwide publicity surrounding the 1 June 2005 approval, I was asked by the Council of Europe to speak at a conference in Strasbourg on Human Rights and the Information Society. I was pleased and surprised by the invitation. In the ensuing report, ICM was given an honourable mention as an actor that had “assume[ed] responsibility for self-regulation and labeling” and was collaborating with impacted stakeholders.⁴⁴ Not only did this endorsement demonstrate our support from impacted stakeholders, but it represents their belief that the sTLD would soon be launched; the Council would not award an initiative that was unlikely to ever take place.

53. As a result of the 1 June 2005 approval, ICM began “gearing up” for the introduction of .XXX. We were inundated with indications of support and desire to register by well over a thousand webmasters from around 70 different countries. We undertook the transition in ICM’s structure from a corporation to an LLC, in anticipation of its new role as a domain operator. In the year following the vote, I would estimate that ICM spent approximately

⁴² Ito, Joichi, 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> (attached as Lawley Exh. 9).

⁴³ Email from Marie Zitkova, Chair of the gTLD Registries Constituency, to Stuart Lawley, 29 June 2005 (attached as Lawley Exh. 10).

⁴⁴ Council of Europe General Report, *Human Rights in the Information Society: Responsible Behavior by Key Actors*, 13 Sept. 2005 (attached as Lawley Exh. 11).

USD 500,000 preparing for the introduction of .XXX. After the 1 June vote, questions about the RFP criteria were not raised by ICANN as an issue needing resolution until approximately May 2006, some 11 months after the application was approved as having met all of the criteria.

B. Negotiations and 10 May 2006 Vote

54. I anticipated, based on discussions with John Jeffrey and Paul Twomey, that the registry agreement negotiations would be straightforward. Indeed, we were able to come to agreement with ICANN staff about the terms of the agreement within a couple of weeks. A draft of the agreement was posted on ICANN's website for public comment, and we were hopeful that approval would follow shortly. Politics, however, intervened. Despite the fact that the chairman of the GAC had publicly stated in April 2005 that "[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round,"⁴⁵ in August 2005, ICANN received two letters about .XXX, one from the U.S. Government and one from the chairman of the GAC. Neither letter indicated direct opposition to the content of the ICM application, although the letter from the U.S. Government indicated that the Government had received letters and emails "expressing concern"⁴⁶ and the letter from the

⁴⁵ ICANN Correspondence: Letter from Mohamed Sharil Tarmizi, GAC Chairman, to Dr. Paul Twomey, ICANN CEO and President, 3 Apr. 2005, *available at* <http://www.icann.org/correspondence/tarmizi-to-twomey-03apr05.htm> (attached as Lawley Exh. 12).

⁴⁶ ICANN Correspondence: Letter from Michael Gallagher, Assistant Secretary for Communications and Information, United States Department of Commerce, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, posted 15 Aug. 2005, *available at* <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf> (Letter from Michael Gallagher to Dr. Vinton Cerf, 15 Aug. 2005) (attached as Lawley Exh. 13).

chairman of the GAC stated that there was “discomfort” among some members of the GAC.⁴⁷ Both letters therefore requested that ICANN provide additional time for interested parties to express their views—despite the fact that the application had already been publicly available for approximately 15 months, and had been discussed multiple times in various ICANN forums, international newspapers, and even on national TV in the United States. Nonetheless, recognizing that ICANN could not be seen to publicly disregard such comments, at the request of John Jeffrey, ICM began to work with ICANN to identify and address any concerns expressed by the GAC, individual governments, or any other ICANN constituency. Accordingly, we pursued opportunities to meet with the GAC, and with government representatives on an individual basis, to discuss the merits of .XXX and answer questions. Importantly, there was little opposition to ICM’s application itself among GAC members; most were displeased with the *process* that ICANN had followed in approving .XXX, and were not requesting that ICANN reverse its approval of .XXX but rather that ICANN alter the process for future TLD application rounds.

55. However, political pressure from key governments such as the United States, erroneously described as “opposition from the GAC,” delayed the Board’s consideration of ICM’s registry agreement, even after ICM had addressed all legitimate concerns with the agreement. This was a dynamic throughout the entire course of negotiations for the next two years: the GAC, or individual governments, would express vague concerns about the process or the controversy surrounding the content of the proposed sTLD, although never expressing any consensus opposed to the domain; ICM would endeavour to meet with anyone voicing concerns,

⁴⁷ ICANN Correspondence: Letter from Mohamed Sharil Tarmizi, GAC Chairman, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, 12 Aug. 2005, *available at* <http://www.icann.org/correspondence/tarmizi-to-board-12aug05.htm> (attached as Lawley Exh. 14).

discuss the concerns, explain how they had been addressed or alter the registry agreement to address the concerns; and then ICM would plead with ICANN to consider slightly revised versions of the registry agreement, only to have the delays begin all over again.

56. I was not heavily involved in the registry agreement negotiations, but I did review all of the changes suggested to the agreement. Although ICM was more than willing to accommodate requests from ICANN, the changes to the commercial and technical terms of the agreement were never major—modifications were made to give ICANN the ability to veto changes in control of ICM, and provisions were added reiterating ICM's commitment to the obligations described in the application—but, on the whole, the commercial and technical terms in all the drafts of the registry agreement were very similar to the agreements ICANN entered into with other registry operators. The major difference between ICM's draft registry agreements and the registry agreements already executed by ICANN were the numerous additional assurances and guarantees, more and more of which were added over time apparently to try to reassure the GAC. These guarantees were simply restatements of the fact that ICM was obligated to comply with the policy commitments outlined in the application, but no other applicant was ever expected to provide such numerous and comprehensive guarantees. As long as all of the applicants were being held to the same standard, there was no basis for rejecting the registry agreement after entering into agreements with other operators on essentially the same terms.

57. I would never have spent the time and money involved in this frustrating, drawn-out negotiation process if I 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. I believed that eventually ICANN would have to agree that we

had done everything possible to accommodate everyone involved, and would then approve the registry agreement. In fact, Vinton Cerf specifically told me in Wellington in March 2006 that ICANN was going to “pull this out” and “get it done” for us during the negotiation process.

58. It was not until May 2006, when the Board voted to reject the ICM agreement, that I received any indication that compliance with the selection criteria would once again be an issue to be reconsidered; namely, that the Board was questioning whether the sponsorship criteria had been met. The first indication of this was a letter from Paul Twomey to the GAC on 4 May 2006 stating that “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.”⁴⁸ Following that letter, at the meeting on 10 May 2006 where the Board was to discuss the .XXX registry agreement, Vinton Cerf mentioned the issue of community support during his introduction of the topic, leading other members to discuss it.

59. We saw this for what it was: a pretence, a false objection to signing the agreement, resulting from ICANN’s concern that the proposal was proving too controversial or politically difficult. To address the stated reason for rejection, we launched a pre-reservation service to completely dispel any notion that the .XXX sTLD had insufficient community interest and support. The overwhelming response unequivocally dispelled such concerns in very short order. Most unbiased observers in the ICANN space have always been of the opinion that an

⁴⁸ ICANN Correspondence: Letter from Dr. Paul Twomey, ICANN CEO and President, to Mohamed Sharil Tarmizi, GAC Chairman, 4 May 2006, *available at* <http://www.icann.org/correspondence/twomey-to-tarmizi-04may06.pdf> (attached as Lawley Exh. 15).

adult content TLD would prove to be one of the most successful TLDs, if not the most successful, measured in terms of registration numbers, ever launched by ICANN.

60. I was very surprised and disheartened by the comments made by some Board members during the May 2006 meeting; particularly when Paul Twomey indicated that he had concerns about the sponsorship criteria. Mr. Twomey, as President of ICANN, had been part of the negotiating process during the previous 11 months; I expected that, if he really did have such concerns, he would have discussed them with us prior to the vote, instead of stringing us along. I was also stunned, as a seasoned corporate operator with experience at both the CEO and public company board levels, that a CEO, who was tasked by his board to negotiate a contract, could express satisfaction to the negotiating party (or at very least not express any dissatisfaction), present that negotiated contract to his Board, and subsequently vote *against* it. To me this was completely unacceptable from a corporate governance angle and could only be considered bad faith negotiations. More importantly, I would have expected these concerns, if they existed, to be expressed to us during the contract negotiations so they could possibly be addressed, rather than sprung on us after the fact as a reason for rejecting the registry agreement. It was at this stage that it became clear that ICANN's treatment of the .XXX application was different, not just in terms of delaying the process in the hope of managing public or government response, but also in terms of rejecting the substantive terms of an agreement which had been accepted for other applicants.

61. I firmly believe that the rejection of the registry agreement was unfair, and that it was a reversal of the 1 June 2005 vote. Having spent significant amounts of time and incurred significant costs—approximately USD 1 million between June 2005 and May 2006, followed by an additional USD 50,000 in establishing and maintaining the pre-reservation programme started

in May 2006—I was unwilling to simply walk away. Instead, we filed a Request for Reconsideration, in accordance with ICANN's Bylaws.

62. Our Request for Reconsideration was pending before the Reconsideration Committee for several months, until October 2006. At that time, we were assured that ICANN would be receptive to a new registry agreement if ICM withdrew the Request for Reconsideration and renewed negotiations. With this understanding, we felt there was no reason to force ICANN to admit it had made a mistake, as ICM was more interested in the ultimate outcome than in wringing any sort of admission from ICANN. If it would save ICANN from embarrassment, as was implied by John Jeffrey, we were willing to drop the Request and simply return to negotiations. Accordingly, ICM submitted a new draft of the registry agreement. Additionally, just after we withdrew the Request, I invested another USD 200,000 in the company, money I certainly would not have invested in pursuing another empty promise had I not been assured that our agreement would ultimately be approved.

C. Further Negotiations and 30 March 2007 Vote

63. Once again, ICANN did not request major changes to the commercial and technical terms of the registry agreement, just additional strengthening of the commitments ICM had previously made. Thus, many of the basic terms of the agreement were the same as in all the other agreements between ICANN and registry operators, except that ICANN required ICM to add guarantees and assurances that were never required of any other registry operator. From my perspective, ICM was already committed to following through on the promises made in the application and in the documents submitted to ICANN, and we had every intention of meeting all of our commitments. In fact, there was never any basis for ICANN or any of its constituents to

suggest this, given the make up and behaviour of ICM and its principals. We were not unwilling to repeat these promises, although we did not see the need. Still, we did our best to accommodate ICANN, in the expectation that we would finally achieve the agreement we had been anticipating for years.

64. After all of the time, effort, and expense that ICM had devoted to the application, negotiation, and drafting of the registry agreement (ICM's costs incurred in the expectation that an agreement would be reached totalled at least USD 2.25 million), I was extremely disappointed when ICANN voted in March 2007 to reject the registry agreement and, reversing the vote of 1 June 2005, deny ICM's application for the sTLD. ICM had demonstrated, repeatedly, that it met all of the selection criteria in the original RFP. The Board had unconditionally agreed, voting to approve ICM's application and enter into commercial negotiations. Then, ICANN simply became bogged down in politics. Overly deferential to the GAC and individual governments, ICANN let the process drag on and delay until the significance of the earlier stages of the application process was forgotten, and new requirements were dreamt up to justify rejecting our application, rather than taking a decision, which might have been disliked by some, to approve our contract.

D. United States Government Interference

65. We suspected that one of the reasons that ICANN had rejected ICM's application was because the U.S. Government had indicated it was opposed. In October 2005, ICM filed a Freedom of Information Act request, hoping to learn what had been done at the United States Commerce and State Departments with regard to the .XXX application. After a series of responses, appeals, and court decisions, we received more than 1,500 pages of material. The

documents show a clear shift in the position of the Department of Commerce over a period of several months.

66. In June of 2005, the National Telecommunications and Information Administration (“NTIA”), the agency of the United States Department of Commerce which is responsible for United States policies and regulations pertaining to telecommunications and the Internet and which was involved in the establishment of ICANN, was seeking to gather talking points on why .XXX “is a good thing and why we support it.”⁴⁹ Later, in a 13 July 2005 email Suzanne Sene, the United States Representative to the GAC, commented approvingly in an email that “there is no mention of . . . xxx in the final [GAC] communiqué,” and also noted that the United States did not share the opinion of some other countries that the Board should have consulted the GAC before approving negotiations with ICM.⁵⁰

67. However, the NTIA eventually became increasingly concerned about objections to the .XXX application from James Dobson, the head of Focus on the Family and founder of the Family Research Council, and his supporters. Mr. Dobson and his organisations are known to have close ties to the White House under the Bush administration.⁵¹ Mr. Dobson’s socially conservative opinion mattered to the U.S. Government because, as “the Christian right’s most powerful leader,” his multimillion-dollar-a-year evangelical media empire included a radio show,

⁴⁹ Email from Meredith Attwell, Senior Advisor, NTIA, to various NTIA personnel, 14 June 2005 (attached as Lawley Exh. 16).

⁵⁰ Email from Suzanne Sene, Senior Policy Advisor, NTIA, 13 July 2005 (attached as Lawley Exh. 17).

⁵¹ Email from Fred Schwien, Executive Secretary, Department of Commerce, 16 June 2005 (attached as Lawley Exh. 18).

and a telephone and letter-writing operation.⁵² The NTIA began monitoring the negative, mainly auto-generated “click here to stop more pornography on the internet” type of emails it received about the .XXX application. The NTIA also met in person with representatives from other conservative organisations, including the Family Research Council and Concerned Women for America. Then, on 8 August 2005, Meredith Attwell, a Senior Advisor at the NTIA, wrote in a memo “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 United States does not wish for that to happen.”⁵³ Shortly after this email, as mentioned earlier, Michael Gallagher, the Assistant Secretary for Communications and Information at the United States Department of Commerce, wrote to Dr. Cerf to express concerns with the process ICANN had followed in approving the .XXX sTLD—thereby signalling a reversal of the U.S. Government’s earlier position.⁵⁴

68. I believe that the position of the U.S. Government—belatedly against the establishment of an .XXX sTLD—communicated to ICANN, informally and through official letters, influenced ICANN in its decision not to approve the .XXX registry agreement, despite the fact that ICANN is required to function as an independent decision-maker under its Bylaws and Articles of Incorporation. Nonetheless, it was more advantageous politically for ICANN to avoid a confrontation with the U.S. Government over this issue. ICANN was very concerned

⁵² Heilbrunn, Jacob, “The Gospel of Dobson,” New York Times, May 27, 2007, *available at* <http://www.nytimes.com/2007/05/27/books/review/Heilbrunn2-t.html> (attached as Lawley Exh. 19). *See also*, Crowley, Michael, “James Dobson, The Religious Right’s New Kingmaker,” Slate, Nov, 12, 2004, *available at* <http://www.slate.com/id/2109621/> (attached as Lawley Exh. 20).

⁵³ Email from Meredith Attwell, Senior Advisor, NTIA, 5 Aug. 2005 (attached as Lawley Exh. 21).

⁵⁴ Letter from Michael Gallagher to Dr. Vinton Cerf, posted 15 Aug. 2005.

about making a decision that would not be executed; if it approved .XXX and the United States simply refused to include the sTLD in the root, ICANN would be exposed as powerless. Especially with ongoing international agitation to transfer ICANN's regulatory function to other organisations, ICANN did not wish to look vulnerable. Acquiescing to the U.S. Government when that capitulation could be disguised as a decision based on other concerns was therefore more palatable to ICANN than making the correct decision but risking a confrontation with the U.S. Government that might demonstrate ICANN's weakness.

V. Conclusion

69. From my perspective, ICANN's actions can be viewed as nothing more than a wholly unjustified decision that was made based on concerns about content, considerations that should never have been a part of ICANN's decisions-making process, and were never included in the RFP. Had such considerations been part of the RFP, I never would have submitted the application, or at the very least, would have understood the risks of rejection. Adult content is not a comfortable subject for some people, and ICANN has shown itself wary about becoming involved. After extensive thought and consideration, ICM proposed a solution that would have allowed providers of adult content, who wished to participate, to work together, voluntarily, to come up with standards and practices that would benefit both the sponsored community and consumers, and also help shield families and other interested stakeholders. Although not a magic solution to all problems—which it never could have been, and was not obliged to be—our proposal was a thoughtful step in the right direction. Yet this proposal was rejected because of concerns regarding the *content* of the websites to be registered in the domain, veiled in vague concerns about regulation, the sufficiency of contractual guarantees not required of any other registry operator, or ICANN's process. ICANN showed that it would rather avoid controversy,

even at the expense of following its own Bylaws, and with the result of stringing ICM along for two very expensive years, than to make the correct decision and approve an application that more than satisfied all the criteria as previously laid out. ICM not only wasted time, effort, and money in negotiations with ICANN, but also lost two years where it could have been operating the sTLD. There is no justification under the terms of the process or the rules governing ICANN for the damage ICM has suffered. By the end of this Independent Review Process, ICM will have incurred costs of over USD 5 million, not to mention the loss of the revenue it would have earned from the operation of the sTLD in the previous two years. At the very least, ICANN should now be required to approve the registry agreement and allow ICM to begin operating the sTLD as soon as possible so that ICM can begin to recoup some of these unnecessary and unjust losses.

Being in full agreement with the statements contained in this document, I hereby sign it and
acknowledge its contents, on this 17th day of Jun 2009.



Stuart Lawley

**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)	
)	

WITNESS STATEMENT OF J. BECKWITH BURR

I. Background

1. My name is J. Beckwith Burr. I am a partner at the law firm of Wilmer Cutler Pickering Hale and Dorr, LLP, in Washington, D.C.¹ I received a B.A. from Yale University in 1977, and a J.D. from Georgetown University Law Center in 1987. I am a member of the District of Columbia Bar.

¹ A copy of my CV is attached as Burr Exh. 1.

2. My practice is focused on electronic commerce and information technology, intellectual property licensing, and the international regulation of communications and information technology.

3. From 1995 to 1 June 1997, I was Attorney-Advisor to a Commissioner at the U.S. Federal Trade Commission, where I participated in developing the Commission's approach to competition and consumer protection in the digital marketplace.

4. From June of 1997 to October of 2000, I served as Senior Internet Policy Advisor and then Associate Administrator and Director of International Affairs at the National Telecommunications and Information Administration ("NTIA") in the U.S. Department of Commerce ("DOC"). While at the NTIA, I was responsible for development and implementation of policy on Internet governance, including transfer to the private sector of coordination responsibilities for the Internet Domain Name System.

5. In my capacity as Director of International Affairs at the NTIA, I received and reviewed a submission dated 2 October 1998, from the Information Sciences Institute at the University of Southern California, proposing to create a not-for-profit corporation to be known as the Internet Corporation for Assigned Names and Numbers ("ICANN") to assume responsibility for coordination of the Internet's Domain Name System. The proposal included ICANN's draft Articles of Incorporation and Bylaws. On 20 October 1998, I notified the Information Sciences Institute that the DOC was prepared to begin work on a transition agreement with ICANN, provided ICANN satisfactorily addressed a number of specific concerns about the substantive and operational aspects of the proposed corporation, including, *inter alia*,

concerns about ICANN's transparency and accountability.² In response, on 6 November 2008, ICANN (which had been formally constituted on 25 October 1998) submitted revised Bylaws to address these concerns.³ Based on the revised Bylaws, the DOC commenced negotiations that culminated in the Memorandum of Understanding between ICANN and the DOC dated 25 November 1998 ("MOU").⁴

6. In late 2003, after I had returned to private practice, ICM Registry asked me to serve as legal counsel in connection with its application for a new sponsored top level domain ("sTLD"). I had a longstanding interest in the development of effective private sector self-regulatory mechanisms to manage the increasing tension between national legal regimes and the global nature of the Internet, including innovative uses of the Domain Name System to empower this self-regulation. At the time, there was widespread concern about the effect on children of exposure to online content intended for a mature audience. In this regard, in 2002, the National Research Council⁵ published an authoritative study entitled *Youth, Pornography, and the Internet*, which acknowledged that the "varying definitions of pornography, the nuances of

² Letter from J. Beckwith Burr, Associate Administrator of NTIA for International Affairs, to ICANN, 20 Oct. 1998, *available at* <http://www.ntia.doc.gov/ntiahome/press/icann102098.htm>, Burr Exh. 2.

³ Letter from ICANN to J. Beckwith Burr, 6 Nov. 1998, *available at* <http://www.ntia.doc.gov/ntiahome/press/ICANN111098.htm>, Burr Exh. 3.

⁴ Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, 25 Nov. 1998, *available at* <http://www.icann.org/en/general/icann-mou-25nov98.htm>, Burr Exh. 4.

⁵ The National Research Council "functions under the auspices of the National Academy of Sciences (NAS), the National Academy of Engineering (NAE), and the Institute of Medicine (IOM)" and is "part of a private, nonprofit institution that provides science, technology and health policy advice under a congressional charter" National Research Council, *Welcome to the National Research Council*, <http://sites.nationalacademies.org/nrc/index.htm>, Burr Exh. 5.

public concern about pornography, and their implications for action defy consensus” and concluded that, in order to be effective, “approaches that deal with pornography in ways that honor democracy and a pluralistic society must allow for, indeed empower, varying community judgments (and in the case of the Internet, a possible community with no geographic bounds on the one hand and individual family judgments on the other).”⁶ The NRC Report specifically identified a contract-based system of self-regulation by commercial sources of sexually explicit imagery as an important tool in protecting children from age-inappropriate content.⁷ Because ICM had a well-thought out approach to this issue, which enjoyed strong support from well-known child advocates and the free expression community as well as responsible adult webmasters, I accepted the engagement.

7. I represented ICM Registry in connection with the application it submitted to ICANN in March of 2004 for the .XXX sTLD.⁸ I participated in the initial drafting of the application materials, helped craft responses to the evaluators’ requests for supplemental information, represented ICM in negotiations with ICANN’s executives, made presentations to various ICANN bodies, negotiated the initial version of the registry agreement and each revised version in response to requests from ICANN, and drafted the Request for Reconsideration following the Board’s initial rejection of a draft registry agreement. Because I also represented

⁶ NATIONAL RESEARCH COUNCIL, YOUTH, PORNOGRAPHY, AND THE INTERNET 26 (National Academy Press 2002) (“NRC REPORT”), Burr Exh. 6.

⁷ *Id.* at 216.

⁸ ICM Registry, New sTLD RFP Application, public version posted 19 Mar. 2004, p. 5, available at <http://www.icann.org/tlds/stld-apps-19mar04/xxx.htm> (“ICM Application”), Burr Exh. 7. ICM had previously applied for the .KIDS and .XXX TLDs in ICANN’s 2000 round of applications, but I was not working with ICM at that time.

another applicant for a sponsored TLD,⁹ I have insight into the application process from the perspective of more than one applicant. Throughout this process, I was in frequent and direct communications with ICANN staff, officers, and Board members, including President and CEO Paul Twomey, then-Chairman of the Board Vinton Cerf, General Counsel John Jeffrey, and Senior Vice President Kurt Pritz.

II. ICM's Application

A. The Application Demonstrated the Support of a Well-Defined Community

8. In 2004, in response to the Request for Proposals posted by ICANN in December of 2003,¹⁰ ICM submitted an application for .XXX, which is to serve as a sponsored top level domain for the “global responsible online adult-entertainment community,” defined as those individuals, businesses, and entities that provide sexually-oriented information, services, or products intended for consenting adults or for the community itself who have determined that registration in a clearly labeled adult domain is desirable.¹¹ ICM noted in its application “[t]he 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.”¹² Membership in the sponsored community will not be determined with reference to participants in the adult entertainment industry subject to a specific set of laws or the regulations of any particular

⁹ I represented (and continue to represent) mTLD Top Level Domain, the registry operator for the .MOBI sTLD.

¹⁰ ICANN, Request for Proposals for New Sponsored Top-Level Domains, 15 Dec. 2003, available at <http://www.icann.org/tlds/new-stld-rfp/new-stld-application-part1-15dec03.htm>, p.3 Burr Exh. 8 (“New sTLD RFP”).

¹¹ ICM Application, Burr Exh. 7.

¹² *Id.*

jurisdiction; rather, members will comprise “websites that convey sexually-oriented information and for which a system of self-identification would be beneficial.”¹³ Thus, in accepting registrants in the sTLD, ICM—like all sponsored top level domains operators—will be responsible for enforcing registrant compliance with the policies developed specifically for the sTLD, but it will have no obligation or need to determine whether any particular website complies with any national laws.¹⁴ As the sponsored community will consist entirely of adult webmasters who *voluntarily* choose to demonstrate their compliance with community-developed best practices by registering in the .XXX domain, website operators will not belong to the community unless they affirmatively identify themselves as such.

¹³ *Id.*

¹⁴ In this way, .XXX is no different from any existing or prospective top level domain. The registry will be subject to the laws of countries with jurisdiction over its operations, and each such country has the right and ability to enforce its own laws directly. Likewise, to the extent that a particular website operator violates the laws of any country with jurisdiction over its operations, each such country will have the right and ability to enforce its national laws. Registries, however, have not been held liable for the activities of registrants. Recall, for example, when an organization sought to enforce the laws of France prohibiting the sale of Nazi memorabilia on yahoo.com, it brought an action against Yahoo! and its subsidiary, Yahoo! France, but did not attempt to reach Yahoo!’s behavior through VeriSign, the registry operator for the .COM top level domain. *French Union of Jewish Students/League Against Racism and Antisemitism v. Yahoo! Inc., Yahoo! France*, No:RG 00/05308, 00/05309 (Court of Paris) May 22, 2000 [unpublished], Burr Exh. 9; for an English translation of the order, see the attachment to the complaint filed by Yahoo! in *Yahoo! Inc. v. La Ligue Contre le Racisme et L’Antisemitisme*, filed in the United States District Court in the Northern District of California, *available at* <http://cdt.org/speech/international/20001221yahoo.complaint.pdf>, Burr Exh. 10. Likewise, when the Federal Trade Commission discovered that an Australian company was using the website www.internic.com to defraud U. S. consumers, it wrote to Network Solutions (the registry operator for .COM) to warn it about the scam, but referred the matter to the Australian Competition and Consumer Commission for investigation. FEDERAL TRADE COMMISSION, FIGHTING CONSUMER FRAUD: NEW TOOLS OF THE TRADE 16-17 (Apr. 1998) *available at* <http://www.ftc.gov/reports/fraud97/fraud97.pdf>, Burr Exh. 11.

9. ICM's application described its extensive outreach efforts "to educate and mobilize the responsible online adult-entertainment community" and to develop support for the sTLD.¹⁵ The application documented the large community of adult-entertainment providers who stated that they supported and intended to register in the .XXX sTLD. ICM also submitted letters of support from major adult-entertainment providers in the United States, Canada, Australia, the United Kingdom, and continental Europe that, as the ICANN evaluators acknowledged, demonstrated substantial interest in and support for the .XXX sTLD. Specifically, supporters noted that they would be interested in participating in the sTLD because it would "provide a platform for the online adult industry to develop their own business practices within this top-level domain."¹⁶ A primary value of the .XXX sTLD to prospective registrants is that it will enable interested webmasters to clearly label their websites, communicate their adherence to best practices, and create a forum for the community to work together and with other interested stakeholders to develop policies and best practices.

B. The Application Explained the Benefits of the Policy Authority Delegated to the Sponsoring Organization

10. The ICM application identified the International Foundation for Online Responsibility ("IFFOR") to serve as the sponsoring organization, responsible the development of policy for the sTLD.¹⁷ In carrying out its policy-formulation responsibility, IFFOR's task will be, *inter alia*, to "promote the development of responsible business conduct within the Community that will be incorporated into the registrant agreement of all .xxx domain names via

¹⁵ ICM Application, p. 2, Burr Exh. 7.

¹⁶ See Letters of Support attached to ICM's Response to Questions from Independent Evaluators, p. 14, Burr Confidential Exh. A.

¹⁷ ICM Application, p. 2-3, Burr Exh. 7.

a Declaration of Best Business Practices” and “promote the development of business practices to safeguard children online and combat child pornography.”¹⁸ The structure and composition of IFFOR reflects input from the responsible online adult-entertainment industry, from free expression and privacy advocates, and from child safety experts.¹⁹ IFFOR’s bylaws deliberately parallel ICANN’s, in order “[t]o ensure openness and transparency.”²⁰

11. As the sponsoring organization, IFFOR’s role will be to develop the specific mechanisms through which .XXX will accomplish its mission, along with specific requirements for registrants, including the rules to be used in approving registrations. In order to achieve its purpose and serve the sponsoring community, the .XXX domain needs the tools and authority, available only to sponsored top level domains,²¹ to bring together the responsible online adult-entertainment constituency, advocates for free expression, consumer privacy, information security, and child safety experts to create binding standards applicable to all who voluntarily join the community. As registration in the domain will be voluntary, the best practices policies to be developed by IFFOR to ensure clear labeling, facilitate parental filtering, and prohibit child pornography are enforceable by contract and without state action or any infringement on freedom of expression. Moreover, registration in the domain will not diminish or undermine the ability of any sovereign to enforce its own laws regulating sexually oriented content.

¹⁸ *Id.*, p. 3.

¹⁹ *See, e.g.*, Letters of Support attached to ICM’s Response to Questions from Independent Evaluators, p. 33-35, 37-39, Burr Confidential Exh. A.

²⁰ ICM Application, p. 2, Burr Exh. 7.

²¹ It is my understanding that ICANN has since changed the terminology it uses for TLD types in connection with its launch of the new generic TLD round.

12. As ICANN has stated, the goal of an sTLD is to address the needs of a sponsored community that “can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate.”²² In contrast, in a generic top level domain (“gTLD”), the registry operator is answerable only to ICANN.²³ The policy authority delegated to sTLDs is a critical feature of the ICM application. As a well-respected counselor to the adult industry stated in connection with the ICM application: “It has been my experience that participants in the adult Internet industry strongly desire to make their voice heard, in some effective format, but have been frustrated with the overall unavailability of any such outlet. IFFOR, and its various Supporting Organizations, should be welcomed as fertile ground for honest debate on the many issues affecting online erotica.”²⁴ These goals can not be achieved if the domain is a gTLD, as ICANN—and not any specific community—is responsible for developing gTLD policy.

III. The Independent Evaluation Process

A. ICANN Established a Two Stage Process for Evaluating Applications

13. Prior to issuing the RFP or accepting applications, ICANN outlined the process it intended to follow in analyzing the applications, which, from the earliest discussions, involved a two stage process: First, the applications were to be assessed by a team of independent

²² New sTLD RFP, p.3, Burr Exh. 8.

²³ See, e.g., WORKING PARTY FOR TELECOMMUNICATION AND INFORMATION SERVICES POLICIES, Report JT00167437 (DSTI/ICCP/TISP(2004)2/FINAL), GENERIC TOP LEVEL DOMAIN NAMES: MARKET DEVELOPMENT AND ALLOCATION ISSUES (OECD 2004), available at <http://www.oecd.org/dataoecd/56/34/32996948.pdf>, Burr Exh. 12.

²⁴ Letter of Support attached to ICM’s Response to Questions from Independent Evaluators, p. 33-34, Burr Confidential Exh. A.

evaluators to determine if they met the RFP-selection criteria. The evaluators would present their conclusions and make recommendations to the ICANN Board of Directors. After the Board confirmed the evaluators' findings that an application met the selection criteria, the applicant would negotiate a registry agreement with ICANN and ICANN would seek to have the new sTLD added to the root zone file. ICANN's current assertion that it made no representations about the two stage process is contradicted by the documentation it issued about the process, its correspondence with applicants, and the text of every official ICANN report regarding the progress of the round.

14. For example, in a presentation to the ICANN Board in Carthage, Tunisia, in October 2003, Dr. Cerf stated “**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.”²⁵ Likewise, during the Public Forums at ICANN's meetings in Rome, Italy, in March 2004, Kurt Pritz, ICANN's Senior Vice President of Services, described the two-part process as follows:

[After the] independent evaluation, certain sTLDs will be selected to go on to the next round. That round is a technical and commercial negotiation. .

..

And at the end of that, we'll execute agreements, and those agreements will be endorsed by the Board.

.....

²⁵ ICANN Board Meeting, Carthage, Tunisia, 31 Oct. 2003: Real Time Captioning, *available at* <http://www.icann.org/en/meetings/carthage/captioning-board-31oct03.html>, Burr Exh. 13.

[After] the independent evaluation . . . **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.²⁶

Shortly after the Rome meetings, ICANN released a document describing the "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.²⁷

15. On numerous occasions, ICANN reiterated this two stage approach specifically with respect to the ICM application, both in public statements and in communications with ICM. For example, at the Luxembourg GAC meetings in July 2005, Dr. Cerf stated "[ICM's] proposal this time met the three main criteria, financial, technical, sponsorship. They [sic] were doubts expressed about the last criteria which were discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters."²⁸ Further, in anticipation of the Board's approval of the ICM application, Mr. Jeffrey, ICANN's General Counsel, approved the wording of a press release that stated in the very first sentence:

²⁶ Kurt Pritz, "sTLD Update," ICANN Public Forum—Part 1, Rome, Italy, 4 Mar. 2004: Real-Time Captioning (emphasis added), *available at* <http://www.icann.org/meetings/rome/captioning-forum1-04mar04.htm>, Burr Exh. 14; *see also* Kurt Pritz, sTLD Update, PowerPoint Presentation to the Board, Rome, Italy, 4 Mar. 2004, *available at* <http://www.icann.org/presentations/pritz-forum-rome-04mar04.pdf>, Burr Exh. 15.

²⁷ ICANN Announcement: Progress in Process for Introducing New Sponsored Top-Level Domains, 19 Mar. 2004 (emphasis added), *available at* <http://www.icann.org/announcements/announcement-19mar04.htm>, Burr Exh. 16.

²⁸ Governmental Advisory Committee Meeting XXII, Plenary Session, Luxembourg City, Luxembourg, 11 July 2005: Minutes, p. 5 (emphasis added), *available at* http://www.gac.icann.org/web/meetings/mtg22/LUX_MINUTES.doc, Burr Exh. 17.

“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.**”²⁹

B. Based on a Misconception of the Criteria, the Independent Evaluators Conclude that ICM and Seven Other Applicants Failed to Meet the Sponsorship Criteria

16. The first step of the two-part process was review of the applications by teams of independent evaluators. As the evaluation teams reviewed the applications, they posed several questions to each of the applicants, requesting clarification of various portions of the applications and additional evidence for the statements in the submissions, including statements about the level of community support for the proposals. The Sponsorship and Other Issues Evaluation Team (the “S&OI ET”) posed similar questions to each of the applicants: how was the proposed sTLD space “differentiated” from existing domains, how would it meet needs not met by current TLDs, and what plans did the applicant have for global outreach. The S&OI ET also asked each applicant to provide signed letters or other evidence of community support. Virtually all of the applicants were also asked to provide additional information on the definition of the sponsored community.³⁰

17. ICM responded to the evaluators’ questions, elaborated on the benefits of the proposed sTLD, and submitted more than 20 letters documenting the support from the sponsored community as well as from individuals and groups involved in child advocacy, privacy and

²⁹ Emails between John Jeffrey and J. Beckwith Burr, 3 May 2005 (emphasis added), Burr Exh. 18.

³⁰ ICANN, Status Report on the sTLD Evaluation Process, updated 3 Dec. 2005—Appendix B, Evaluators’ Questions for Applicants, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppB.pdf> (“sTLD Status Report”), Burr Exh. 19.

security, and free expression.³¹ This response was entirely consistent with the responses provided by other applicants.³²

18. At no time did ICM represent that it had universal support from the online adult entertainment industry. Such universal support was not required by the RFP, and none of the applicants could have demonstrated support from every potential member of their proposed sponsored community. For example, the European Telecommunications Network Operators Association was opposed to the .TEL (Telnic) application because of the failure “to take into account the existence of global and national rules and conventions,” the lack of sufficient “procedures need[ed] to safeguard consumer interests,” and insufficient attention to privacy concerns.³³ Similarly, the global telecommunications company Telefónica S.A. believed that the .TEL (Telnic) application did “not satisfy the requirements to be a ‘sponsored top level domain’, that it d[id] not take into account national and international regulations nor the international community, and that it ha[d] serious shortcomings as regards intellectual property, data, privacy, consumer protection and competition.”³⁴ Telefónica Móviles also posted statements opposing the .MOBI application, specifically noting that the “proposal show[ed] . . . inconsistencies with public numbering regulation for mobile telecommunication services in Europe . . . a lack of information about the internal rules in the governance of the society and the decision making

³¹ Letters of Support attached to ICM’s Response to Questions from Independent Evaluators, p. 14, Burr Confidential Exh. A.

³² sTLD Status Report—Appendix C, Applicants’ Responses to Questions, Burr Exh. 19.

³³ Posting of Gerd Wiedenaupt, Chairman of the European Telecommunications Network Operators Association Working Group on Naming, Addressing and Numbering Issues, 30 Apr. 2004, *available at* <http://forum.icann.org/lists/stld-rfp-tel-telnic/msg00008.html>, Burr Exh. 20.

³⁴ Posting of Ramiro Sánchez de Lerín, Vice Secretary of Telefónica S.A., 29 Apr. 2004, *available at* <http://forum.icann.org/lists/stld-rfp-tel-telnic/msg00004.html>, Burr Exh. 21.

process,” and insufficient information on the proposed measures “related to personal data protection policies.”³⁵ In neither case did ICANN find these objections disqualifying.

19. Similarly, ICM was aware that not everyone involved in the adult entertainment industry was supportive of the application, and even informed ICANN that a non-trivial minority of adult webmasters opposed creation of the TLD.³⁶ ICM noted, however, that as the sponsored community was self-identified, no one who opposed .XXX would ever be forced to register, and, by definition, would not be part of the sponsored community. Several other applicants made exactly the same point, apparently persuasively. For example, Telnic, which now operates the .TEL sTLD stated: “The community is defined by their use of this TLD.”³⁷ Telnic also described the sponsored community as “open to individuals and companies that wish to store personal or corporate communications contacts.”³⁸ Notably, inasmuch as the .TEL registry did not exist at the time these statements were made, its sponsored community “did not exist” at the time—the same deficiency that ICANN now cites as disqualifying with regard to .XXX.³⁹

20. ICM also reminded the evaluators that it was not seeking to regulate adult-oriented content, rather, the sTLD was “intended to serve the needs of the Internet community

³⁵ Posting of Maria Luisa Rodriguez Lopez, General Secretary of Telefónica Móviles España, 30 Apr. 2004, *available at* <http://forum.icann.org/lists/stld-rfp-mobi/msg00035.html>, Burr Exh. 22.

³⁶ ICM Registry, The Sponsored .xxx TLD: Promoting Online Responsibility, presented to the ICANN Board on 2 Apr. 2005, Burr Confidential Exh. B.

³⁷ Telnic’s Response to Evaluators’ Report, contained in 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>, Burr Exh. 23.

³⁸ *Id.*

³⁹ ICM explained, in detail, the fact that the sponsored community did exist, in a letter to ICANN submitted on 9 October 2004, pp. 5-10, Burr Exh. 24.

that is involved in sexually-oriented entertainment, as that concept is broadly understood,” who desire to participate in the sTLD and are willing to comply with best practices to be developed with input from all stakeholders.⁴⁰ Providers of adult entertainment are capable of recognizing themselves and each other as such, and, just like .TEL, registration in .XXX will evidence their membership in the sponsored community of webmasters willing to comply with best practices. There is no incentive for a webmaster **not** providing adult entertainment or unwilling to comply with community-developed best practices to register in the space, and even if such incentives existed, the policies adopted by ICM and IFFOR to prevent abusive registrations would ensure that there would be little reason for anyone who was not part of the community to attempt to register.⁴¹

21. Despite ICM’s thorough and well-supported responses, the S&OI ET continued to take the position that the sponsored community for .XXX could not be defined—and that a community of common interests and goals could not exist—in the absence of a uniform international understanding of what constitutes “adult content.”

22. The S&OI evaluators reached the same conclusions, for very similar reasons, with respect to eight of the 10 applicants for new sTLDs. In the opinion of the evaluators, only the

⁴⁰ ICM’s Response to Evaluation Team Questions, p. 6, Burr Confidential Exh. A.

⁴¹ See ICM Application (“ICM and IFFOR propose a comprehensive array of mechanisms to minimize abusive registrations and protect the rights of intellectual property owners. Specifically, ICM and IFFOR will provide a process to ensure contractual enforcement, charter compliance, dispute resolution, and accurate Whois information as set forth in more detail in the following sections.”), p. 18 Burr Exh. 7. The Independent Evaluators concluded that ICM’s mechanisms for preventing abusive registrations were sufficient. See *New sTLD Applications: Independent Evaluation Report*, 27 Aug. 2004, p. 27 (“Independent Evaluation Report”), Burr Confidential Exh. C.

.POST and .CAT applications met the sponsorship criteria. .XXX, .ASIA, and .TRAVEL failed only the sponsorship criteria, .JOBS, and .MOBI failed both the sponsorship and technical criteria, and .MAIL⁴² and both .TELs failed to meet all three categories. Nonetheless, ICANN has since approved .ASIA, .CAT, .JOBS, .MOBI, .TRAVEL, and .TEL (Telnic), which are all now operating sTLDs.

IV. The ICANN Board Reviews the Applications and Determines that ICM's Application Satisfied the RFP Selection Criteria

A. ICANN Board Begins Analysis of the Applications

23. The low number of applicants recommended by the evaluators for approval evidently disappointed ICANN, which immediately informed each applicant that the Board would undertake its own analysis of the applications to decide which should be approved. Mr. Pritz wrote to ICM to say that the Board had “decided to allow each proposal to progress on its own timetable” and that the Board would conduct additional analysis of ICM’s application “before the evaluation will be considered completed.”⁴³ The letter also explicitly referenced the two step process that ICANN now denies: “If it is determined that the sponsorship criteria have been met, the application will proceed immediately into technical and commercial negotiation.”⁴⁴

24. The Board’s first step in this analysis was to invite the applicants to respond to the evaluation reports and address the evaluators’ criticisms. ICM provided the Board with a

⁴² The Technical Team did not recommend .MAIL, stating that they were not yet convinced the proposal was likely to succeed given its technical complexity.

⁴³ Letter from Kurt Pritz to Stuart Lawley, 31 July 2004, Burr Exh. 25.

⁴⁴ *Id.*

detailed response, which explained that the evaluators' concern regarding the lack of a universal definition for adult content was misplaced. ICM again explained that the proposal need not conform to any particular regulatory or cultural definition, as it, like all other proposals, was voluntary and self-defining; that is, no one who did not wish to participate in the sTLD would be forced to do so. As with the other sTLD applications, there would be no consequences for any entity that might be part of the industry but that chose not to become part of the community by registering in the sTLD. The sponsored community would be only those "providers of online adult entertainment who desire to work collectively to develop industry guidelines and best practices and who desire to establish a space on the Internet where those guidelines and best practices can be implemented."⁴⁵ As long as there is a community of providers of online material that can be deemed sexually explicit (either by common sense or by agreement among those providers) who believe they can benefit from a collective policy development environment, there is a distinct community for the sTLD. ICM had already demonstrated that there was strong support for the creation of .XXX among online providers of such content, each of whom believed that it would be in their interest to participate in the development of best practices. ICM reiterated the breadth of the support for the application, including from industry participants outside of North America and from child safety, and free expression advocates, and law enforcement.⁴⁶

25. The Board did not discuss ICM's application until three months after ICM had submitted its responses to the evaluation reports. At that time, it had already moved forward on

⁴⁵ See Letter from Stuart Lawley to Kurt Pritz, 9 Oct. 2004, p. 6, Burr Exh. 24.

⁴⁶ *Id.*, pp. 8-10; see also Memorandum to the ICANN Board of Directors, 2 Nov. 2004 (revised 7 Dec. 2004), pp. 2-4, Burr Confidential Exh. D.

other applications and, in so doing, unequivocally rejected the manner in which the S&OI ET applied the published criteria.⁴⁷ A few months later, the Board rejected the views of the S&OI ET with respect to the .TEL (Telnic) proposal.⁴⁸ None of these applicants changed their proposals in order to get Board approval; rather, they were approved because the Board applied the sponsorship selection criteria differently—and in my view more coherently—than the evaluators had.

26. At the request of the Board, ICM brought a large team to Mar del Plata, Argentina, in April 2005, to meet with the Board in person. I, along with Stuart Lawley, the Chairman and President of ICM, Robert Corn-Revere, a lawyer and respected First Amendment advocate, Larry Walters, a leading lawyer in the adult entertainment industry, and (by telephone) Parry Aftab, a well-known advocate for child safety, gave an in-depth presentation regarding the ICM application, compliance with the criteria, community support, and the benefits of the proposal.⁴⁹ The team then responded to numerous questions from the Board and Board liaisons.⁵⁰

⁴⁷ See ICANN Board Meeting, 13 Dec. 2004: Adopted Resolutions, *available at* <http://www.icann.org/en/minutes/resolutions-13dec04.htm> (authorizing negotiations with .JOBS and .MOBI), Burr Exh. 26.

⁴⁸ ICANN Board Resolution on .TEL (Telnic) Approval to Enter into Contract Negotiations, ICANN Board Meeting, 28 June 2005: Minutes, *available at* <http://www.icann.org/en/minutes/minutes-28jun05.htm>, Burr Exh. 27.

⁴⁹ ICM Registry, The Sponsored .xxx TLD: Promoting Online Responsibility, presented to the ICANN Board on 2 Apr. 2005, Burr Confidential Exh. B; *see also* Letter from Stuart Lawley to John Jeffrey, 5 April 2005, Burr Exh. 28.

⁵⁰ Notably, the Chairman of the GAC, Mohamed Sharil Tarmizi, attended at least a portion of this meeting, received the documents we prepared for the Board, and had the same opportunity to ask questions as the Board members did. In fact, as the GAC liaison to the Board, Mr. Tarmizi

(continued...)

27. Like other applicants that had been rejected by the S&OI ET, ICM was pleased that the Board decided to set aside the conclusions of the evaluation teams. Nevertheless, I categorically reject ICANN's argument that it somehow went "above and beyond" what was required for ICM.⁵¹ ICM, like other applicants, demonstrated that it fully met the sponsorship criteria as interpreted by the Board and had the support of a well-defined sponsored community. ICM, like other applicants, had invested heavily in developing its proposal, and had paid ICANN's \$45,000 application fee. ICM, like other applicants, had followed the rules issued by ICANN and expected ICANN to follow those rules as well. ICM, like other applicants, believed that it was incumbent upon the Board to undertake this review. ICM, like other applicants, was also frustrated with the delay in and the cost of a process that was supposed to have been much briefer. ICM, like other applicants, frequently asked that the Board move forward with consideration of the application. Having undertaken this review with respect to some applicants, ICANN had no basis for treating ICM differently.

28. The Board finally scheduled consideration of the .XXX application for early May of 2005. On 29 April 2005, in anticipation of that meeting, and at the request of ICANN's General Counsel, John Jeffrey, ICM's public relations team held a coordinating call with ICANN's public relations team. On a separate call, I discussed with Mr. Jeffrey a draft ICM press release, which would describe ICANN's approval of ICM's application. After I made certain changes requested by Mr. Jeffrey, he affirmatively signed off on a press release, which

(continued)

was invited to attend all Board meetings, and did in fact attend several Board meetings where the .XXX application was discussed. *See infra*, footnote 72.

⁵¹ ICANN's Response to ICM's Request for Independent Review, para. 100.

began with the statement, "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.**"⁵²

29. Although the Board did not vote on the ICM proposal during the May meeting as anticipated,⁵³ Mr. Jeffrey told me that the Board's discussion had been "very positive" and said that he believed the application "would go through" at the next meeting. He indicated that ICM and ICANN could begin work on the registry agreement, and, in anticipation of press inquiries, asked for additional information about ICM's commitments with respect to the "tools, technology, and programs" to be launched in connection .XXX.⁵⁴

B. ICANN Approves the .XXX Application

30. Finally, on 1 June 2005, the Board determined that the ICM application met the evaluation criteria.⁵⁵ I attest to this for several reasons, fully understanding that ICANN is *now representing* that the vote signified something different.

31. First, ICANN had consistently described the two-step process before and after the vote. ICM and the public understood that this vote meant that the Board had determined that

⁵² Email from John Jeffrey to J. Beckwith Burr, 3 May 2005 (emphasis added), Burr Exh. 18.

⁵³ The 3 May 2005 Board meeting minutes say: "Although no resolution was offered regarding this issue, there was broad discussion of this matter regarding whether or not the application met the criteria within the RFP particularly relating to whether or not there was a 'sponsored community' and the Board agreed that it would discuss this issue again at the next Board Meeting." ICANN Board Meeting, 3 May 2005: Minutes, *available at* <http://www.icann.org/en/minutes/minutes-03may05.htm>, Burr Exh. 29.

⁵⁴ Memorandum from ICM to John Jeffrey and Kurt Pritz, 31 May 2005, Burr Exh. 30.

⁵⁵ ICANN Board Resolution on .XXX sTLD Approval to Enter into Contractual Negotiations, ICANN Board Meeting, 1 June 2005: Minutes, *available at* <http://www.icann.org/minutes/minutes-01jun05.htm>, Burr Exh. 31.

ICM's application met all of the selection criteria, including the requirement that there be a clearly defined community and that there be sufficient support from the community.

32. Second, the Board had no reason to authorize ICM to proceed to negotiations for the registry agreement if it did not feel that the application met the criteria. The record reflects that the Board thoroughly discussed whether ICM's application met the sponsorship criteria on numerous occasions before voting. At the 24 January 2005 Board meeting, for example, "[t]here was extensive board discussion regarding the [.XXX] application in particular focused around the issue of whether a sponsored community criteria of the RFP was appropriately met."⁵⁶ As I already described, I personally met with the Board, along with the rest of the ICM team, on 2 April 2005. In addition to our presentation, which included a discussion of sponsorship issues, we were available to answer and any all questions from the Board on that topic. Later, at the 3 May 2005 meeting during which the Board was expected to vote on ICM's application, there was instead "broad discussion . . . regarding whether or not the application met the criteria within the RFP particularly relating to whether or not there was a 'sponsored community.'"⁵⁷ Following that meeting, ICANN's General Counsel, John Jeffrey sent me an email with the following message: "Board discussed, but needed additional time to talk about it. Another special meeting will be set in two weeks and they are aiming to resolve at that time."⁵⁸ Indeed, at the 1 June 2005 Board meeting, following additional discussion of "the adequacy of the application with

⁵⁶ ICANN Board Meeting, 24 Jan. 2005: Minutes, *available at* <http://www.icann.org/en/minutes/minutes-24jan05.htm>, Burr Exh. 32.

⁵⁷ ICANN Board Meeting, 3 May 2005: Minutes, Burr Exh. 29.

⁵⁸ Email from John Jeffrey to J. Beckwith Burr, 4 May 2005, Burr Exh. 33.

particular focus on the ‘sponsored community’ issues,”⁵⁹ ICANN approved the .XXX application. If, after all of this deliberation, the Board had still felt that there were still questions about the ICM application, I have no doubt that it would have continued to discuss those questions with ICM before voting to approve. Instead, the resolution approved the application, without reservations or caveats:

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.⁶⁰

33. In contrast to this resolution, in two other instances, the Board’s approval to proceed to contract negotiations contained specific directions or conditions with respect to those negotiations. In the resolution authorizing negotiations for the .JOBS registry agreement, the Board directed that, in the course of negotiating the terms of the registry agreement, “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.”⁶¹ Similarly, the Board directed that during the .MOBI negotiations, staff should take “special consideration . . .

⁵⁹ ICANN Board Resolution on .XXX sTLD Approval to Enter into Contractual Negotiations, ICANN Board Meeting, 1 June 2005: Minutes, Burr Exh. 31.

⁶⁰ *Id.* The resolution was approved six to three with two abstentions.

⁶¹ ICANN Board Resolution on .JOBS sTLD Negotiation, ICANN Board Meeting, 13 Dec. 2004: Approved Resolutions, Burr Exh. 26.

to confirm the sTLD applicant's proposed community of content providers for mobile phones [sic] users, and confirmation that the sTLD applicant's approach will not conflict with the current telephone numbering systems."⁶² One Board member, Raimundo Beca, highlighted the importance of these directives. In responding to concerns about the lack of transparency in the sTLD approval process, Mr. Beca noted that "DOT JOBS and DOT MOBI were asked in the negotiations with the staff to achieve or to demonstrate that they were compliant . . . with the RFP on the supporting organization, because there were some doubts about that. . . . [S]ometimes many didn't realize that there was a lot of information . . . in the way that the [sTLD] resolution[s] were] drafted."⁶³ Thus, to the extent that the Board had concerns about whether or not an application met the RFP criteria, it knew how to express those concerns and to direct staff to use contract negotiations as a means to demonstrate that the RFP criteria had been met. The resolution authorizing ICM to move into contract negotiations, on the other hand, contained no such caveats, directions or conditions, clearly indicating therefore that no such requirements were imposed on ICM.

34. Third, the ICANN Board also understood the significance of this vote. Following the vote, ICANN Board member Joichi Ito posted to his blog explaining the reasons the Board decided to approve .XXX and noting, "ICANN has been mandated with trying to increase the TLD space and the .XXX proposal, in my opinion, has met the criteria set out in the RFP. Our approval of .XXX is a decision based on whether .XXX met the criteria and does not endorse or

⁶² ICANN Board Resolution on .MOBI sTLD Negotiation, ICANN Board Meeting, 13 Dec. 2004: Approved Resolutions, Burr Exh. 26.

⁶³ ICANN Public Forum—Part II, Luxembourg, 14 July 2005: Real-Time Captioning, p. 32 available at <http://www.icann.org/meetings/luxembourg/captioning-pf2-14jul05.htm>, Burr Exh. 34.

condone any particular type of content or moral belief.”⁶⁴ Not long after the vote, Vinton Cerf, at that time the Chairman of the ICANN Board, told the Governmental Advisory Committee that ICM met the criteria.⁶⁵ Mr. Pritz, and other ICANN executives and senior staff repeatedly indicated that the vote constituted a decision that the application had met the selection criteria; for example, Mr. Pritz stated during the public forum at the July 2005 ICANN meetings in Luxembourg that: “There’s four other applicants that have been found to satisfy the baseline criteria, and they’re presently in negotiation for the designation of registries, dot CAT, dot POST, TELNIC, and XXX.”⁶⁶ Nor did any of ICANN’s communications to ICM or to the public following the vote suggest that there were unresolved questions regarding the application’s compliance with the selection criteria. In the negotiations following the vote, neither the Board nor ICANN staff requested new information regarding sponsorship, community support, or any other selection criteria.⁶⁷ Other ICANN related organizations also understood the meaning of the vote; for instance, following the vote, the gTLD Registries Constituency recognized ICM as having an interest in common with registry operators and

⁶⁴ Ito, Joichi, 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>, Burr Exh. 35.

⁶⁵ Governmental Advisory Committee Meeting XXII, Plenary Session, Luxembourg City, Luxembourg, 11 July 2005: Minutes, Burr Exh. 17.

⁶⁶ ICANN Public Forum—Part II, Luxembourg, 14 July 2005: Real-Time Captioning, Burr Exh. 34.

⁶⁷ It was not until some 11 months later, in May 2006, that there was an indication the Board was re-considering issues already decided by the 1 June 2005 vote; and the first hint came not in direct discussions between ICANN and ICM, but in a letter from Dr. Paul Twomey to the GAC. ICANN Correspondence: Letter from Dr. Paul Twomey to Mohamed Sharil Tarmizi, 4 May 2006, *available at* <http://www.icann.org/correspondence/twomey-to-tarmizi-04may06.pdf>, Burr Exh. 36 (stating 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.”).

invited ICM to participate in the constituency group as an observer, pending the final registry agreement with ICANN.⁶⁸ In short, there is no doubt in my mind that the 1 June 2005 vote was a determination that the application met the criteria, regardless of what ICANN may claim now.

35. Following the vote, on 12 June 2005, ICM submitted to ICANN a draft of the registry agreement, based on the template agreement and appendices issued by ICANN and used by .JOBS and .TRAVEL, including a draft of Appendix S containing the charter for the sponsoring organization (IFFOR, in the .XXX draft). Having just negotiated a registry agreement on behalf of another sTLD applicant, I was very familiar with ICANN's approach. Mr. Jeffrey told ICM that he "anticipate[d] that this should be a fairly straightforward negotiation and also look[ed] for a quick conclusion to any required discussions relating to the agreement."⁶⁹ Mr. Jeffrey and I met in Luxembourg following the ICANN meetings in July 2005 to discuss the ICM registry agreement, and by 1 August 2005 we came to agreement on the terms of a draft, which was posted to the ICANN web site on 9 August 2005.⁷⁰

⁶⁸ Email from Marie Zitkova, Chair of the gTLD Registries Constituency, to Stuart Lawley, 29 June 2005, Burr Exh. 37. The gTLD Registries Constituency is one of the Constituencies represented in the Generic Names Supporting Organization. The Generic Names Supporting Organization is the main entity that provides the ICANN Board with advice on TLD policy; the gTLD Registries Constituency is composed of all gTLDs under contract with ICANN. Thus the invitation to join signaled that the gTLD Registries Constituency expected that ICM would soon have a final registry agreement with ICANN.

⁶⁹ Email from John Jeffrey to J. Beckwith Burr, 13 June 2005, Burr Exh. 38. Mr. Jeffrey's contemporaneous expectation that the negotiations would be "straightforward" cannot be reconciled with ICANN's current claim that the contract negotiation process was meant to address open questions regarding sponsorship.

⁷⁰ ICANN's outside counsel, Esme Smith, informed me that we had reached agreement on the terms of the draft on 1 August 2005. See Email from Esme Smith to J. Beckwith Burr, 1 Aug. 2005, Burr Exh. 39. When the agreement was posted, several days later on 9 August, it was still dated 1 August 2005. Draft of Sponsored TLD Registry Agreement between ICM and ICANN,

(continued...)

V. Belated Government Reaction Causes ICANN to Stall in Negotiations with ICM

A. The GAC Declines to Express Opposition to the .XXX Application

36. After receiving the 10 applications in March 2004, ICANN posted them on the ICANN website for public review and comment.⁷¹ Thus, by the time the draft .XXX sTLD registry agreement was posted on 9 August 2005, the applications had been public for nearly 18 months. During this period, ICM had repeatedly asked Mohammed Sharil Tarmizi, the Chair of the Governmental Advisory Committee (the “GAC”), if the GAC had any questions or concerns about ICM’s application, and Mr. Tarmizi had repeatedly told ICM that it did not. Mr. Tarmizi was extremely familiar with ICM’s negotiations with ICANN, having participated in several Board meetings where the application had been discussed.⁷² Moreover, ICANN had followed its rules by providing the GAC with an opportunity to comment on the sTLD applications. In a December 2004 letter, Dr. Twomey had reminded Mr. Tarmizi that the Board expected to move toward contract negotiations with applicants from the 2004 round, and had suggested that Mr. Tarmizi might wish to bring the issue to the attention of the GAC

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posted 9 Aug. 2005, *available at* <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-09aug05.pdf>, Burr Exh. 40.

⁷¹ ICANN Announcement, ICANN: Progress in Process for Introducing New Sponsored Top-Level Domains, 19 Mar. 2004, Burr Exh. 16.

⁷² Mr. Tarmizi was present for all or part of ICM’s presentation to the Board about .XXX in Mar del Plata, Argentina on 2 April 2005; the Board meeting several days later on 8 April 2005 where Dr. Cerf reported that the Board had engaged in “fairly extensive discussion about .ASIA and .XXX” and was “continu[ing] to evaluate those” applications, ICANN Board Meeting, Mar del Plata, Argentina, 8 Apr. 2005: Real-Time Captioning, *available at* <http://www.icann.org/en/meetings/mardelplata/captioning-BoD-meeting-08apr05.htm>, Burr Exh. 41; and the 3 May 2005 Board meeting where there was “broad discussion” of whether the .XXX application “met the criteria within the RFP particularly relating to whether or not there was a ‘sponsored community,’” ICANN Board Meeting, 3 May 2005: Minutes, Burr Exh. 29.

membership.⁷³ According to Mr. Tarmizi's response, dated 3 April 2005, neither the GAC nor any individual countries had expressed opposition to the application. In his own words, "[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round."⁷⁴

37. In July 2005, ICANN met in Luxembourg. According to the minutes of the GAC meetings, and as reflected in contemporaneous descriptions of the meeting between the ICANN Board and the GAC, both ICANN and the GAC accepted that the .XXX application had been approved. Dr. Cerf told the GAC that the ICM application met the criteria,⁷⁵ and the U.S. Government representative to the GAC informed her superiors that, "happily," the Luxembourg Communiqué did not reference .XXX.⁷⁶

B. The United States Government Reverses its Position and ICANN Responds

38. As previously discussed, ICANN posted the proposed registry agreement on 9 August 2005. On or about 12 August 2005, Mr. Jeffrey called me to report that Dr. Cerf had received a letter from Michael Gallagher, the Assistant Secretary for Communications and

⁷³ See Letter from Dr. Paul Twomey to Mohamed Sharil Tarmizi, 1 Dec. 2004, *available at* <http://www.icann.org/correspondence/twomey-to-tarmizi-01dec04.pdf>, Burr Exh. 42.

⁷⁴ Letter from Mohamed Sharil Tarmizi to Dr. Paul Twomey, 3 Apr. 2005, *available at* <http://www.icann.org/correspondence/tarmizi-to-twomey-03apr05.htm>, Burr Exh. 43.

⁷⁵ Governmental Advisory Committee Meeting XXII, Plenary Session, Luxembourg City, Luxembourg, 11 July 2005: Minutes, p. 5 (emphasis added), Burr Exh. 17 ("The [.XXX] proposal this time met the three main criteria, financial, technical, sponsorship. They [sic] were doubts expressed about the last criteria which were discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters.").

⁷⁶ Email from Suzanne Sene, U.S Representative to the GAC and Senior Policy Advisor at the NTIA, to Fiona Alexander, Telecommunications Policy Specialist, Office of Internal Affairs, NTIA, *et al.*, 13 July 2005, Burr Exh. 44.

Information at the U.S. Department of Commerce, asking the Board to delay consideration of ICM's registry agreement.⁷⁷ In a telephone conversation that day or the next, Paul Twomey, ICANN's President and CEO, gave me additional background. He reported that he had been given a "heads up" by the U.S. Department of Commerce about this letter. Fearing a negative international reaction to what could be perceived as inappropriate pressure on ICANN by the U.S. Government, he had asked the U.S. Government to work through the GAC. When the U.S. Department of Commerce insisted on moving forward unilaterally, Dr. Twomey reached out to Mohamed Sharil Tarmizi, the Chair of the GAC, to ask him to send in a letter, ostensibly on behalf of the GAC.⁷⁸ The international community was already unhappy with the failure of the U.S. Government to complete the promised transition to full private sector governance of the Internet, and Dr. Twomey presumably anticipated that unilateral Department of Commerce action would compound this problem. I concluded that Dr. Twomey wanted Mr. Tarmizi's letter to serve as "cover," so that it would not appear that ICANN was being overly deferential to the U.S. Government's interests.

39. Presumably to de-emphasize the importance of the United States' intervention, ICANN posted Mr. Tarmizi's letter on 12 August 2005, and did not post Mr. Gallagher's letter until several days later, on 15 August 2005, despite having received it via email no later than 12

⁷⁷ Letter from Michael Gallagher, Assistant Secretary for Communications and Information, United States Department of Commerce, to Dr. Vinton Cerf, posted 15 Aug. 2005, *available at* <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf>, Burr Exh. 45.

⁷⁸ Letter from Mohamed Sharil Tarmizi to Dr. Vinton Cerf, 12 Aug. 2005, *available at* <http://www.icann.org/correspondence/tarmizi-to-board-12aug05.htm>, Burr Exh. 46. Mr. Tarmizi later confirmed that Dr. Twomey had asked him to write the letter from the GAC after learning that the Department of Commerce intended to send its letter.

August 2005.⁷⁹ While neither letter expressed opposition to ICM's application, both noted that "others" were opposed to it, and both requested that ICANN allow additional time for those opposed to the application to voice their concerns.

40. In our discussions, Dr. Twomey made it clear that ICANN would be in an extremely awkward position if the vote on the ICM registry agreement were to take place on 16 August as originally scheduled. He told me, for example, that the Commerce Department had even suggested 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. I have no first hand knowledge of these discussions, however, Dr. Twomey's assertions regarding this threat were entirely credible, and I also agreed with his assessment of the likely negative consequences of such U.S. Government action.⁸⁰

41. The FOIA documents also show a clear shift in the position of the Department of Commerce over a period of several months. In June of 2005, Meredith Attwell was preparing

⁷⁹ See Internet Governance Project, "Review of Documents Released under the Freedom of Information Act in the .XXX Case," Paper IGP06-003, 19 May 2006, *available at* <http://www.internetgovernance.org/pdf/xxx-foia.pdf>, Burr Exh. 47 ("On its website, ICANN backdated the Commerce Department letter to August 15, even though the record proves that they had received it on the 12th.").

⁸⁰ Moreover, allusions to this threat appear in the documents provided by the Department of Commerce in response to a Freedom of Information Act request filed by ICM. An August 2005 memorandum sent by Meredith Attwell, a senior advisor at the National Telecommunications and Information Administration ("NTIA") of the U.S. Department of Commerce to Robin Layton, also with the NTIA, states 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.*" 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, Burr Exh. 48.

talking points on why .XXX “is a good thing and why we support it.”⁸¹ Later, in a 13 July 2005 email, Suzanne Sene, the U.S Representative to the GAC, stated that, happily, “there is no mention ofXXX in the final [GAC] communiqué.”⁸² Ms. Sene also noted that the U.S. Government did not share the opinion of some other countries that the Board should have further consulted the GAC before approving negotiations with ICM.⁸³ Over the summer, however, the administration of United States President George W. Bush apparently became increasingly concerned about negative reactions by social conservatives in the United States. According to one email: “[w]ho really matters in this mess is Jim Dobson,” the head of Focus on the Family and founder of the Family Research Council.⁸⁴ The U.S. Department of Commerce began monitoring the negative emails it was receiving about the .XXX application, and also met with representatives from the Family Research Council and Concerned Women for America. Soon after Ms. Attwell confirmed that the U.S. had the ability to block addition of .XXX to the root, the U.S. Government (through Mr. Gallagher’s August 2005 letter) belatedly reversed its position, and began publicly expressing concerns about the process ICANN had followed in approving the .XXX sTLD and declared the need for further consultation with the GAC.

42. Concerned that it could become the victim of the political situation developing between the U.S. Department of Commerce and ICANN, ICM requested that consideration of the .XXX registry agreement by the Board be postponed. ICM formally requested the delay in a

⁸¹ Email from Meredith Attwell, senior advisor at the NTIA to Jeffrey Joyner, NTIA, *et al.*, 14 June 2005, Burr Exh. 49.

⁸² Email from Suzanne Sene to Fiona Alexander *et al.*, 13 July 2005, Burr Exh. 44.

⁸³ *Id.*

⁸⁴ Email from Fred Schvien, Executive Secretary, Department of Commerce, to Meredith Attwell, senior advisor at the NTIA, *et al.*, 13 July 2005, Burr Exh. 50.

letter of 15 August 2005, but, since the letter was being sent as a result of conversations with ICANN, we provided Mr. Jeffrey with a draft of the letter two days earlier to allow him to comment.⁸⁵ The request reflected conclusions reached collectively by ICM and ICANN over several conversations in response to the actions of the U.S. Government. Thus, ICANN's position that it was ICM's actions that prevented the Board's consideration of its draft registry agreement on 16 August 2005 as scheduled is incorrect.

43. Dr. Twomey suggested a two month delay, until the end of October 2005. I was aware, however, that ICANN would be focused on preparations for the World Summit on the Information Society ("WSIS") in November 2005, and therefore pressed ICANN to consider the ICM application in September. On 13 September I spoke at length with Mr. Jeffrey, who informed me that the Board would consider the .XXX application at the Board meeting on 15 September 2005, and that the only questions on the Board's mind were first, how to ensure that ICM would develop good policies, and second, what to do if ICM did not do so.

44. At its 15 September 2005 meeting the ICANN Board discussed the draft registry agreement proposed by ICANN staff and its outside counsel. Following this discussion, the Board passed a resolution asking staff to "discuss possible additional contractual provisions or modifications" to the agreement "to ensure that there are effective provisions requiring effective development and implementation of policies consistent with the principles in the ICM

⁸⁵ See Letter from Stuart Lawley to Dr. Paul Twomey, 15 Aug. 2005, *available at* <http://www.icann.org/correspondence/lawley-to-twomey-15aug05.pdf>, Burr Exh. 51; Email from J. Beckwith Burr to John Jeffrey, 13 Aug. 2005, Burr Exh. 52 (This email mistakenly references conversations between the U.S. Department of Commerce and ICM; it should have referred to conversations between ICANN and the U.S. Department of Commerce, as ICM was not involved in any conversations with the U.S. Department of Commerce at that time.).

application.”⁸⁶ Notably, however, and consistent with Mr. Jeffrey’s statements earlier in the week, the resolution confirms the Board’s focus on the terms in the registry agreement, and the absence of any questions about whether ICM had met the selection criteria.

45. ICM responded quickly to this request, providing ICANN with revisions to the draft agreement before the end of September.⁸⁷ As Mr. Jeffrey requested, the proposed revisions (1) ensured that ICANN had advance notice of, and the opportunity to block, changes in control of IFFOR and (2) specified certain minimum elements to be included in the best practices. Mr. Jeffrey immediately acknowledged receipt, promising to review and circulate the new language, and call me with any questions or concerns.⁸⁸

C. ICM Cooperates with ICANN to Reassure the GAC and the U.S. Government

46. While waiting for ICANN to approve the registry agreement, ICM undertook to respond to questions from the GAC, the U.S. Department of Commerce, and other governments. Although the criteria compliance question was closed, ICM was willing to assist ICANN in explaining why the Board’s decision to approve the application had been correct in the hopes that such explanations would expedite the approval of ICM’s registry agreement. At this stage, we believed that ICM’s interests were aligned with ICANN’s; and my correspondence with Mr. Jeffrey reflects our collaborative efforts to identify strategies to produce the best results for both ICM and ICANN. In preparation for approval of the registry agreement, both ICM and

⁸⁶ ICANN Board Resolution on Review of Proposed .XXX Sponsored Top-Level Domain Registry Agreement, ICANN Board Meeting, 15 Sept. 2005, *available at* <http://www.icann.org/minutes/minutes-15sep05.htm>, Burr Exh. 53.

⁸⁷ See Email from J. Beckwith Burr to John Jeffrey, 27 Sept. 2005, Burr Exh. 54.

⁸⁸ Email from John Jeffrey to J. Beckwith Burr, 27 Sept. 2005, Burr Exh. 55.

ICANN wanted to demonstrate to the GAC that the sTLD met the criteria, and to better inform the GAC about the benefits of .XXX. I kept ICANN up to speed on ICM's efforts, and even submitted drafts of various letters to the GAC and the U.S. Department of Commerce for review and comment by senior ICANN staff before the final letters were sent.⁸⁹

47. During this period, ICANN received a handful of inquiries from governments regarding the .XXX sTLD, most of which expressed concern with ICANN's process rather than with the proposed sTLD itself.⁹⁰ The U.S. Government appears to have played some role in

⁸⁹ See, e.g., Email from J. Beckwith Burr to John Jeffrey, with attachment, 14 Sept. 2005, Burr Exh. 56; Email from J. Beckwith Burr to John Jeffrey, with attachment, 26 Sept. 2005, Burr Exh. 57; Email from J. Beckwith Burr to John Jeffrey and Dr. Paul Twomey, with attachment, 17 Apr. 2006, Burr Exh. 58.

⁹⁰ See, e.g., ICANN Correspondence: Letter from Marcelo de Carvalho Lopes, Brazilian Secretary of Information and Technology, to Mohamed Sharil Tarmizi, 6 Sept. 2005, *available at* <http://www.icann.org/correspondence/lopez-to-tarmizi-06sep05.pdf>, Burr Exh. 59 (expressing concern about the lack of adequate consultation with governments regarding the introduction of .XXX and .TRAVEL and requesting only that the introduction of new TLDs *in the future* include more robust consultations, especially with national governments); ICANN Correspondence: Letter from Peter Zangl, Deputy Director of the European Commission's Information Society and Media Directorate General, to Dr. Vinton Cerf, 16 Sept. 2005, *available at* <http://www.icann.org/correspondence/zangl-to-cerf-16sep05.pdf>, Burr Exh. 60 (requesting an explanation for ICANN's decision to approve the .XXX application and a delay for further GAC review). ICANN has mischaracterized these letters as objections to .XXX rather than inquiries regarding ICANN's process; very few governments actually expressed objections to the .XXX agreement. See, e.g., Email from Sidse Aegidius to Stuart Lawley, 25 Sept. 2005, Burr Exh. 61 ("I would however like to clarify the Danish position. The remarks I have made have solely addressed the fact that [the] ICANN board has not followed the procedures that it – according to the bylaws – must follow when taking 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."); Letter from Jonas Bjelfvenstam, Swedish State Secretary for Communications and Regional Policy, to Dr. Paul Twomey, 23 Nov. 2005, *available at* <http://www.icann.org/correspondence/bjelfvenstam-to-twomey-23nov05.htm>, Burr Exh. 62 (expressing the Swedish position that pornography "is not compatible with [] gender equality goals" and asking ICANN to delay consideration of the .XXX proposal until after the next GAC meeting.); Memorandum from Stuart Duncan to Dr. Paul Twomey, 3 Dec. 2005, Burr Exh. 63 (describing the positions of various government representatives with whom ICM had spoken).

encouraging countries to send these letters; at the very least, the Gallagher letter was specifically sent to countries that were identified as being “active” in the GAC, perhaps in the hopes that such countries would submit similar letters.⁹¹ Nevertheless, ICM continued to work with ICANN to address any concerns expressed. Over these months ICM continued to receive assurances from ICANN that the process was on track. ICM even made a presentation to the GAC at ICANN’s next meeting in November 2005.⁹²

VI. ICANN’s Decision to Post the Original Evaluation Reports on the ICANN Website

48. In July 2005, in the midst of contract negotiations, and after ICANN had already executed several registry agreements, ICANN notified all of the applicants that it intended to make the evaluation reports and related materials available to the public by posting the materials on the ICANN website. This was contrary to the process established and followed by ICANN to that point, which provided that the reports would only be published when ICANN had completed the process for all applications.⁹³ Thus, it was a surprise to me when Mr. Pritz called me in late July 2005 and asked ICM to redact confidential information from the evaluation materials so that they could be posted. After speaking with Mr. Pritz, I called Mr. Jeffrey on 21 July, and told him that publishing the evaluations at that time would be inconsistent with ICANN’s previous practices and stated policy, and would be unfairly prejudicial to ICM. Mr. Jeffrey assured me

⁹¹ See Email from Suzanne Sene, U.S Representative to the GAC and Senior Policy Advisor at the NTIA, to Fiona Alexander, Telecommunications Policy Specialist, Office of Internal Affairs, NTIA, *et al.*, 10 Aug. 2005, Burr Exh. 64.

⁹² ICM, *The Sponsored .xxx TLD: Promoting Online Responsibility*, presented to the GAC on 27 Nov. 2005, Burr Confidential Exh. E.

⁹³ Letter from Kurt Pritz to Stuart Lawley, 31 July 2004, Burr Exh. 25 (“[T]he evaluation reports will be released publicly, as soon as **all applicants have concluded the process . . .**”) (emphasis added).

that the evaluation materials would not be posted, saying that the posting was “not going to happen.” That was the last we heard of this matter until late October 2005, just before the ICANN meeting in Vancouver. By that time, .JOBS, .MOBI, and .TRAVEL, all of which had received failing grades from the sponsorship evaluators, had entered into registry agreements with ICANN. However, .XXX, .ASIA, and .TEL (Telnic) (the latter two having also received unfavorable evaluations) were still actively negotiating with ICANN.

49. ICM made inquiries about why ICANN wanted to deviate from its established process. We learned from several attendees of the Luxembourg meeting in July between the GAC and the ICANN Board, including current ICANN staff and GAC representatives, that the GAC had asked Dr. Twomey about the evaluation reports. In response, Dr. Twomey had informed the GAC that the evaluations were long posted. Those present report that Dr. Twomey tried to find the reports on the ICANN website, and when unsuccessful, concluded that they were probably temporarily unavailable due to a broken link. In reality, the evaluations reports were not posted at that time, and had never been posted. Instead of correcting Dr. Twomey’s statements to the GAC, ICANN determined to post the materials, prompting Mr. Pritz’s call to me in July 2005. After my discussion about this with Mr. Jeffrey, the issue did not resurface until October 2005, shortly before the next meetings in Vancouver, Canada.

50. When Mr. Pritz once again demanded ICM’s redacted documents, ICM contacted ICANN’s Ombudsman, Frank Fowlie. In the final days before the November 2005 Vancouver meetings, Mr. Fowlie assured ICM that the evaluation materials would not be posted until ICM had an opportunity to meet with ICANN to discuss the issue. Apparently, however, he was overruled: by the time I arrived in Vancouver on 28 November 2005 to discuss the matter, ICANN had already posted the material. Dr. Cerf, who may not have been fully aware of the

circumstances, was clearly angered by what he believed to be ICM's refusal to cooperate, and unilaterally pulled the ICM agreement from the Board's agenda for the Vancouver meetings.

VII. The Wellington Meetings and the GAC's Communiqué

51. In March 2006, in the run up to ICANN's next meeting in Wellington, New Zealand, ICANN finally responded to ICM's proposed contract language, which had been submitted in September 2005. Mr. Jeffrey, who was busy preparing for the meeting, asked me to speak with ICANN's outside counsel. Although we reached agreement in just a few days, fully expecting Board approval in Wellington,⁹⁴ ICANN failed to post the new agreement. Nonetheless, based on interviews with Dr. Cerf and Dr. Twomey, New Zealand and Australian press reported that the .XXX would "be firmly back on the agenda in Wellington."⁹⁵ Then, on the eve of the Wellington meeting, two things happened: first, a simmering partisan debate about ISP level filtering boiled over in Australia, and second, the U.S. Department of Commerce wrote another letter to ICANN. This time, the Commerce Department complained that the terms of the draft registry agreement didn't adequately address the commitments made by ICM in its application.⁹⁶ Notably, however, the Commerce Department was commenting on a long outdated version of the agreement that had been posted in August 2005 (which, in any case, was fully consistent with the contracts already signed by ICANN). ICANN did not correct this

⁹⁴ See Email from Esme Smith to J. Beckwith Burr, 19 Mar. 2006, Burr Exh. 65.

⁹⁵ Louisa Hearn, *Wellington to Host .xxx Debate*, THE AGE, 10 Mar. 2006, Burr Exh. 66; see also Peter Nowak, *Creator's Vision of Open Net*, THE NEW ZEALAND HERALD, 28 Mar. 2006, Burr Exh. 67.

⁹⁶ Letter from John Kneuer, Acting Assistant Secretary, United States Department of Commerce, to Mohamed Sharil Tarmizi, 20 Mar. 2006, available at <http://www.icann.org/correspondence/kneuer-to-tarmizi-20mar06.pdf>, Burr Exh. 68.

misunderstanding, however, and compounded the problem by instructing the GAC to comment on the outdated version. This resulted in the GAC's Wellington Communiqué, which, based on the same outdated draft, echoed the Department of Commerce's letter.⁹⁷

52. ICM was obviously frustrated but continued to receive ICANN's reassurances that only patience was needed to obtain approval of the registry agreement. In discussions with Dr. Twomey in Wellington, for example, he told me that he was feeling "good" about .XXX's prospects and believed that we were "okay." Dr. Cerf stated that this was "just contract negotiations." ICM quickly produced a revised version of the registry agreement to address the GAC's Communiqué. Like previous changes, these had nothing to do with the definition of the sponsored community. The revisions obligated IFFOR to require registrants to comply with applicable law, and to develop registration policies reflecting the various commitments made in previously submitted documents, including the application.⁹⁸

53. ICM added the reference to compliance with applicable law and regulation at the request of ICANN, and in response to the letter from the U.S. Department of Commerce and the GAC's Communiqué. ICANN now claims that in agreeing to require registrants to "comply with applicable law," ICM was agreeing to enforce the laws of all countries with respect to the domain, and has repeatedly attempted to justify its rejection of the agreement as unenforceable on this basis. This is preposterous. The provision recognizes and affirms a simple fact: a

⁹⁷ GAC 2006 Communiqué # 24—Wellington, New Zealand, 28 Mar. 2006, *available at* <http://gac.icann.org/web/communiques/gac24com.pdf>, Burr Exh. 69. This Communiqué, like all other GAC statements on the .XXX agreement, did not state a GAC position against the sTLD, although it did note that some individual countries had strong objections.

⁹⁸ Email from J. Beckwith Burr to John Jeffrey 26 Mar. 2006, Burr Exh. 70.

webmaster—or any other actor—is subject to the laws of the jurisdiction in which it does business. Ironically, ICANN requires all of its accredited registrars to “abide by applicable laws and governmental regulations” in dealing with registrants, but has never assumed responsibility for enforcing the consumer protection laws of each and every country in response to a registrar’s misconduct.⁹⁹ In an exact parallel, ICANN itself requires every registry to include a requirement in its zone file access agreement that obligates recipients of the zone file to “comply with all applicable laws and regulations governing the use of the [zone file data].”¹⁰⁰ But ICANN has never suggested that this requires registries to enforce data protection laws around the world, which would be at least as difficult, and nearly as contentious, as enforcing every country’s laws on adult content.¹⁰¹

54. The .XXX registry will be maintained in the United States, and the operations of .XXX are clearly subject to the laws of the United States. If, upon launch, the registry has sufficient contacts with other jurisdictions, presumably their laws would apply as well. This

⁹⁹ See ICANN, Registrar Accreditation Agreement, 17 May 2001, Sec. 3.7 (with additional appendices) available at <http://www.icann.org/en/registrars/ra-agreement-17may01.htm>, Burr Exh. 71.

¹⁰⁰ See Appendix 3 (“Zone File Access Agreement”), Section 4(e) of the .ASIA Registry Agreement, available at <http://www.icann.org/en/tlds/agreements/asia/appendix-3-06dec06.htm>, Burr Exh. 72; Appendix 3 (“Zone File Access Agreement”), Section 4(e) of the .CAT Registry Agreement, available at <http://www.icann.org/en/tlds/agreements/cat/cat-appendix3-22mar06.htm>, Burr Exh. 73; Appendix 3 (“Zone File Access Agreement”), Section 4(d) of the .MOBI Registry Agreement, available at <http://www.icann.org/en/tlds/agreements/mobi/mobi-appendix3-23nov05.htm>, Burr Exh. 74; Appendix 3 (“Zone File Access Agreement”), Section 4(e) of the .TEL Registry Agreement, available at <http://www.icann.org/en/tlds/agreements/tel/appendix-3-07apr06.htm>, Burr Exh. 75; Appendix 3 (“Zone File Access Agreement”), Section 4(c) of the .TRAVEL Registry Agreement, available at <http://www.icann.org/en/tlds/agreements/travel/travel-appendix-3-12apr06.htm>, Burr Exh. 76.

¹⁰¹ Moreover, the “all applicable law” provision was later removed from the agreement, with the consent of ICANN’s counsel, who presumably realized that the presence or absence of that provision had no real affect on the substance of the agreement. See *infra*, para. 67.

same situation applies to all registries currently in operation pursuant to a contract with ICANN. ICM was taking on no more “law enforcement” duties than any other registry operator or ICANN itself. If a court with jurisdiction over ICM directed it to take some action to enforce a foreign judgment, ICM would be obligated to comply with that order. ICM was obligated to require registrants to comply with applicable law, but had no authority or obligation, absent a court order, to enforce those laws.

55. Because the GAC’s Wellington Communiqué was based on an outdated version of the contract, and without even considering the revisions made to the registry agreement that reiterated ICM’s commitment to the numerous policy goals of the sTLD, on 31 March 2006, the Board once again directed ICANN staff to “continue negotiations with ICM Registry, and to return to the Board with any recommendations regarding amendments to the proposed sTLD registry agreement, particularly to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor's policies.”¹⁰² Once again, ICM responded promptly with revisions to the registry agreement, providing additional detail about the structure and function of IFFOR and strengthening even further the obligation to follow through on the policy commitments already made.¹⁰³ Importantly, the Board asked no questions about community support.

¹⁰² ICANN Board Resolution on ICM Registry sTLD Application, ICANN Board Meeting, Wellington, New Zealand, 31 Mar. 2006: Minutes, *available at* <http://www.icann.org/en/minutes/minutes-31mar06.htm>, Burr Exh. 77.

¹⁰³ *See* Email from J. Beckwith Burr to John Jeffrey, with attachment, 31 Mar. 2006, Burr Exh. 78.

VIII. ICANN Reverses Earlier Vote and Rejects ICM's Proposed Registry Agreement and Application

56. Throughout these negotiations, ICM acquiesced to all of ICANN's requests, and proactively proposed solutions or new contract language in an attempt to satisfy vague governmental objections. The Board discussed the agreement in mid-April, and then, before posting the minutes of that meeting, and notwithstanding Dr. Cerf's and Dr. Twomey's statements in Wellington, voted on 10 May 2006 to reject the draft registry agreement.¹⁰⁴ In hindsight, it is clear that staff knew in advance that something was up, because Mr. Jeffrey had asked me the day before the Board call if ICM had "counted votes" recently. We learned later, from the Board minutes and from subsequent discussions, that members of the Board were persuaded that provisions of the draft agreement that required ICM to comply with "all applicable law" could put ICANN in the "difficult position of having to enforce all of the world's laws governing pornography,"¹⁰⁵ citing the provisions of the draft agreement that required ICM to comply with "all applicable law." For example, one Board member who voted against the proposed agreement, Hagen Hultsch, told me that he would have voted to approve the contract if it had not included the phrase "all applicable law."

57. This fear must have been an afterthought as it was not brought to ICM's attention during any of the negotiations before the 10 May vote. And, as already explained, it was not justified: ICM's contractual obligation to comply with applicable law, and to require registrants

¹⁰⁴ ICANN Board Meeting, 10 May 2006: Voting Transcript, *available at* <http://www.icann.org/minutes/voting-transcript-10may06.htm>, Burr Exh. 79.

¹⁰⁵ *ICANN Finally Rejects '.xxx' Domain Name*, FoxNews.com (11 May 2006), *available at* <http://www.foxnews.com/story/0,2933,195040,00.html>, Burr Exh. 80; *see also* ICANN Board Meeting, 10 May 2006: Voting Transcript, Burr Exh. 79.

to do so, is a standard provision that ICANN itself includes in its own contracts. Nothing about this contractual term obligates ICM to enforce national laws regarding Internet content any more than any other registry operator is obligated to do so. Accordingly, nothing would obligate ICANN to enforce laws governing content in the .XXX registry any more than ICANN would be obligated to act in the case of any other registry or registrar, for example, with respect to a web address in .COM or another domain. To my knowledge, no government has ever asked ICANN to enforce its national laws on adult content with respect to registrants in .COM.

58. Some Board members expressed concern that the registry agreement did not guarantee that ICM would fulfill the commitments it had made.¹⁰⁶ For example, Vanda Scartezini, who had previously voted to approve the application, said: “Well, I have been in favor during all this process. I'm not sure anymore, because the contract language did not come with the guarantee that I have expected. So in that occasion, I will vote against.”¹⁰⁷ This concern reflects a fundamental misunderstanding of the nature of contracts: no party to a contract is capable of “guaranteeing” actual performance of all of its contractual obligations. Instead, if a party fails to meet its contractual obligations, the contract can be enforced, and the party who has been harmed can be compensated. Dr. Cerf, who had also voted to approve the application in June of 2005, cited the enforceability issue, although in a slightly different way. In his view, he

¹⁰⁶ ICANN Board Meeting, 10 May 2006: Voting Transcript, Burr Exh. 79.

¹⁰⁷ *Id.* Another Board member, Alejandro Pisanty, referred in the voting transcript to the absence of “in-built structural guarantees.” But Mr. Pisanty had been opposed to the application from the start on the grounds, as he told me, that it was “more trouble than it was worth.”

no longer thought it “possible for ICM to achieve the conditions and recommendations that the GAC has placed before us as a matter of public policy.”¹⁰⁸

59. In my view, the concerns that were voiced about the registry agreement’s enforceability were baseless. In addition to the ordinary breach provisions contained in contracts, the proposed registry agreement before the ICANN Board contained a number of extraordinary enforcement tools. For example, the draft:

- Empowered ICANN to terminate the agreement if ICM failed to cure any fundamental and material breach of its obligations after notice and a reasonable opportunity to cure;
- Made termination a practical enforcement tool by obligating ICM to escrow critical data and to cooperate during any transition to another operator;
- Armed ICANN with unusual enforcement tools with real “teeth” in the form of **specific performance rights** and/or the award of **punitive, exemplary, and other damages** for repeated and willful breach of the agreement’s fundamental terms;
- Ensured that ICANN could enforce its rights through binding arbitration and, ultimately, the enforcement authority of a court of the United States; and
- Fully indemnified ICANN for any liability arising from the actions of the .XXX registry.

60. ICANN’s relationships with registry operators and other parties are *always* contractual in nature; ICANN cannot obtain “guarantees” or institute enforcement actions outside of contractual commitments. ICM gave the Board more assurances of its intention to

¹⁰⁸ *Id.* As stated in the Wellington Communiqué, the GAC requested ICANN’s confirmation “that any contract currently under negotiation between ICANN and ICM Registry would include enforceable provisions covering all of ICM Registry’s commitments” GAC 2006 Communiqué # 24—Wellington, New Zealand, 28 Mar. 2006, p. 4, Burr Exh. 69. Dr. Cerf may have been referring to references in the Communiqué to “offensive” content, but if so, it represents an extraordinary expansion of ICANN’s mission, which is limited to preserving stability and security by, among other things, establishing policies about the registration—as opposed to the content—of a website.

fulfill its commitments than any of the other applicants in the sTLD round, and none of the other applicants were required to provide the types of commitments that were required to be given by ICM.

61. Some Board members expressed concern about the variety of cultural views about unacceptable and/or offensive content. Once again, in addition to straying into territory outside of ICANN's limited mission, this concern erroneously presumes that the application required a universal, global definition of adult content. No other applicant was required to create a universal, globally accepted definition for any of their communities. Different countries define and regulate travel agencies and air line pilots in different ways, but we all generally know what pilots and travel agencies do, and can understand the concept of a community consisting of those individuals; thus, both .TRAVEL and .AERO are operating using the definitions they chose to apply. Even within the United States, where pornography is regulated on the basis of local community standards, there is still some shared understanding of the concept of adult content.

62. Nor is the fact that the sponsored community will not contain all members of the adult online entertainment industry disqualifying. That is the nature of a self-selecting community. In fact, in the very same Board meeting in which it rejected the ICM contract, the Board approved the contract for .TEL, an sTLD designed to serve the community of individuals or entities who want to have their contact information available online. Susan Crawford, who nonetheless supported the .TEL agreement, made the point clearly, saying "the .TEL application does raise substantial concerns about the merits of continuing to believe that ICANN has the

ability to choose who should sponsor a particular domain or, indeed, that sponsorship is a meaningful concept in a diverse world.”¹⁰⁹

63. Dr. Twomey’s comments shortly in advance of and during the Board’s discussion on 10 May 2006 provide the first indication of a new strategy to re-open the selection criteria question.¹¹⁰ Nearly a full year after voting to approve .XXX, and only a few days prior to the Board’s vote, Dr. Twomey wrote to the Chairman of the GAC stating that “[t]he final conclusion on the Board’s decision to accept or reject the .XXX application has not been made and will not be made until such time as the Board either approves or rejects the registry agreement relating to the .XXX application.”¹¹¹ This position, and Dr. Twomey’s assertion during the Board meeting that he had concerns regarding the sponsored community, completely contradicted ICANN’s repeated statements about the process in general and the meaning of the 1 June 2005 vote in particular.

64. ICM was dismayed by the 10 May 2006 vote rejecting the proposed registry agreement, and by the misunderstandings and misconceptions evident in various Board members’ statements explaining their votes. On 19 May 2006, ICM filed a Request for Reconsideration, in accordance with Article IV, Section 2 of ICANN’s Bylaws. As the deadline for the Committee’s response approached, Mr. Jeffrey called me from a Board retreat in

¹⁰⁹ ICANN Board Meeting, 10 May 2006: Voting Transcript, Burr Exh. 79.

¹¹⁰ Prior to the Board’s approval on 1 June 2005, Dr. Twomey once suggested to me that .XXX was more appropriately a generic (or in today’s terms, unsponsored) domain. ICM fully addressed this question, as discussed above, and demonstrated that the sponsored community could not achieve its self-regulatory goals in a generic top level domain environment. Dr. Twomey did not raise this issue again, and voted to approve the application in June 2005.

¹¹¹ Letter from Dr. Paul Twomey to Mohamed Sharil Tarmizi, 4 May 2006, Burr Exh. 36.

Bulgaria. He told me that the Committee was working towards a response, and also delivered a message from the Committee to the effect that it would not be inappropriate for ICM to submit a new contract to ICANN for review. I took this oddly constructed message to mean that the Committee preferred not to rule on the Request, and that the best way forward might be to put a new agreement on the table. Mr. Jeffrey and I then discussed a timetable for this process, and, in the interests of working constructively with ICANN, ICM withdrew its Request for Reconsideration and returned to negotiations regarding the terms of yet another draft registry agreement.

IX. ICM Continues to Negotiate with ICANN

65. I flew to California on 1 November 2006 to negotiate a new agreement with Mr. Jeffrey and Mr. Pritz. In fact, though, we spent very little time discussing the agreement itself. Both Mr. Jeffrey and Mr. Pritz stressed the Board's desire for commitments about the individuals who would be involved in the IFFOR policy development process. ICANN understood from our application and from various discussions that ICM planned to contract with a well respected, industry-supported organization, the Internet Content Rating Association ("ICRA," subsequently renamed the Family Online Safety Institute, or "FOSI") to coordinate IFFOR's policy development process.¹¹² In addition, they knew that ICM intended to engage a respected third party to monitor sites operated by registrants in .XXX for compliance with the

¹¹² See Letter from Stuart Lawley to Dr. Vinton Cerf re Additional Assurances Regarding Policy Commitments Made by ICM Registry, 5 Jan. 2007, *available at* <http://www.icann.org/en/tlds/agreements/xxx/monitoring-commitments-05jan07.pdf>, Burr Exh. 81; Letter from Stuart Lawley to Dr. Vinton Cerf re IFFOR Policy Development, 5 Jan. 2007, *available at* <http://www.icann.org/en/tlds/agreements/xxx/policy-development-05jan07.pdf>, Burr Exh. 82.

rules prohibiting child pornography, including “virtual” child pornography. In essence, Mr. Pritz and Mr. Jeffrey asked ICM to submit executed contracts with ICRA/IFFOR and the monitoring agent with the revised registry agreement. I objected to this demand, which was not required of any other sTLD applicant, because it would seriously undermine ICM’s ability to negotiate favorable commercial terms with these providers.

66. ICANN staff and I continued to work towards an agreeable set of documents, which culminated in a call with Mr. Jeffrey, Dr. Twomey, and Mr. Pritz on 20 December 2006. During that call, we agreed on a timeline that included producing a new set of negotiated documents for posting on 2 January 2007. Throughout the holidays I exchanged drafts with ICANN’s outside counsel, Esme Smith, until we reached full agreement on 28 December 2006.

67. Based on the Board’s statements in May about the reference to “all applicable law and regulations,” we removed that phrase from the agreement. Neither Mr. Jeffrey nor Ms. Smith had any objection to the removal of that phrase, presumably because they realized that removing the phrase would not alter the fact that a webmaster is always subject to the laws of the jurisdiction in which it operates, regardless of the website’s contract with the registrar, the registrar’s contract with the registry operator, or the registry operator’s contract with ICANN. The presence or absence of the phrase “all applicable law” in ICM’s registry agreement with ICANN would not change this fact.

68. Another change to the draft registry agreement was the inclusion of a “comprehensive” list of ICM’s policy commitments. The list was hastily drafted by ICANN’s

outside counsel based on a reference document I provided.¹¹³ Although the result was inelegant—comprehensive, but repetitive and perhaps a bit confusing—ICM decided not to revise ICANN’s own drafting.

69. On or about 5 January 2007, as the documents were about to be posted on ICANN’s website, I received an urgent call from ICANN staff, including Mr. Paul Levins, an ICANN Executive Officer and Vice President, who had not previously participated in these conversations. Mr. Levins again pressed for a signed contract with ICRA/FOSI for policy coordination. Although I found this demand inappropriate and unreasonable, ICM agreed. We scrambled to secure ICRA/FOSI’s consent to disclose our arrangement with them, and committed in writing to enter into an agreement with ICRA/FOSI as a condition precedent to the launch of .XXX.¹¹⁴ ICANN posted all of the negotiated documents on its website on 5 January 2007, for discussion with the Board at its next meeting scheduled for 12 January 2007. Aside from all of the additional guarantees, policy commitments, assurances, and the agreement with ICRA/FOSI, the commercial and technical terms of the registry agreement were largely the same as all of ICANN’s other agreements with registry operators; thus, the terms of the draft registry agreement should not have provided any reason for the rejection of ICM’s application. For ease

¹¹³ See Email from J. Beckwith Burr to John Jeffrey and Kurt Pritz, with attachment, 14 Dec. 2006, Burr Exh. 83; *see also* email from Esme Smith to J. Beckwith Burr, with attachment, 21 Dec. 2006, Burr Exh. 84.

¹¹⁴ See Email from J. Beckwith Burr to John Jeffrey and Kurt Pritz, with attachment, 6 Dec. 2006, Burr Confidential Exh F. This contract was duly executed on 1 February 2007 and provided to ICANN on 10 February 2007. *See* Agreement Between ICRA/FOSI and IFFOR, 1 Feb. 2007, Burr Confidential Exh. G; Email from J. Beckwith Burr to John Jeffrey, Kurt Pritz, and Dan Halloran, 10 Feb. 2007, Burr Exh. 85.

of reference, the similarities and differences among the .MOBI, .TEL, and drafts of the .XXX registry agreements are summarized in a chart attached to my statement.¹¹⁵

70. By that time, given the length of time that the application had been pending, some of ICM's supporters were, understandably, beginning to lose confidence that the .XXX sTLD would ever come into being. This same delay gave the small but vocal opponents—identified by ICM at the outset of this process—additional time to organize against the proposal and, as time went on, to generate additional negative comments. ICM provided evidence to ICANN staff that many of these comments were from the same people, and also provided evidence of continued strong community support. For example, the sponsored community responded enthusiastically to a pre-reservation service established by ICM in May 2006. Even without advertising, the response was overwhelming and by March 2007, ICM had received requests for over 72,000 names, from over 1,500 webmasters in dozens of countries—more than have registered in many existing TLDs, and more than enough to make .XXX a viable business proposition.¹¹⁶

71. The Board, which by now included several new members, did discuss the revisions on 16 January 2007. In that meeting, Board member Susan Crawford, who supported approval of .XXX, expressed concerns about certain of the provisions of the proposed agreement that had been hurriedly drafted by ICANN's outside counsel. Board member Steve Goldstein

¹¹⁵ See Appendix A.

¹¹⁶ See Letter from Stuart Lawley to ICANN Board, 23 Mar. 2007, Burr Exh. 86. Even after ICANN's vote in May 2007 to reject the .XXX registry agreement and ICM's application, ICM has continued to receive additional pre-reservation requests, for a to-date total of over 100,000 names. This level of demand, for a TLD that has not yet been created or even approved, is even more significant when compared to the number of registrants attracted by TLDs that have existed for years.

asked for various other clarifications.¹¹⁷ Sharil Tarmizi and Janis Karklins (the incoming GAC chair), however, complained that the GAC had no idea that this issue was being raised again and assumed the matter had gone away in May of 2006.¹¹⁸ As the minutes clearly reflect, several members of the Board told Mr. Tarmizi and Mr. Karklins that the process by which a revised contract could be considered was clear and well understood.¹¹⁹ Mr. Tarmizi warned the Board that this was a “volatile issue” and that the GAC would need more time to see for itself whether it’s advice in Wellington was being followed.¹²⁰

72. Following the 16 January Board meeting, we again revised the draft registry agreement to address the concerns of certain Board members about the clarity of the commitments by eliminating repetition and by referring to authoritative documents. We did not, however, materially revise the substance of the agreement.¹²¹ Finally, throughout this period, I kept Mr. Jeffrey apprised of efforts by a small group of adult webmasters to flood ICANN’s public forum with trumped-up opposition to .XXX. Their tactics included writing scripts to create numerous submissions that falsely appeared to be from different senders, and that contained patently false statements.

¹¹⁷ ICANN Board Meeting, 16 Jan. 2007: Minutes, *available at* <http://www.icann.org/en/minutes/minutes-17jan07.htm>, Burr Exh. 87.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* The GAC representatives were, in essence, asking ICANN not to act until a group of government employees from around the world, almost none of whom were lawyers, made a legal judgment about the enforceability of a contract under U.S. law.

¹²¹ *See* Revised Appendix S, posted 16 Feb. 2007 (but mistakenly dated 8 February 2006), *available at* <http://www.icann.org/en/tlds/agreements/xxx/appendix-S-rev-16feb07.pdf>, Burr Exh. 88.

73. On 12 February 2007 the ICANN Board met again to discuss the ICM agreement. Rita Rodin, who was new to the Board, but quite familiar with the sTLD process,¹²² almost immediately introduced a discussion about whether or not .XXX had the support of the sponsored community. The evidence, apparently, was 65 letters from individuals who identified themselves as adult webmasters opposing the agreement. Mr. Pritz reminded the Board that “ICM had provided extensive evidence for a sponsor[ed] community and that documentation of this could be found in the application” and pointed out that, at the Board's request, additional information had been presented to them during ICANN's Mar del Plata Meeting.¹²³ The Board ignored Mr. Pritz and voted by voice vote to send the staff back to explore—for the first time since June of 2005—whether ICM's application met the sponsorship criteria.¹²⁴

74. By this time it was clear to me that ICANN was so determined to kill ICM's application that it would seize upon any excuse to accomplish this. I expressed this concern to Mr. Jeffrey, along with my concerns about the enormous cost of a process that now appeared to have a predetermined outcome. I suggested that it might make more sense to seek outside assistance, using the Independent Review Process, to resolve the matter. This was an honest statement about my sense of the situation, and not a threat. Mr. Jeffrey seemed to understand my

¹²² Ms. Rodin represented .TEL (Telnic), the TLD that claimed to represent the “community of people who wanted to post their contact information on the Internet.” The record suggests that she was a bit uncomfortable with the Board's discussion of the sponsorship criteria for .XXX, and repeatedly sought staff assurance that this line of questioning was appropriate. ICANN Board Meeting, 12 Feb. 2007: Minutes, *available at* <http://www.icann.org/en/minutes/minutes-12feb07.htm>, Burr Exh. 89.

¹²³ *Id.*

¹²⁴ *Id.*

concerns, but assured me that all that ICM needed to do was provide the information that it had already provided to ICANN to demonstrate the support of a sponsored community.

75. ICM responded, as always. Dr. Twomey and Dr. Cerf, however, continued to raise doubts and objections without basis. At the last moment, the Board even decided to hold a “debate” between ICM and the representatives of a U.S.-based organization that represented a small portion of the adult industry. The transcript from that meeting demonstrates that the opponents had no case.¹²⁵ Despite that, and ignoring all of the materials amassed by ICM showing that the application complied with the RFP criteria, the benefits of the .XXX sTLD, and ICM’s resolve to fulfill the commitments made throughout the process, the Board voted on 30 March 2007 to reverse its approval of the application and reject the registry agreement and the application.¹²⁶

76. In order to accomplish this outcome, the Board unfairly re-opened long resolved questions about the selection criteria, employing an ad hoc process that involved an endless series of brand new selection criteria never discussed by the ICANN community or applied to any other applicant. The new criteria included vague references to public policy concerns, offensive content, law enforcement compliance issues, the frightening specter of liability for offensive content, and a myriad of concerns well outside ICANN’s mission. While I have the utmost respect for the ICANN Board, it is a fact that most Board members lacked the legal

¹²⁵ ICANN Public Forum—Lisbon, Portugal, 29 Mar. 2007: Transcript, *available at* <http://www.icann.org/en/meetings/lisbon/transcript-public-forum-29mar07.htm>, Burr Exh. 90.

¹²⁶ ICANN Board Resolution on Proposed sTLD Agreement with ICM Registry, ICANN Board Meeting, 30 Mar. 2007, *available at* <http://www.icann.org/minutes/resolutions-30mar07.htm>, Burr Exh. 91.

training necessary to question the legitimacy of, or to identify legal inadequacies in, the tactics employed by ICANN's management.

X. Conclusion

77. In my view, by any standard, ICANN's treatment of ICM following the 1 June 2005 vote was discriminatory and arbitrary. ICM met all of the selection criteria, acceded to every request made by ICANN during negotiations over the registry agreement, and demonstrated repeatedly that it had addressed all legitimate concerns. In response, ICANN made new, increasingly unreasonable demands, applied one-off criteria arbitrarily, ignored its own processes, and violated basic notions of equity and fairness.

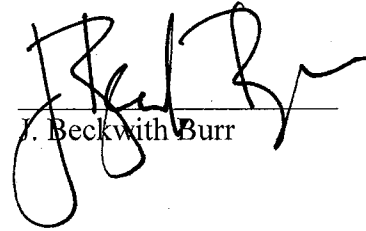
78. In closing, I believe it is important to note that the issues before the Panel have significance far beyond the very real harm suffered by ICM as a result of ICANN's actions. The positions asserted in ICANN's Response to ICM's Request for Independent Review, if permitted to stand, threaten the continued viability of the ICANN experiment in global private sector management of Internet resources. Based on this document, ICANN apparently believes that, in the end, it should not be accountable to anyone for anything. It claims to take the Independent Review Process "quite seriously," but that claim is belied by its assertion that, on the one hand, it has no obligation to comply with the *recommendations* of the Panel and, on the other hand, the Independent Review Process is the "ultimate check" on the decisions of the Board. ICANN also claims that because its Bylaws permit the Board to reach, under certain circumstances, an appropriate and defensible balance among competing values articulated in Article I, Section 2 of the Bylaws ("Core Values"), it is entitled to an extraordinary degree of deference. This is based on an obvious misreading of the ICANN Bylaws. The balancing provision on its face applies

only to Article I, Section 2 of the Bylaws. This provision does not, however, allow ICANN to violate any of its other Bylaws, including Article II, Section 3, which flatly and unequivocally prohibits ICANN from applying its standards, policies, procedures, or practices inequitably or singling out any particular party for disparate treatment unless justified by substantial and reasonable cause. Contractual agreements are the fundamental source of ICANN's legitimacy, and the Bylaws' prohibition of disparate treatment is a fundamental element of the exchange of promises between ICANN and the ICANN community.

I affirm that the contents of this witness statement are true and correct to the best of my knowledge and recollection.

Date:

15 January 2009



J. Beckwith Burr

APPENDIX A

Registry Agreement Comparison

<u>Main Agreement</u>	<u>.MOBI Agreement¹</u>	<u>.TEL Agreement²</u>	<u>.XXX Agreement³</u>	<u>.XXX Agreement⁴</u>
Art. I - Introduction	Provides the effective date, names the TLD (.MOBI), and designates the Registry Operator ⁵ (mTLD Top Level Domain Ltd.)	Provides the effective date, names the TLD (.TEL), and designates the RO (Telnic)	Provides the effective date, names the TLD (.XXX) and designates the RO (ICM Registry LLC)	Provides the effective date, names the TLD (.XXX) and designates the RO (ICM Registry LLC)
Art. II - Representations and Warranties	RO warrants ability to enter agreement and promises truth/accuracy in application statements. ICANN states that it does not exercise exclusive control over the root server but promises to work in good faith and use best efforts to ensure that the TLD is added to the root.	RO warrants ability to enter agreement and promises truth/accuracy in application statements.	RO warrants ability to enter agreement and promises truth/accuracy in application statements; and ICANN states that it does not exercise exclusive control over the root server but promises to work in good faith and use best efforts to ensure that the TLD is added to the root.	RO warrants ability to enter agreement and promises truth/accuracy in application statements; and ICANN states that it does not exercise exclusive control over the root server but promises to work in good faith and use best efforts to ensure that the TLD is added to the root.
Art. III - Covenants	RO agrees to: <ul style="list-style-type: none"> • abide by and implement temporary specifications and policies enacted by the 	RO agrees to: <ul style="list-style-type: none"> • abide by and implement temporary specifications and policies enacted by the 	RO agrees to: <ul style="list-style-type: none"> • abide by and implement temporary specifications and policies enacted by the 	RO agrees to: <ul style="list-style-type: none"> • abide by and implement temporary specifications and policies enacted by the

¹ Entered into on 10 July 2005 and amended 27 March 2007 (Article 7) and 14 November 2008 (Appendix 6).

² Entered into on 30 May 2006 and amended 29 June 2007 (Article 7) and 4 February 2008 (Appendix 1).

³ Proposed 18 April 2006.

⁴ Main Agreement proposed 5 January 2007; Appendix S proposed 16 February 2007.

⁵ Registry Operator is abbreviated "RO."

.MOBI Agreement¹

.TEL Agreement²

.XXX Agreement³

.XXX Agreement⁴

ICANN Board and all ICANN Consensus Policies;

- create data escrow of registry data; protect “personal data”; provide bulk access to certain data
- produce monthly reports in accordance with Appendix 4;

• operate according to standard functional, technical, stability, and security specifications;

- develop policies consistent with RO Charter (App. S);
- pay registry fees quarterly; and

• maintain a transparent TLD policy development apparatus.

- Introduce new registry services in accordance with procedures set forth.

ICANN agrees to

- operate with transparency;
- provide equitable treatment; and

• provide technical support related to pointing to RO zone servers, implementing RO nameserver changes, and publishing RO zone

ICANN Board and all ICANN Consensus Policies;

- create data escrow of registry data; protect “personal data”; provide bulk access to certain data
- produce monthly reports in accordance with Appendix 4;

• operate according to standard functional, technical, stability, and security specifications;

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- Introduce new registry services in accordance with procedures set forth.

ICANN agrees to

- operate with transparency;
- provide equitable treatment; and

• provide technical support related to pointing to RO zone servers, implementing RO nameserver changes, and publishing RO zone

ICANN Board and all ICANN Consensus Policies;

- create data escrow of registry data; protect “personal data”; provide bulk access to certain data
- produce monthly reports in accordance with Appendix 4;

• operate according to standard functional, technical, stability, and security specifications;

- develop policies consistent with RO Charter (App. S);
- pay registry fees quarterly; and

• maintain a transparent TLD policy development apparatus.

- Introduce new registry services in accordance with procedures set forth.

ICANN agrees to

- operate with transparency;
- provide equitable treatment; and

• provide technical support related to pointing to RO zone servers, implementing RO nameserver changes, and publishing RO zone

.MOBI Agreement¹

.TEL Agreement²

.XXX Agreement³

.XXX Agreement⁴

information.

- Evaluate new registry services in accordance with procedures set forth.

Provides 10-year term, renewal and amendment procedures, and caps punitive damages for RO's failure to perform in good faith

Requires "meet and confer" before initiating arbitration;

Provides arbitration procedures and specific performance remedies; and

Caps ICANN's monetary liability

information.

- Evaluate new registry services in accordance with procedures set forth.

Provides 10-year term, renewal and amendment procedures, and caps punitive damages for RO's failure to perform in good faith

Requires "meet and confer" before initiating arbitration;

Provides arbitration procedures and specific performance remedies; and

Caps ICANN's monetary liability

information.

- Evaluate new registry services in accordance with procedures set forth.

Provides 10-year term, renewal and amendment procedures, **but does not cap penalties for RO's failure to perform in good faith**

Requires "meet and confer" before initiating arbitration;

Provides arbitration procedures and specific performance remedies; and

Caps ICANN's monetary liability

information.

- Evaluate new registry services in accordance with procedures set forth.

Provides 10-year term, renewal and amendment procedures, **but does not cap penalties for RO's failure to perform in good faith**

Requires "meet and confer" before initiating arbitration;

Provides arbitration procedures and specific performance remedies; and

Caps ICANN's monetary liability

Art. IV - Term of Agreement

Art. V - Dispute Resolution

Art. VI - Termination Provisions

Provides ICANN ability terminate for material breach and automatic termination for RO's bankruptcy;

Gives RO opportunity to cure; Allows RO to terminate with notice; and

Relieves RO of IP rights in data or rights to reimbursement upon termination

Provides for transition in event of termination and/or

Provides ICANN ability terminate for material breach and automatic termination for RO's bankruptcy;

Gives RO opportunity to cure; Allows RO to terminate with notice; and

Relieves RO of IP rights in data or rights to reimbursement upon termination

Provides for transition in event of termination and/or

Provides ICANN ability terminate for material breach and automatic termination for RO's bankruptcy;

Gives RO opportunity to cure; Allows RO to terminate with notice; and

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Relieves RO of IP rights in data or rights to reimbursement upon termination

Provides for transition in event of termination and/or

.MOBI Agreement¹

.TEL Agreement²

XXX Agreement³

.XXX Agreement⁴

	non-renewal	non-renewal	non-renewal	non-renewal
Art. VII - Special Provisions	Provides for the selection of registrars; Prohibits ROs from acting as their own registrars; and Sets out a payment schedule to ICANN. ⁶	Provides for the selection of registrars; Prohibits ROs from acting as their own registrars; and Sets out a payment schedule to ICANN.	Provides for the selection of registrars; Prohibits ROs from acting as their own registrars; and Sets out a payment schedule to ICANN.	Provides for the selection of registrars; Prohibits ROs from acting as their own registrars; and Sets out a payment schedule to ICANN.
Art. VIII - Miscellaneous	Indemnifies ICANN; Allows RO to use ICANN IP; Provides for assignment and subcontracting, and amendments and waivers; Prohibits third party beneficiaries; and Contains integration and other miscellaneous clauses	Indemnifies ICANN; Allows RO to use ICANN IP; Provides for assignment and subcontracting, and amendments and waivers; Prohibits third party beneficiaries; and Contains integration and other miscellaneous clauses	Indemnifies ICANN; Allows RO to use ICANN IP; Provides for assignment and subcontracting, and amendments and waivers; Prohibits third party beneficiaries; and Contains integration and other miscellaneous clauses	Indemnifies ICANN; Allows RO to use ICANN IP; Provides for assignment and subcontracting, and amendments and waivers; Prohibits third party beneficiaries; and Contains integration and other miscellaneous clauses

Appendix S

Part 1. [TLD] Charter

Identifies target community; Requires RO to manage TLD in accordance with Agreement, establish registration requirements, permit registration, provide public information, support community policy development.	Identifies target community; Requires RO to manage TLD in accordance with Agreement, establish registration requirements, permit registration, provide public information, support community policy development.	Identifies target community; Requires RO to manage TLD in accordance with Agreement; and Obligates RO to: <ul style="list-style-type: none"> • Develop policies and procedures in conjunction with IFFOR that comply with “all applicable law and regulation;” 	Identifies target community; Requires RO to manage TLD in accordance with Agreement, including, without limitation, the provisions of a new Part 8 of the Appendix.
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⁶ The Agreements provide slightly different payment schedules.

- **Develop policies and procedures in conjunction with IFFOR, which reflect past communications with ICANN;**
- **Establish and fund an independent IFFOR; and**
- **Empower IFFOR to develop best practices, including practices related to child pornography.**

Part 2. Delegated Authority

Delegates RO authority to manage TLD and develop policy regarding TLD, including naming rules, pricing decisions, IP dispute resolutions, etc.

Delegates RO authority to manage TLD and develop policy regarding TLD, including naming rules, pricing decisions, IP dispute resolutions, etc.

Delegates RO authority to manage TLD and develop policy regarding TLD, including naming rules, pricing decisions, IP dispute resolutions, etc.

Delegates RO authority to manage TLD and develop policy regarding TLD, including naming rules, pricing decisions, IP dispute resolutions, etc.

Part 3. Description of the sTLD Community

Describes target community (mobile communications services, equipment and content providers, and consumers)

Describes target community (those who wish to store contact information using DNS)

Describes target community (responsible adult entertainment providers, service providers and representatives)

Describes target community (responsible adult entertainment providers, service providers and representatives)

Part 4. Start-up Plan

Outlines unique start-up plan, including policy development, choosing registrars, early applicants, and public rollout.

Outlines unique start-up plan, including policy development, choosing registrars, early applicants, and public rollout.

Outlines unique start-up plan, including policy development, choosing registrars, early applicants, and public rollout; and

Outlines unique start-up plan, including policy development, choosing registrars, early applicants, and public rollout; and

Includes specific milestones for IFFOR establishment.

Includes specific milestones for IFFOR establishment; board creation, selection of CEO, Board, supporting organization coordinators, creation of ombuds; town

hall meetings with key stakeholders groups; mechanism for protecting culturally significant names and geographic designators; contract with monitoring service provider, regular progress reports.

	.MOBI Agreement ¹	.TEL Agreement ²	XXX Agreement ³	XXX Agreement ⁴
Part 5. Selection of Registrars	Describes the selection process for registrars	Describes the selection process for registrars	Describes the selection process for registrars	Describes the selection process for registrars
Part 6. Public WHOIS Specification	Outlines the specifications for a WHOIS database	Outlines the specifications for a WHOIS database	Outlines the specifications for a WHOIS database	Outlines the specifications for a WHOIS database
Part 7. Additional Provisions	<p>Gives RO right to sue for material breach; and</p> <p>Requires ICANN to consider differentiation requirements when designating new TLDs</p>	<p>Does not contain a provision on material breach.</p> <p>Allows RO to submit future proposals for increased privacy measures to ICANN</p>	<p>Gives RO right to sue for material breach;</p> <p>Requires ICANN to consider differentiation requirements when designating new TLDs;</p> <p>Gives ICANN the right to review and block any proposed change in control of RO;</p>	<p>Gives RO right to sue for material breach;</p> <p>Requires ICANN to consider differentiation requirements when designating new TLDs;</p> <p>Gives ICANN the right to review and block any proposed change in control of RO; and</p> <p>Prohibits namesystem.com from being registrar of .XXX</p>
Part 8. [Heading Varies]	Changes: Reflects material changes to the application or comments made during negotiation, including a list of .MOBI	N/A	N/A	<p>Registry Operator's Commitments:</p> <p>Requires RO to:</p> <ul style="list-style-type: none"> • Cause IFFOR to develop

investors (equipment
manufacturers, service
providers, and software
designers)

specifi policies and
procedures;

- Establish registration requirements, permit registration, provide public information, support community policy development;
- Develop policies and procedures in conjunction with IFFOR, which reflect specified communications with and submissions to ICANN and the Government Advisory Committee;
- Establish and fund an independent IFFOR;
- Empower IFFOR to develop best practices, including practices related to child pornography;
- Promote free expression principles set forth in United Nations Declaration of Human Rights;
- Develop policies to prohibit child pornography as outlined in United Nations Convention on the Rights of the Child;

- **Implement and enforce IFFOR policies including policies relating to site labeling;**
- **Enable governments to identify names of cultural and religious significance to be withheld from registration;**
- **Develop policies prohibiting abusive registrations and a rapid takedown mechanism to respond to reports of abusive registrations;**
- **Brief governments and stakeholders regarding launch planning;**
- **Conduct comprehensive tests of the authentication procedures;**
- **Name a compliance officer and ombudsperson;**
- **Verify that applicants are members of sponsored community; and**
- **Establish monitoring and oversight arrangements with third parties regarding RO's child pornography**

obligations.

RO may also establish 30-day "quick look" system for ICANN to pre-approve new policies.

Each obligation is associated with specific safeguards regarding performance, and identifies ICANN's enforcement mechanisms.

Auxiliary Contract with Third Parties Required as Pre-condition of Launch

N/A

N/A

N/A

Agreement with ICRA/FOSI:

At ICANN's insistence, ICM committed, in writing, to enter into an agreement for child monitoring and site labeling with the Internet Content Rating Association ("ICRA"), as a condition precedent to the launch of the sTLD.⁷

The agreement between ICM and ICRA (which was to be relaunched as the Family Online Safety Institute, or FOSI) was executed on 1 February 2007, and a copy was provided to ICANN.

⁷ This written commitment was delivered to ICANN on 5 January 2007, the same date on which the main portion of the registry agreement was proposed.

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

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

WITNESS STATEMENT OF ELIZABETH WILLIAMS

I. Background

1. My full name is Elizabeth A. Williams. I am an international affairs specialist and management consultant; my clients include global regulatory agencies, national governments, technology entrepreneurs, large corporations, and non-profit organisations. I have a Ph.D in Information Technology and Law from Queensland University of Technology, an MA in Communications from the University of Canberra, and a BA in International Relations from

the Australian National University.¹

2. On three separate occasions, I have been retained by ICANN to provide advice to the CEO and senior management team with regard to the development and implementation of ICANN policy; and, more recently, have been involved in ICANN's Business Constituency and Nominating Committee. My first two positions both related to ICANN's selection of new sponsored Top Level Domains ("sTLDs"), formally initiated by ICANN's December 2003 Request for Proposals, in response to which applications were submitted in March 2004 ("2004 round"). First, I was retained to design and implement the technical functionality of the online application system for use in the 2004 round of sTLD applications. Second, I was the Chair of the Sponsorship and Other Issues Evaluation Team ("Sponsorship Team"), which was one of the teams responsible for making recommendations to the ICANN Board about the sTLD applications. My third advisory position with ICANN was that of Senior Policy Counselor, where I had a lead role in the policy development process for ICANN's upcoming 2009 round of applications for TLDs and was the primary author of the Generic Names Supporting Organisation New TLDs Committee's Final Report. I was involved in the policy development process until 2007, but am no longer involved now that the programme is moving into the implementation phase. I have never been a part of the ICANN staff, but have always worked for ICANN as a contractor. In 2008, as a member of the Business Constituency, I was elected to the ICANN Nominating Committee. The Nominating Committee appoints Board members and also makes appointments to an array of other leadership positions within ICANN. Members of the

¹ My full curriculum vitae is attached as Williams Exh. 1.

Nominating Committee serve as volunteers, without compensation other than the reimbursement of certain expenses.

3. I was acquainted with Dr. Paul Twomey, ICANN's current CEO, before I began my work with ICANN, and during my involvement with ICANN we had a close working relationship. We spoke often about events and developments at ICANN, and as a result I have knowledge of his experiences and opinions on a number of issues, including the 2004 round.

4. Although the Sponsorship Team recommended that the ICANN Board reject the .XXX application, as I discuss below, we did so applying the criteria on an equal basis to all of the applicants. I feel that the Board did not act properly or consistently in ultimately rejecting ICM's application. The Board accepted several other applications that the Sponsorship Team also recommended be rejected, for basically the same reasons we recommended that ICM's application be rejected. Having accepted these other applications, the Board should not have rejected ICM's application. As all of the other accepted applications ultimately resulted in signed registry agreements, ICM's application should also have resulted in an agreement, on the same or similar terms.

II. Development of the Selection Criteria for the RFP Initiating the 2004 Round

5. I was already involved with ICANN, in my first role in the development of the technical aspects of the application process, during the time that ICANN was discussing and creating the criteria for the selection of sTLDs in the 2004 round. Although the criteria were objective, they were underspecified in several respects, and little guidance was given to the evaluators to help them to interpret the criteria. Nor was sufficient attention paid to what process the ICANN Board should follow in the event that it became the final adjudicator of the

applications because the evaluation teams and the ICANN staff were unable to make a decision or made a decision with which the Board disagreed.

6. The criteria also failed to address a number of important matters, many of which could have been anticipated to arise, such as the issue of adult content. Those involved in the development of the selection criteria for the 2004 round were well aware of the possibility that an application for a “.XXX”, “.SEX”, or other adult content strings might be forthcoming. In fact, in the 2000 “proof of concept” round of TLD applications, several applicants had applied for “.SEX” and/or “.XXX.” Even before these applications were submitted, ICANN was aware that a TLD application targeted at adult content was a possibility; in fact, the possibility was discussed at the ICANN meetings in Yokohama, Japan, in July 2000, in which I took part, where the Board introduced the “proof of concept” round.² Moreover, the prevalence of adult content on the Internet, which is by no means a hidden secret, made it likely that someone would apply for such a string.

7. It was also obvious from the 2000 “proof of concept” round that an application for an adult content string would be controversial from a public relations standpoint. In the evaluation of the .XXX application from the 2000 round, ICANN had already noted that there was a “degree of controversy [] surround[ing]” the application.³ ICANN could have, and should have, anticipated that someone would apply for an adult content sTLD, and that the application,

² 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> (attached as Williams Exh. 2).

³ ICANN, Report on New TLD Applications, Section III.B.1.c—Restricted Content Group, 9 Nov. 2000, available at <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm> (attached as Williams Exh. 3).

however well prepared, would be controversial. This point would have been well understood by Dr. Twomey, who was the Chairman of the Governmental Advisory Committee (“GAC”) in 2000. And because of his connection with the GAC and with the Australian government, he would certainly have been aware that some governments might react unfavorably. ICANN therefore had an opportunity to create criteria or procedures to address and resolve these concerns, or to include statements in the RFP or related materials that applications raising such concerns would be subjected to increased scrutiny. 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.

8. The final criteria that were established for the 2004 round were divided into three main topics: technical, business and financial, and sponsorship and other issues.⁴ In addition to establishing the substantive criteria for evaluating applications, ICANN also created a process for all evaluations of the applications. The process, as initially envisioned, called for the establishment of three independent evaluation teams, one for each of the three sets of criteria. Each team was to be composed of experts with substantial knowledge and experience in the relevant areas. These teams would review each application for compliance with the selection criteria, and then provide the ICANN Board of Directors with a report of their conclusions and recommendations on how to proceed. The Board would then make the final determinations about the applications, based on the evaluators’ recommendations and advice from senior ICANN staff (such as Kurt Pritz, who was then Vice President of Business Operations, and John

⁴ ICANN, Request for Proposals for New Sponsored Top-Level Domains, 15 Dec. 2003, available at <http://www.icann.org/tlds/new-stld-rfp/new-stld-application-part-a-15dec03.htm> (“New sTLD RFP”) (attached as Williams Exh. 4).

Jeffrey, who was ICANN's General Counsel). As the process was explained to me, 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.

9. The evaluators were to remain anonymous until the evaluation process was completed. Miriam Sapiro, of Summit Strategies International, was responsible for coordinating the overall process and communicating with the applicants without revealing the identity of the evaluators. In May 2004, I was selected to serve as the Chair of the Sponsorship Team. The other two members were Daniel Weitzner and Pierre Ouedraogo. Mr Weitzner, a lawyer, had both legal and technical expertise. He served as Policy Director of the World Wide Web Consortium's Technology and Society activities, where he was involved in the development of technical standards relating to social, legal, and public policy challenges. The World Wide Web Consortium is an international consortium where member organisations, staff, and the public collaborate to develop open standards for Internet technology, languages, protocols, and software, to ensure compatibility and interoperability. Mr. Ouedraogo was the Information Society Project Manager at the Francophone Institute for Information and Learning New Technologies, a subsidiary unit of the Agence intergouvernementale de la Francophonie (now called the Organisation internationale de la Francophonie) which focuses on promoting the development of information technology in French-speaking states and the participation of those states in the international endeavors related to information technology. Mr. Ouedraogo's background is in internet governance, human resource development, and the use of information technology to promote economic development. The three of us began our review the third week of May 2004, and we planned to complete our report in about six weeks.

III. Applications and Evaluations

A. Ten Applications are Submitted

10. ICANN received 10 sTLD applications, for the strings “.ASIA,” “.CAT,” “.JOBS,” “.MAIL,” “.MOBI,” “.POST,” two different versions of “.TEL,” “.TRAVEL,” and “.XXX.” .ASIA was to “serve the Pan-Asia and Asia Pacific community” by offering a regionally dedicated domain to promote stronger global competition “among Asia and Asia Pacific corporations, economies, and people.”⁵ .CAT was requested to serve the “Catalan Linguistic and Cultural Community”, that is, “those identifying themselves and/or their activities with the promotion of those areas in the Internet.”⁶ .JOBS was proposed for the “benefit of the international human resource management community,” ostensibly to allow the registration of employers based on applications submitted by their human resource manager or other qualified individual within the company.⁷ .MAIL was to serve “the community of individuals and companies who wish to receive spam-free email and individuals and companies who wish to send spam-free email and who do not want to be blocked, filtered or inconvenienced when doing

⁵ DotAsia Organisation Limited, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/asia.htm> (“ASIA Application”) (attached as Williams Exh. 5).

⁶ Associació puntCat, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/cat.htm> (“CAT Application”) (attached as Williams Exh. 6).

⁷ Employ Media LLC, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/jobs.htm> (“JOBS Application”) (attached as Williams Exh. 7).

so.”⁸ Using the sTLD would allow “mail server operators who follow ‘the rules’ to be able to identify each other.”⁹ The community to be served by .MOBI was, essentially, “all commercial participants in the mobile community.”¹⁰ The goal was to allow mobile service operators and content providers to better serve the online needs of the mobile market by harmonising their efforts “under a single namespace to serve the entire community.”¹¹ .POST was meant to serve “the worldwide postal community, which includes public and private operators, organisations and government agencies” in order to “facilitate and enhance global communications between members of the postal communities in developed and less developed countries alike,” thus improving transportation logistics, increasing expertise, and promoting business.¹² The first .TEL application, to be sponsored by an entity named Pulver.com (“.TEL (Pulver)”), was designed for “those who seek to register telephone numbers in ITU E.164 format as domain names on the Internet”¹³ in order to “to facilitate the smooth migration of communications

⁸ The Anti-Spam Community Registry, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/mail.htm> (“MAIL Application”) (attached as Williams Exh. 8).

⁹ *Id.*

¹⁰ ICANN, New sTLD Applications, Appendix D: Evaluation Reports, 27 Aug. 2004, p. 95, public version available at <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf> (“Independent Evaluation Report”) (attached as Williams Exh. 9).

¹¹ Nokia Corporation *et al.*, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/mobi.htm> (“.MOBI Application”) (attached as Williams Exh. 10).

¹² Universal Postal Union, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/post.htm> (“.POST Application”) (attached as Williams Exh. 11).

¹³ Independent Evaluation Report, p. 100.

services.”¹⁴ The community for the other .TEL string, applied for by a company called Telnic Limited (hereinafter “.TEL (Telnic)”), was to “consist[] of individuals and/or businesses who wish to have a universal identity, brand or name, in the Internet-Communications space, as well as providers of Internet-Communications services and related content.”¹⁵ Registrants would be able to consolidate all contact information to one website.¹⁶ The .TRAVEL string was intended to serve “businesses, organisations, associations, and governmental and non-governmental agencies operating in” certain sections of the travel industry.¹⁷ Finally, the .XXX application was intended to serve “the global responsible online adult-entertainment community.”¹⁸

11. The Sponsorship Team struggled considerably with the task of evaluating these applications. The sponsorship criteria were harder to apply than were the other criteria; for example, how does one measure “adding value to the Internet?” Whereas the Business Evaluation Team could make straightforward determinations about such matters as the applicants’ financial models and business plans, the Sponsorship Team was faced with more nebulous questions, such as the definition of the community, the appropriateness of the

¹⁴ NetNumber, Inc., New sTLD RFP Application, public version posted 19 Mar. 2004, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/tel-pulver.htm> (“.TEL (Pulver) Application”) (attached as Williams Exh. 12).

¹⁵ Telnic Limited, New sTLD RFP Application, public version posted 19 Mar. 2004, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/tel-telnic.htm> (“.TEL (Telnic) Application”) (attached as Williams Exh. 13).

¹⁶ *Id.*

¹⁷ Tralliance Corporation, New sTLD RFP Application, public version posted 19 Mar. 2004, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/travel.htm> (“.TRAVEL Application”) (attached as Williams Exh. 14).

¹⁸ ICM Registry, Inc., New sTLD RFP Application, public version posted 19 Mar. 2004, *available at* <http://www.icann.org/tlds/stld-apps-19mar04/xxx.htm> (“ICM Application”) (attached as Williams Exh. 15).

sponsoring organisation, the level of support from the sponsored community to be represented, and the addition of value to the Internet name space. These are all significant questions in an environment where different approaches to innovation are so important, but they are not easy to decide. The evaluators also had somewhat different philosophies on the various criteria and how they should be applied. The difference in philosophies was one of the reasons the team was put together as it was, to ensure that these different perspectives—technical, non-technical, governance, cultural, economic, and so on—were shared and taken into account in the final decision, but it also made it difficult to come to an agreement. Moreover, while the technical and business aspects of each application were fairly standard, the sponsorship portions of the 10 applications were different, because the applications were based on very different ideas.

12. The most important element of our evaluation was the judgment about what formed a “community” for the purposes of the application process. As a team, we felt that the crux of the sponsorship evaluations was to answer the question of whether the application actually represented the sponsored community it claimed to represent, but that question was exceedingly difficult to answer based on the information available to us in each of the applications. In a number of applications, such as .TEL (Telnic), .TRAVEL, .XXX, and .JOBS, the “community” was formed solely for the purposes of applying for the sTLD; there was no pre-existing community and no shared interests other than putting a certain type of information on the Internet in a certain space.

13. We created several drafts of our evaluation report before finalising it and sending it to the Board. As Chair of the Sponsorship Team, I was in charge of the drafting. Our final report was provided to the Board in July 2004.

B. Criteria and Evaluations of Applications Other Than .XXX

14. The criteria to be analysed by the Sponsorship Team were divided into the Sponsorship Information criteria and the Community Value criteria.¹⁹ Each of the two sets of criteria was further divided into subparts.²⁰ We evaluated each application against all of the subparts, determining whether it passed or failed each, before coming to an overall conclusion regarding the application. We did not compare the applications to each other to make our decision, but evaluated each individually against the selection criteria. I felt that the Sponsorship Team worked very hard to properly evaluate the applications in the face of the difficulties described above; meeting through a series of teleconferences to discuss the applications and our opinions, drafting reports, and reviewing and revising our positions until we were satisfied with our conclusions. It was our impression from early on that the majority of the applications did not meet the sponsorship criteria, and most suffered from the same or similar flaws, despite the fact that the applicants' concepts were very different. In our view, the only applications that met all of the sponsorship criteria were the .CAT and .POST applications.²¹

1. Sponsorship Information

a. Definition of Sponsored TLD Community: The RFP required "precise definition of a sponsored community; evidence that that community would benefit from the establishment of an sTLD and evidence that the community would be involved in policy

¹⁹ Independent Evaluation Report, p. 75; *see also* New sTLD RFP.

²⁰ Independent Evaluation Report, pp. 75-80; *see also* New sTLD RFP.

²¹ Independent Evaluation Report, at p. 82.

formulation.”²² The Sponsorship Team felt that most of the applications did not meet these criteria. In our opinion, the applications did not define a specific community with clearly identifiable needs and membership that could be readily determined.²³ Specifically, we felt that .ASIA identified a community that was too diverse to be served by an sTLD;²⁴ that the string “.JOBS” was broader than the community described;²⁵ that the .MAIL community was too amorphous to be a distinct community;²⁶ that it was unclear how membership in the .MOBI community could be established;²⁷ and that the communities described in both .TEL applications were far too broad.²⁸ Aside from .CAT and .POST,²⁹ only .TRAVEL had an adequate definition of the sponsored community, but its community, as defined, was not “consistent in breadth with the name string .travel.”³⁰

b. Evidence of Support from the Sponsoring Organisation: The second section of the RFP looked for “direct evidence of support from the Sponsoring Organisation for the application.”³¹ The applicants generally did not have a problem with these criteria, as the applicant and the sponsoring organisation were all either closely affiliated, or were the same

²² *Id.* at p.76.

²³ *Id.* at pp. 83, 90, 93, 95, 100, 102-105.

²⁴ *Id.* at p. 83.

²⁵ *Id.* at p. 90.

²⁶ *Id.* at p. 93.

²⁷ *Id.* at p. 95.

²⁸ *Id.* at pp. 100, 102-105.

²⁹ *Id.* at pp. 87, 98.

³⁰ *Id.* at p. 107.

³¹ *Id.* at p. 76.

entity.³² Applicants who were to serve as the sponsoring organisation themselves clearly had no problem with organisational support; the others had specifically chosen or created an organisation that would be supportive of their application.

c. Appropriateness of the Sponsoring Organisation and the policy formulation environment: The third section of the RFP required the evaluators “to judge whether the Sponsoring Organisation’s policy formulation procedures and structures would successfully demonstrate a robust and effective policy formulation and implementation organisation,” such that policies would be developed in the best interests of the sponsored community and the public.³³ The applicants struggled with these criteria, and most failed to meet them. Aside from .CAT and .POST, the only applicant which successfully met these criteria was the .MAIL application, and despite the fact that .MAIL met the criteria, we remained uncertain about the value of using a .MAIL registry on top of the registrants’ existing websites.³⁴ We felt that the community identified in .ASIA was too diverse for effective policy formulation;³⁵ the policy formulation body for .JOBS was insufficient to reflect the full interests of the community;³⁶ the policy-making bodies for both .TEL sTLDs were too narrow and unrepresentative to be trusted to act in the best interests of the community;³⁷ and the policy focus for .TRAVEL was too narrow for the string, because the concept of “travel” extends far beyond

³² *Id.* at pp. 83, 90, 93, 95, 98, 100, 103, 107, 111.

³³ *Id.* at p. 76.

³⁴ *Id.* at p. 93.

³⁵ *Id.* at pp. 83-84.

³⁶ *Id.* at pp. 90-91.

³⁷ *Id.* at pp. 100-101, 103-104.

commercial providers.³⁸ Additionally, I felt it was problematic that the sponsoring organisations for several of the proposed sTLDs, including .ASIA., .MOBI, and .TRAVEL, were organisations created specifically for the purpose of sponsorship,³⁹ and therefore were not organisations whose involvement with the sponsored community pre-dated the applications. Thus, even if there was a clear sponsored community with specific policy needs that could be addressed through the creation of an sTLD, it was not clear that a newly-formed organisation was the appropriate body to represent the community and oversee the policy-making. However, if a newly formed organisation was appropriate for any of the applications, then it would have to be appropriate for all of the applications. Hence, .CAT, .ASIA, .MOBI, and .TRAVEL were in the same position as .XXX.

d. Level of Support from the Community: The fourth section of the RFP required the Sponsorship Team to assess whether “the applicants had demonstrated sufficient levels of support from the community.”⁴⁰ In assessing the level of community support, we took into account both comments on ICANN’s public forums and letters of support provided to us by the applicants. While all applicants were able to provide such letters from various sources, we nonetheless felt that only .CAT and .POST demonstrated sufficient support to justify approval.⁴¹ .ASIA and both .TEL applicants failed to show sufficient support from key organisations or stakeholders in the sponsored community.⁴² .ASIA and .JOBS failed to show participation or

³⁸ *Id.* at pp. 107-108.

³⁹ *See* .CAT Application; .ASIA Application; .MOBI Application; .TRAVEL Application.

⁴⁰ Independent Evaluation Report, p. 77.

⁴¹ *Id.* at pp. 87-88, 98-99.

⁴² *Id.* at pp. 84, 101, 104.

representation that was sufficiently broad geographically;⁴³ the fees for .MAIL were viewed as prohibitively expensive,⁴⁴ there was little evidence of support for .MOBI (although it was hard to judge because the sponsoring organisation had not yet been formed);⁴⁵ and the level of support for .TRAVEL from the travel industry was insufficient to justify approving a string that also had non-commercial aspects.⁴⁶

2. Community Value

a. **Addition of new value to the Internet namespace:** Using the criteria as explained in the RFP, the Sponsorship Team attempted to determine if the proposed sTLDs were of broad significance but also appropriate to the community described in the application; whether they enhanced the diversity of the Internet by meeting needs not met by the current structure; and whether they had broad geographic and demographic importance.⁴⁷ All of these criteria were expressed in very broad, general terms, and we were given no guidance on how to objectively measure concepts such as “significance,” “diversity,” or “geographic and demographic importance.” Unlike other ICANN initiatives, such as the Internationalized Domain Names or the Country Code TLD projects, which are clearly designed to enhance linguistic and geographic diversity on the Internet, it was not clear what type of diversity or added value ICANN expected the proposed sTLDs to create. Using our best judgment of the broad concepts set forth in the criteria, however, we felt that several applicants, most notably .JOBS, .MAIL, .MOBI, and

⁴³ *Id.* at pp. 84, 91.

⁴⁴ *Id.* at p. 93.

⁴⁵ *Id.* at p. 96.

⁴⁶ *Id.* at p.108.

⁴⁷ *Id.* at pp. 77-78.

.TRAVEL failed to demonstrate that there was a need that could not be met just as well (or even better) through the currently existing TLD structure.⁴⁸ We also felt that the strings “.ASIA” and “.TRAVEL” were more appropriate for broader communities than the communities described in their applications. The .ASIA application did not have sufficient support from the entire geographic region,⁴⁹ and while the .TRAVEL application focused only on the commercial travel industry, the concept of “travel” is much broader than just that commercial aspect.⁵⁰ In the cases of .MOBI and both .TEL proposals, we felt there was as much potential for confusion as there was for value,⁵¹ and we did not feel that the concepts behind the .TEL proposals had yet been tested thoroughly enough to determine their value.⁵² Once again, therefore, we determined that only .CAT and .POST met these criteria.⁵³

b. Protecting the rights of others: With regard to this set of criteria, the Sponsorship Team assessed the applicants’ “ability to meet other ICANN policies designed to protect registrants’ interests and those of intellectual property and trademark owners.”⁵⁴ Most applicants described policies that were sufficient or close to sufficient, but we did have doubts regarding several of the applications. We determined that .ASIA had not met the criteria, in that it did not take into account rights and needs specific to the regions involved;⁵⁵ .MAIL did not

⁴⁸ *Id.* at pp. 91, 94, 96-97, 108-109.

⁴⁹ *Id.* at pp. 84-85.

⁵⁰ *Id.* at pp. 108-109.

⁵¹ *Id.* at pp. 96-97, 101-102, 104-105.

⁵² *Id.* at pp. 101-102, 104-105.

⁵³ *Id.* at pp. 88, 99.

⁵⁴ *Id.* at p. 78.

⁵⁵ *Id.* at p. 85.

meet the criteria in that it was not clear what benefit there was to registrants to adding a domain in .MAIL to their already existing domains in other registries;⁵⁶ and .TEL (Telnic) failed in that it had no provisions for protection of data or law enforcement access.⁵⁷ All of the other applications met these criteria,⁵⁸ although we noted some concern with .JOBS' failure "to account for global service reach,"⁵⁹ and the lack of proof that .MOBI would be capable of implementing the policies described in the application.⁶⁰

c. Charter-compliant registrations; avoidance of abusive registrations:

The Sponsorship Team attempted to "assess whether registry operators could ensure the veracity of registrants within their community and protect the rights of intellectual property holders."⁶¹ Only .ASIA did not meet these criteria, as we felt that the diversity of the community involved would make it very difficult to develop policies for what constituted valid registrations and to ensure compliance.⁶² We also noted that while .MOBI met the criteria, further work would be needed before creating the domain to ensure full compliance with ICANN's policies.⁶³

d. Dispute resolution mechanisms: To meet the dispute resolution criteria, applicants had to demonstrate that they could both "implement and ensure compliance with ICANN's well-established Uniform Dispute Resolution Policy" and that they were aware of and

⁵⁶ *Id.* at p. 94.

⁵⁷ *Id.* at p. 105.

⁵⁸ *Id.* at pp. 88, 91, 97, 99, 102, 109.

⁵⁹ *Id.* at p. 91.

⁶⁰ *Id.* at p. 97.

⁶¹ *Id.* at p. 79.

⁶² *Id.* at p. 85.

⁶³ *Id.* at p. 97.

could respond to other disputes.⁶⁴ The applicants had little difficulty with these criteria, especially with showing that they could comply with ICANN's UDRP; we felt that all applicants met these criteria.⁶⁵

e. **WHOIS service:** Finally, the Sponsorship Team evaluated each applicant's ability to provide accurate WHOIS data, implement the existing ICANN WHOIS policy, and comply with future WHOIS policies.⁶⁶ The applicants all met the criteria in this area.⁶⁷

C. The Evaluation of .XXX

15. The Sponsorship Team struggled quite a bit with applying the sponsorship criteria to the .XXX application. The bottom line was that we simply did not agree. Like all applications, the .XXX application met the criteria regarding support from the sponsoring organisation, dispute resolution mechanisms, and WHOIS services.⁶⁸ We also felt that the .XXX application met the criteria related to the protection of the rights of others and charter compliant registrations.⁶⁹ Although we 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

⁶⁴ *Id.* at p. 79.

⁶⁵ *Id.* at pp. 85, 88, 92, 94, 97, 99, 102, 105, 109.

⁶⁶ *Id.* at p. 80.

⁶⁷ *Id.* at pp. 85, 89, 92, 94, 97, 99, 102, 105, 109.

⁶⁸ *Id.* at pp. 111, 113.

⁶⁹ *Id.* at pp. 112, 113.

protection of the rights of others, and also, to a somewhat lesser degree, a better evaluation than .JOBS and .MOBI, given our somewhat tentative conclusions regarding those two applications.⁷⁰

16. The criteria relating to the definition of the sponsored community, the appropriateness of the sponsoring organisation, the level of community support, and the addition of new value were, however, more difficult. Over the evaluation period, we engaged in significant debate, and went back and forth on our positions on these criteria before finally settling on a conclusion. I remember that at some stage, Mr. Weitzner and Mr. Ouedraogo were more favorably disposed towards the .XXX application. An early draft of our evaluation report, dated 28 June 2004, tentatively concluded that the .XXX application met each of the selection criteria, but failed to make an overall recommendation for the treatment of the application.⁷¹ Over time, however, the positions of the Sponsorship Team members shifted as we debated the issue. Thus, a draft from early July concluded that there were some criteria that .XXX did not meet, and reached the overall conclusion that .XXX did not meet the selection criteria.⁷² The .XXX application was the only application about which we shifted our opinion from a determination that it met the criteria to a determination that it did not. The other seven applications we rejected (.ASIA, .JOBS, .MAIL, .MOBI, the two different version of .TEL, and .TRAVEL) were applications that we easily determined, early in our analysis, did not meet the

⁷⁰ *See id.* at pp. 85, 91, 94, 97, 105.

⁷¹ Draft of the New sTLD Applications: Evaluation Report—Report of the Sponsorship and Other Issues Team, 28 June 2004 (attached as Williams Confidential Exh. A).

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⁷² Draft of the New sTLD Applications: Evaluation Report—Report of the Sponsorship and Other Issues Team, 2 July 2004 (attached as Williams Confidential Exh. B). **CONFIDENTIAL**

criteria. Our difficulty in reaching agreement on the final recommendation for the .XXX sTLD was, in my opinion, due to the lack of clarity in the sponsorship criteria.

17. The final report that was sent to the Board concluded that the .XXX application did not meet four of the nine subparts of the sponsorship selection criteria, and recommended against approving the application.⁷³ Specifically, we concluded: (1) that the community was not sufficiently clearly defined, due to the “extreme variability in definitions of what constitutes” adult content;⁷⁴ (2) that the lack of cohesion in the community, and the planned involvement of child advocates and free expression interest groups, would preclude the effective formulation of policy for the community;⁷⁵ (3) that there was not sufficient evidence of community support outside of North America or from child safety, law enforcement, or freedom of expression organisations;⁷⁶ and (4) that the new sTLD would add little value as goals of the sTLD could be accomplished within the existing DNS structure.⁷⁷

18. Clearly, these concerns were no different from the concerns we identified with regard to all of the applications that we felt failed to meet the criteria: failure to clearly define the

⁷³ Independent Evaluation Report, pp. 110-113.

⁷⁴ *Id.* at p. 110.

⁷⁵ *Id.* at p. 111.

⁷⁶ *Id.* at pp. 111-112.

⁷⁷ *Id.* at p. 112. During our discussions, we never considered issues such as the potential for offensive content in an sTLD, an applicant’s ability to comply with all laws relating to content, or whether the applicant would fail to apply the community’s policies regarding content. These factors do not appear anywhere in the RFP, and it would have been inappropriate for us to have considered them in our decision-making process. Although the evaluation report does mention differences in regulation of adult content in different jurisdictions, it was not meant as a statement about the need for .XXX to comply with all such laws, but only as a proxy for whether or not there was a clearly identified community based on a shared understanding of the definition of adult content.

sponsored community (.ASIA, .JOBS, .MAIL, .MOBI, and both .TELS—even .TRAVEL was flawed because the definition was not appropriate to the string);⁷⁸ lack of support from key elements of the community (.ASIA, .JOBS, .MAIL, .MOBI, both .TELS, and .TRAVEL);⁷⁹ and failure to identify goals that could not be accomplished under the existing structure (.ASIA, .JOBS, .MAIL, .MOBI, both .TELS, and .TRAVEL).⁸⁰ Therefore, it would be inconsistent to reject .XXX based on any of these reasons without also rejecting the other applications.

D. ICANN Exerts Pressure and We Provide Our Final Report

19. In short, the Sponsorship Team concluded that eight of the 10 applications failed to meet the sponsorship criteria, in large part because the definition of the sponsored community was either too unclear or too broad, making it very difficult to identify potential members or determine the common interests or policy needs of the community. This was especially true in the cases of .MAIL (“anyone who does not want to receive spam”), .MOBI (“all commercial participants in the mobile community”), .TEL (Pulver) (“[i]f it [does] make sense to register telephone numbers as domain names, then it becomes even more problematic to identify a clearly defined community whose needs are differentiated from existing Internet users”), and .TEL (Telnic) (“this application seems to sweep almost all existing registrants . . . under its ambit”).⁸¹ Our overall recommendation was that only .CAT and .POST proceed to negotiations for a registry agreement; although we felt that there might be some value in further discussions

⁷⁸ *Id.* at pp. 83, 90, 93, 95, 100, 102-103, 107.

⁷⁹ *Id.* at pp. 84, 91, 93, 96, 101, 104, 108.

⁸⁰ *Id.* at pp. 91, 94, 96-97, 101-102, 104-105, 108-109.

⁸¹ *Id.* at pp. 93, 95, 100, 103.

with .ASIA, .JOBS, and .TRAVEL, either in altering the applications or in encouraging the applicants to work within the existing structure or try again in later gTLD application rounds.⁸²

20. ICANN learned of our conclusions in advance of our final report, and was clearly disappointed that we intended to recommend that so few applications should proceed to the next step in the process: registry agreement negotiations. At that time, certain ICANN staff, including Kurt Pritz, an ICANN Vice President, and John Jeffrey, ICANN's General Counsel, were very clear that they wanted as many applications as possible to advance to the next stage of the process, and encouraged us to be more positive in our assessments in order to achieve that goal. I believe that they viewed the new sTLD application process as a means to demonstrate ICANN's prestige and importance as an international organisation; therefore the process had to be seen as successful—meaning lots of new sTLDs—so that it would appear that ICANN was in control of a valuable resource, and so that future rounds would attract more applicants. At the time, it was perhaps more important to them that the process result in as many new sTLDs as possible than it was that the criteria be applied correctly to the applications. Mr. Pritz and Mr. Jeffrey indicated to us that ICANN was dissatisfied with our initial conclusions. In response, we gave the applicants an additional opportunity to demonstrate that their applications met the criteria by providing the applicants with a series of questions to clarify and supplement their applications.⁸³

⁸² *Id.* at pp. 82, 114.

⁸³ Questions from the Evaluation Teams to sTLD Applicants, 7 June 2004 (attached as Williams Exh. 16).

21. The Sponsorship Team was, in general, not very receptive to this pressure from ICANN. We felt that we were doing a very difficult job, in a short time frame, and had spent a great deal of time carefully analysing the applications, discussing the criteria, and refining our conclusions. We were frustrated by the expectation that we should discount the results, which we felt were correct based on our understanding of the criteria, and devote even more time to the process; especially as our work was being done, principally, on a volunteer basis, since the honorariums which were paid to the evaluators were far lower than the commercial rate for the work we performed. Nonetheless, we reviewed the information we received in response to our supplemental questions; we did not find anything that caused us to doubt our conclusions.

E. Publication of the Reports

22. After we provided our reports to the Board, the Sponsorship Team was no longer formally involved in the process (although I believe the other two teams continued to work with certain applicants). It was the evaluators' understanding that our report for each application would be made public at the same time, and the anonymity of the evaluators would end, as soon as the reports were provided to the Board. This commitment had been made to us by ICANN when the evaluation teams were formed. If that procedure had been followed, all applications would have been at the same stage of the process when the reports were published. Instead, the reports were not made public until November 2005, after various debates and discussions I had with Dr. Twomey and Mr. Jeffrey. Before the reports were published, I had moved to Brussels, Belgium, in my role as Senior Policy Counselor for the new TLD round, and I felt that the delay in publishing the evaluators' reports impinged upon my professional credibility. Although many people already knew or guessed what my role had been, I was unable to confirm it or discuss any aspect of my work as an evaluator, which hampered my ability to fully participate in policy

development for the round to come. When the evaluations were finally published, some applicants had already finalised and signed their registry agreements with ICANN (namely, .CAT, .JOBS, .MOBI, and .TRAVEL),⁸⁴ whereas others (such as .XXX, and .TEL (Telnic)) had received Board approval of their applications but were still in contract negotiations and had not yet finalised and executed their registry agreements. Thus, our critical comments in the evaluation report became available to be used by those seeking to block the .XXX application. However, applications for which registry agreements had already been executed were insulated from such similar criticisms. Despite my eagerness to see the evaluations published, I do not believe that the evaluations should have been published when the applications were at different stages. Doing so was contrary to the process as described to me and the evaluators. If the reports were not going to be published before the Board began approving applications, they should not have been published until after all of the applicants had executed their registry agreements—so that each applicant was treated by the Board in a similar manner, as we had treated them.

IV. ICANN Board Action

23. Once the evaluations were presented to the Board, the Board took over the process. The Board decided not to follow the conclusions of the Sponsorship Team, and instead

⁸⁴ ICANN Board Resolution on Approval of .CAT Sponsored Top-Level Domain Registry Agreement, ICANN Board Meeting, 15 Sept. 2005, *available at* <http://www.icann.org/en/minutes/minutes-15sep05.htm> (attached as Williams Exh. 17); ICANN Board Resolutions on Proposed sTLD Agreements for .JOBS and .TRAVEL, ICANN Board Meeting, Mar del Plata, Argentina, 8 April 2005, *available at* <http://www.icann.org/en/minutes/minutes-08apr05.htm> (attached as Williams Exh. 18); ICANN Board Resolution on Proposed sTLD Agreement for .MOBI, ICANN Board Meeting, 28 June 2005, *available at* <http://www.icann.org/en/minutes/minutes-28jun05.htm> (attached as Williams Exh. 19).

undertook its own analysis of the applications. The Board did not necessarily use the same criteria as the evaluation teams were required to do, although it clearly should have. For the evaluation process to retain its integrity, however, the Board needed to limit itself to considering the criteria already established in the RFP. As part of the Sponsorship Team, I never would have engaged in creating new criteria as a justification for rejecting applications. Doing so would have been highly inappropriate and outside of the agreed-upon process. It was just as inappropriate and unjustified for the Board to impose new criteria on applicants who had prepared their applications to meet the published criteria. If the Board was going to apply the criteria to some applications in a more lenient fashion, it was obligated to do so for all applications. In performing our evaluations, we were very careful to apply the criteria to all applications in an even-handed and balanced manner; to do otherwise would have been unfair. In considering the Board's treatment of .XXX, however, I do not feel that the Board followed these principles and, in particular, engaged in "decision-making" by public comment, bowing to (real or manufactured) public pressure instead of exercising independent judgment based on set, agreed upon criteria.

24. I know that the Board spent a significant amount of time considering the applications, including ICM's application. Then on 1 June 2005, the Board voted to begin registry agreement negotiations with ICM. It is my personal belief, based on everything I know about the process, that the 1 June 2005 resolution was a definitive statement that the Board—after receiving and hearing further input from ICM, including information that we, the Sponsorship Team, did not receive—had approved the application based on its determination that the application met the selection criteria. Not only was this the logical progression in the application process as the evaluators understood it (and which I helped develop), but this was

how the other applications were treated. After all the time and effort ICANN had expended on the applications, the Board would not have approved an application for negotiations unless it decided that the application met the criteria. 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. The wording of the resolution may not explicitly state that the application met all of the selection criteria, but I understood—and I believe that everyone involved in the process understood—the resolution to mean that, after considering the determinations of the evaluation teams and doing much follow-up analysis, the Board had approved the .XXX application. At that point, the only remaining task was to arrive at an agreement on specific contract terms, which should have been relatively simple, as all of the other agreements had been approved based on minor modifications to the standard terms.

V. Governmental Pressure on ICANN

25. The June 2005 vote should have marked the completion of the substantive discussions of the .XXX application, especially in light of the Board resolution that approved the .XXX application with no reservations or caveats. Instead, following the vote, the ICANN Governmental Advisory Committee “woke up” to the .XXX application, and ICANN began to feel pressure from a number of governments, especially from the United States and Australia. It was common knowledge among ICANN staff (particularly for Steve Conte, who was then the General Manager of Information Services and therefore responsible for fixing the problem) that Dr. Twomey's email in-box was flooded to the point of incapacitation with comments about .XXX, principally from automated email from the United States.

26. Dr. Twomey was particularly sensitive to pressure from Australia, as he had previously headed the National Office for the Information Economy (“NOIE”) and worked with that government department as the Chair of the Governmental Advisory Committee. NOIE was under the ministerial function headed by Senator Richard Alson and then-Senator Helen Coonan, both vocal opponents of .XXX. Following the June 2005 vote, Senator Coonan was very critical of Dr. Twomey in the press regarding the approval of .XXX, and Dr. Twomey expressed to me several times his frustration and stress as a result of that focus on a small part of his and ICANN’s work.

27. The United States Government also had a great deal of influence on ICANN and its executives. At that time, ICANN was even more connected to the United States Government than it is currently, as it had not yet transitioned from the Memorandum of Understanding to the presumed greater autonomy allowed under the Joint Project Agreement. An open dispute with the United States would have been very damaging to ICANN’s credibility, and it was therefore very difficult to resist pressure from the United States, particularly from Michael Gallagher and senior members of President George W. Bush’s administration. Although he could not describe his conversations with U.S. representatives in great detail, Dr. Twomey expressed to me his anxiety about the .XXX registry agreement as a result of this intervention. This concern went to the heart of ICANN’s legitimacy as a quasi-independent technical regulatory organisation with the power to establish the process by which new TLDs could be created and put on the root. If the United States Government disagreed with ICANN’s process or decision at any point and did

not enter a TLD accepted by ICANN on to the root, it would call into question ICANN's authority, competence, and entire reason for existence.⁸⁵

VI. The Board's Final Decision

28. The Board's ultimate rejection of the .XXX application was a complete turnaround from the 1 June 2005 approval. The final vote on the .XXX application was in March 2007. I believe that the rejection was in part due to matters of timing and other events. During the prior year, negotiations over the renewal of Dr. Twomey's employment contract had taken place.⁸⁶ His handling of the .XXX application process was of particular concern, and I feel that he was frustrated with the continued attention on the topic and simply hoped to bring the process to a close somehow, regardless of whether it was a fair outcome. Additionally, Vinton Cerf's tenure as Chair of the ICANN Board was coming to an end in November 2007, and he was ready to resolve the .XXX question, which he felt was requiring too much of ICANN's time and attention, to focus on issues he considered more important for the remainder of his tenure. Both felt that the controversy was reflecting poorly on their job performance and harming ICANN's

⁸⁵At an international level, the ongoing events in preparation for the meetings of the World Summit on the Information Society in November 2005 and the annual meetings of the International Governance Forum, both of which brought together governments that viewed ICANN as insufficiently representative of many governments (and too beholden to the United States Government) also caused ICANN executives great anxiety. ICANN executives were concerned that there would be attempts to replace ICANN with another international organisation, or that ICANN would be pressured to cede authority to the United Nations. Although the United Nations was sympathetic to ICANN's connection with the United States Government, any additional involvement by the United Nations or other organisations would result in a decrease in the importance of ICANN as an international organisation, and such a result was simply unacceptable to the executives involved.

⁸⁶ See McCarthy, Kieren, *The Internet's CEO Signs up for Three More Years*, The Register, 26 June 2006, available at http://www.theregister.co.uk/2006/06/26/twomey_new_contract/ (attached as Williams Exh. 20).

prestige and standing with the United States and other national governments, and so were more concerned with resolving the issue than ensuring the proper process or correct result.

29. After the Board received the recommendations from the evaluators, it could have rejected .XXX, and the other seven applications that failed our evaluation process. Instead, however, the Board chose to re-consider the applications, and substitute its analysis of the criteria for the analysis of the evaluators. Having made this decision, the Board should have applied the pre-existing criteria in a consistent and objective manner to the applications. Instead, the Board adopted new criteria that were never included in the original RFP, and applied the existing criteria less strictly to most applications. It, however, treated the .XXX application to more, and, in my view, unfair, public scrutiny. Having accepted several applications, such as .ASIA, .JOBS, .MOBI, and .TEL (Telnic), that the Sponsorship Team judged to have the same flaws as the .XXX application with regard to definition of sponsored community, community support, and ability to formulate policy, the Board had no basis to rely on those flaws to reject the .XXX application. ICANN's determination that .XXX "failed to meet the sponsorship criteria" simply demonstrates that ICANN was treating the .XXX application differently from the other applications which it approved.

30. Moreover, the other reasons given by the Board for rejecting the .XXX application do not appear in the criteria outlined in the RFP, and are instead unfair, *ex post facto* justifications for the decision, based on criteria different from those formally established in the RFP, relied upon by the applicants, and used by the Sponsorship Team and the Board on 1 June 2005. According to the 30 March 2007 Board resolution in which the Board stated it was

rejecting the .XXX application, the Board based its rejection in large part on “public policy concerns,” including “offensive content.”⁸⁷ This was outside the RFP as originally disseminated. There is no basis in the RFP, and no basis in any of the rules governing ICANN, to have allowed ICANN to reject an sTLD proposal simply because the websites that might register in such a TLD might contain offensive content. “Offensive content” of the type that would be registered in the .XXX sTLD had been present on the Internet long before ICM Registry submitted its application in 2004, yet the presence of such content had never before served as a justification for ICANN to prevent the creation of a TLD or deny a registry operator the right to operate.

31. This conclusion is not altered by the concern expressed in the resolution that ICANN would “be forced to assume” a role in managing content.⁸⁸ Given the nature of a sponsored TLD as described to the evaluators, all applicants were to develop community policies regarding the content and nature of websites that could be registered in the sTLD. The fact that the .XXX sTLD’s policies would relate to adult content makes it no more likely that ICANN would be called upon to regulate such content. If content on the .XXX sTLD violated national laws, it would be treated no differently than content on any other TLD that violated national laws. If the sponsoring organisation for .XXX was not developing policies in the manner specified in the contract, it would be either a contractual matter, which would allow ICANN to pursue the normal contractual rights and remedies, or a matter to be solved through the sponsoring organisation’s dispute resolution methods described in the contract. Neither scenario

⁸⁷ ICANN Board Resolution 07.18 on Proposed sTLD Agreement with ICM Registry, ICANN Board Meeting, Lisbon, Portugal, 30 March 2007, *available at* <http://www.icann.org/en/minutes/resolutions-30mar07.htm> (attached as Williams Exh. 21).

⁸⁸ *Id.*

would result in ICANN's involvement in content regulation. The fact that different countries have different laws regarding adult content is an entirely separate matter from the fact that the sponsoring organisation intended to develop policies for adult content specific for the .XXX sTLD, that would govern those websites which voluntarily chose to register for a .XXX domain name. If ICANN were to disallow any TLD that might fail to monitor content or abide by a contract in such a way that ICANN would be forced to act, there would be no more Internet, and certainly no more sponsored TLDs. In my view, for ICANN to reject one application on this basis is simply treating it differently than the others.

32. Nothing in the RFP selection criteria justifies the Board's rejection of the .XXX application, and the record of the process for all applications clearly shows the Board's discriminatory actions towards ICM. In fact, some aspects of the process designed for the future round of applications for TLDs (to be implemented in 2009) 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 the future 2009 TLD 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."⁸⁹ By including these processes in the draft RFP for the 2009 round, ICANN has provided sufficient notice to

⁸⁹ ICANN, New gTLD Program: Draft Applicant Guidebook (Draft RFP) p. 3-1, 24 Oct. 2008, available at <http://www.icann.org/en/topics/new-gtld-draft-rfp-24oct08-en.pdf> (attached as Williams Exh. 22); see also 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-gtlds/morality-public-order-draft-29oct08-en.pdf> (attached as Williams Exh. 23).

applicants that controversial or unpopular applications may be subject to objection and even rejection based on “morality” considerations.

33. Applicants, participants, and observers of the 2004 round had the legitimate expectation that an application would be approved so long as it met the criteria in the RFP, which did not include concerns about morality, public policy, “offensive” content, and so on. Applicants in the upcoming 2009 round now are on notice that objections based on those concerns are included in the approval process. As I already noted, ICANN could have included such provisions in the RFP for the 2004 round but chose not to do so. To impose such provisions after the applications had been submitted meant changing the rules long after the applicants and others had acted in reliance on the established criteria, and applying new and different criteria to some applicants but not to others.

Being in full agreement with the contents of this witness statement, I hereby sign it and
acknowledge its contents, on ~~this~~ 16 day of 16/16 2009 2009.

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Elizabeth Williams

DocuSigned By: Elizabeth Williams

Elizabeth Williams

Expert Report of Dr. Milton Mueller

Independent Review Process, ICM Registry LLC v. ICANN

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1 Objective of Expert Report

I have been asked to describe the history, policies, and practices of the Internet Corporation for Assigned Names and Numbers (ICANN) as they relate to issues of Internet governance and governmental influence. Specifically, I examine the history, policies, and practices of ICANN as they impacted ICM Registry's application for the sponsored top level domain (sTLD) .xxx. As set forth in detail below, ICANN's administration of the 2004 round for new sponsored TLDs and its rejection of ICM Registry's application was inconsistent with ICANN's Bylaws and Articles of Incorporation.

2 My Qualifications and Experience

I am a tenured Professor at the Syracuse University School of Information Studies. In January 2008, I was appointed the XS4All Professor at the Technische Universiteit Delft, The Netherlands. This is an endowed Chair on the Faculty of Technology, Policy and Management sponsored by XS4All (the Netherlands' first Internet service provider) and the position is devoted to the "security and privacy of Internet users." It is a part-time position and I continue to hold my professorship at Syracuse University.

I have extensive experience with ICANN, and have conducted academic and applied policy research on Internet governance issues since 1997. My book, Ruling the Root: Internet Governance and the Taming of Cyberspace, published by MIT Press in 2002, is a critically acclaimed and widely cited scholarly account of the history of the domain name system, the development of policy conflicts over control of Internet identifiers, and the formation of ICANN. In the course of researching this book, I comprehensively reviewed the key documents reflecting the technical, administrative, legal, and economic evolution of the domain name system, and interviewed scores of the people involved in making that history. Since 1998, I have published fourteen articles on ICANN and Internet governance-related issues in academic journals or as chapters in scholarly books. In addition, I sit on the editorial boards of four scholarly publications

concerned with information and communication policy issues.

I also participate in a number of groups and associations dedicated to researching Internet governance issues. In 2004, I, along with four other scholars, founded the Internet Governance Project, an alliance of academics who collaboratively research and participate in the international institutions shaping the Internet. I also helped found the Global Internet Governance Academic Network (GigaNet) in 2006. GigaNet is a scholarly association of researchers who hold an annual symposium concurrently with the annual Internet Governance Forum. In 2007, I served as GigaNet's program committee chair and in 2008, I was elected vice-chair of GigaNet. My academic CV with a complete list of publications, positions, and accomplishments is attached.¹

My research on Internet governance has been funded by the Markle Foundation, the Ford Foundation, the Association for Computing Machinery, the Next Generation Infrastructures Foundation in the Netherlands, the Eastman Kodak Foundation, and Nokia, Inc. I have been invited to speak or to present the results of this research at numerous forums, including the annual meeting of the International Trademark Association (INTA), the New York State Bar Association, the United Nations Internet Governance Forum, the International Telecommunication Union, the U.S. Federal Communications Commission (Office of Strategic Planning), the U.S. Department of Commerce (National Telecommunications and Information Administration), and the United Nations General Assembly. In 2001, I was invited to join a committee formed by the U.S. National Academy of Science to study "Internet Navigation and the Domain Name System." The Academy's National Research Council forms committees of established experts to study and report on important policy problems. The committee reports are then circulated to Congress, federal agencies, and the general public. The project I served on was funded by the National Science Foundation and the U.S. Department of Commerce. Our report, *Signposts in Cyberspace*, was released on March

¹ See Exhibit A.

31, 2005.²

In addition to my scholarly work, I have extensive practical experience in domain name policy-making and ICANN's processes and procedures. I was an active participant in the U.S. Department of Commerce proceedings that led to the creation of ICANN in 1997-1998, and in the International Forum on the White Paper (IFWP), which followed the U.S. Department of Commerce's release of the White Paper.³ I was a member of a group (one that included the current Chairman of ICANN's Board, Peter Dengate Thrush) that submitted an alternative proposal to the U.S. Department of Commerce for the creation of an entity to manage the domain name system. In 1999, I co-founded the Noncommercial Users Constituency,⁴ a part of ICANN's policy-making apparatus. From 1999 to 2003, I was an arbitrator of domain name trademark disputes under ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) for the World Intellectual Property Organization, serving as a panelist on approximately 20 cases. In 2000, I actively participated in ICANN's Working Group C, which set the policy for the initial addition of seven top level domains (TLDs) in 2001. From February 2001 to February 2002, and again from March 2003 to March 2004, I was an elected representative on an ICANN policy-making organ, the Names Council of the Generic Names Supporting Organization,⁵ where I represented the Noncommercial Users Constituency. In that capacity I chaired a Task Force on the divestiture of the .org TLD, leading in the production of a policy document that guided ICANN's subsequent redelegation of the

² The NRC report does not reflect my views alone, but a consensus of committee members with widely divergent views and areas of expertise. Participation in the NRC Committee is mentioned only to document an important form of peer recognition.

³ The Department of Commerce's statement on the Management of Internet Names and Addresses, also known as the "White Paper," was a statement by the U.S. government that it intended to transition the responsibilities for Internet management to a private body. U.S. Department of Commerce, National Telecommunications and Information Administration, Management of Internet Names and Addresses, Docket Number: 980212036-8146-02 (The White Paper), June 5, 1998. Available at: http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm. For a more complete discussion, see *infra*, sections 4.1.2.

⁴ The Noncommercial Users Constituency was called the Noncommercial Domain Name Holders Constituency before 2003. In 2003 it was renamed in accordance with Bylaw changes recommended by ICANN's "Evolution and Reform" initiative. For simplicity's sake, I use only one name, the current one.

⁵ The Generic Names Supporting Organization (GNSO) was called the Domain Name Supporting Organization (DNSO) during my first term as a Names Council representative. Its name was changed in accordance with Bylaw changes recommended by ICANN's "Evolution and Reform" initiative in 2002. For simplicity's sake, I use one name, the current one.

.org domain from VeriSign to the Public Interest Registry. As part of the .org redelegation, in August 2002, I served as a member of a team selected by Stuart Lynn, ICANN's CEO at the time, to evaluate applicants. In March 2003, I was again elected to represent the Noncommercial Constituency on the Names Council. In 2004, 2006, and 2007, I was elected Chair of the Noncommercial Users Constituency. Additionally, I have attended many of ICANN's quarterly meetings and am familiar with its procedures, its corporate structure, and many of the executives and staff who manage the organization.

Because of my research and experience with ICANN, and my knowledge of Internet governance issues generally, I have previously served as an expert witness in matters involving Internet issues. In 1999, I served as an expert witness in Worldsport v. ArtInternet S.A., Cedric Loison and Network Solutions, Inc. 99-CV-616 (BWK) (E.D. Pa.). In November 2002 I served as an expert witness in the case Taubman Company v. Webfeats and Henry Mishkoff, Civil Action No. 01-72987 (E.D. Mich.). Both of the cases mentioned above were done *pro bono* because they involved policy issues concerning freedom of expression. I have also served as a paid expert witness or consultant. In 2002, Professor Lee McKnight of Syracuse University and I produced a report funded by Nokia, Inc. on the policies and methods that could be used for adding new TLDs. From 2002 to 2004 I was an expert witness in a Hong Kong telecommunications industry case, Reach Communications v New World Telephone. In 2005, I served as an expert witness in the case Brian Cartmell v. VeriSign, involving a dispute over the transfer of a country code top level domain (ccTLD).

Although I am participating in the current case on a paid basis, this report is prepared for the Independent Review Panel, and I recognize that my obligation as an expert is to advise and inform the Panel.

3 Overview of the Statement

ICANN is a new and innovative model of global governance that coordinates and

regulates the multi-billion dollar industry of domain name registration.⁶ I was a participant in and observer of ICANN throughout the period of ICM Registry's application. Because this expert report is long and complex, I begin by providing a summary of my analysis to serve as a navigation guide for the Panel.

First, I will explain how ICANN works as an institution, focusing in particular on the respective roles of private sector and governmental actors in ICANN, and the ways in which ICANN's decisions implicate matters of public policy.

Next, I will analyze the roller-coaster treatment of the .xxx application and then critically assess the ICANN Board's stated reasons for its ultimate rejection. This analysis hinges on two crucial factual questions:

- (a) What was the meaning of the Board's vote on June 1, 2005 to enter contract negotiations with ICM? Was it, as ICANN asserts, nothing more than a wary, noncommittal nod to ICANN staff to start negotiating with ICM in order to determine whether a questionable application could somehow, through additional negotiations, be adjusted to meet the requirements of the sTLD process? Or was it, as ICM Registry asserts, a formal recognition by the Board that the .xxx application had met the technical, business, community value, and sponsorship requirements outlined in the RFP and all that remained was to negotiate specific contractual conditions within those parameters?
- (b) How should the interventions of the U.S. government and its allies in the GAC in the two and a half months after the Board's vote on June 1, 2005 be characterized? Were these interventions, as ICANN implies in its Response, a legitimate, expected part of a well-defined process in which governments advise ICANN on public policy concerns? Or were they extraordinary and untimely disruptions that essentially destroyed the defined process for reviewing the applications, as well as ICANN's principles, including transparency, nonarbitrariness, fairness and nondiscrimination?

⁶ In July 2008, there were about 162 million domain name registrations worldwide, with a somewhat arbitrary but plausible estimate that, at US\$ 20 in annual revenue per domain, the registration industry as a whole is worth approximately US\$ 3.25 billion. *VeriSign Domain Report*, Volume 5 Issue 3, June 2008. Domain name registrations are growing at a rate of about 26% per year and the creation of domain names in non-Roman scripts, such as Chinese, Korean, or Cyrillic, may sustain or even accelerate this growth level, though of course no one knows for sure.

In response to the first question, I set out the facts to show that the Board's vote on June 1, 2005, was held to resolve the question of whether ICM Registry met the four sets of evaluation criteria established in the Request for Proposals (RFP), and specifically its fulfillment of the sponsorship criteria. The Board's vote meant that the .xxx application met all four sets of criteria and was ready to enter into contract negotiations. As an expert on ICANN and its processes, I consider the evidence on this point to be overwhelming. The two-step nature of the evaluation process is repeatedly described by Kurt Pritz, the ICANN staff person in charge of introducing the new TLDs. Numerous statements by Board members confirm that the vote meant that the .xxx application met the published criteria. No TLD considered ineligible on any of the three grounds would ever have been passed on to contract negotiations. If the ensuing negotiations were actually intended to clear up specific concerns about the eligibility of the .xxx application, the resolution authorizing negotiations would have specified what those concerns were, just as the Board resolutions authorizing negotiations around other TLDs identified the specific concerns associated with those TLDs which were to be addressed along with the contract negotiations.

In response to the second question, I discuss the facts demonstrating that the U.S. government-led intervention in August 2005 was a surprising and disruptive act. ICANN impermissibly allowed partisan and ideological domestic U.S. political considerations to supersede and overturn its own evaluation process. The intervention not only prompted ICANN's Board to discard its June 2005 decision, but also reflected a sudden change in the U.S. Department of Commerce's own position. This intervention triggered a complete breakdown of the established sTLD process for ICM Registry's application.

In the final section of this report, I explain how accountability and resistance to political interference are major concerns for ICANN and the future of the Internet. I also discuss why independent, impartial review processes such as this IRP are needed to protect ICANN's ability to follow its defined criteria and procedures. The importance of a strong commitment to defined procedures and objective standards goes well beyond the ICM Registry case; it has major implications for the future of the Internet as a whole.

4 ICANN as an Institution

Many of the points of dispute between ICM Registry and ICANN involve

different interpretations of ICANN's function and of its relationship to governments. For that reason it is useful to explain in detail how and why ICANN ended up taking the particular institutional form it did. In this section I explain why ICANN was organized as a private sector nonprofit corporation, even though it engages in global governance over a global resource. I also explain the changing role of governments in ICANN and the way ICANN operates under its Bylaws.

4.1 Why ICANN was set up as a private sector, California nonprofit organization

It is unusual for a private organization to hold policy-making and administrative control over resources critical to the functioning of an international public infrastructure. Why then was ICANN organized as a private corporation? This organizational structure occurred for three reasons:

- (a) The need for global rather than national coordination and policy-making;
- (b) The desire of the U.S. government and Internet businesses to avoid the influence of other governments and existing intergovernmental organizations; and
- (c) The preferences of the technologists who developed the Internet and had previously held informal authority over the Internet's administration.

4.1.1 The need for global coordination and policy

In forming its policy toward the Internet in the mid-to-late 1990s, the Clinton administration was concerned that the Internet's promise of global electronic commerce would be undermined by assertions of territorial jurisdiction.⁷ It was feared that national governments, in particular, would impose upon the naturally global arena of the Internet a patchwork of inconsistent or conflicting national laws and regulations. A private sector governance authority was perceived as a way around this problem, and so the U.S. adopted a strategy of internationalization through privatization. In its 1997 policy document, "*A Framework for Global Electronic Commerce*," the Clinton administration

⁷ "The Internet is emerging as a global marketplace. The legal framework supporting commercial transactions on the Internet should be governed by consistent principles across State, national, and international borders that lead to predictable results regardless of the jurisdiction in which a particular

called for “private sector leadership” and noted that “governments should establish a predictable and simple legal environment based on a decentralized, contractual model of law....”⁸ With respect to domain names, the White House proposed in the *Framework* that it may be possible “to create a contractually based self-regulatory regime that deals with potential conflicts between domain name usage and trademark laws on a global basis.”⁹

4.1.2 Avoidance of existing intergovernmental organizations

The U.S. Government’s Internet governance policy was driven not only by its positive assessment of private sector leadership and global contractual approaches, but also by a negative outlook toward the performance of existing intergovernmental institutions. U.S. telecommunication and information policy-makers shared a longstanding antipathy toward the International Telecommunication Union (ITU), because U.S. technology leadership and its often aggressive liberalism were typically blunted within ITU forums.¹⁰ The U.S. was also leery of European-led efforts to create a new international treaty or charter for regulation of the Internet,¹¹ fearing that it would open the door to an ITU or U.N.-like bureaucracy, which could stifle the Internet. Thus, the 1998 U.S. Department of Commerce White Paper, that in many ways served as the charter and founding document for ICANN, avoided direct government action while inviting international participation in governance. The White Paper concluded that “the U.S. Government is prepared to recognize, by entering into agreement with, and to seek international support for, a new, not-for-profit corporation formed by private sector Internet stakeholders to administer policy for the Internet name and address system.”¹² In

buyer or seller resides.” A Framework for Global Electronic Commerce, The White House, July 1, 1997. Available at: <http://clinton4.nara.gov/WH/New/Commerce/read.html>.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Peter Cowhey, “Dialing for Dollars: Institutional Designs for the Globalization of the Market for Basic Telecommunication Services,” in J. Hart and A. Prakash (eds.) *Coping with Globalization*. New York: Routledge (2000), pp. 243-288.

¹¹ On September 8, 1997, European Union Commissioner Martin Bangemann, in a speech prepared for an ITU conference in Geneva, called for an “international charter” to regulate the Internet. The charter, he said, should deal with questions such as technical standards, illegal content, licenses, encryption and data privacy. Bangemann’s proposed charter, according to Peter Cowhey, who was, at the time, the Chief of the U.S. Federal Communications Commission’s International Bureau, strongly motivated the U.S. to seek a private sector solution.

¹² The White Paper.

this manner the U.S. sidestepped traditional intergovernmental arenas and moved the Internet governance problem to an entirely new forum where governments and intergovernmental organizations were not the central players.

4.1.3 Preserving the special role of the Internet technical community

The Internet protocols and the domain name system standards and software were developed by computer science researchers about 25 years prior to the creation of ICANN. This elite, tightly-knit group received government research subsidies but acted with a great deal of autonomy. As the Internet grew, this technical cadre, led by Vinton Cerf and Jon Postel, developed their own organizations and institutions for standardizing and promoting Internet protocols. The most significant products of that effort were the Internet Engineering Task Force (IETF) and its Internet Assigned Numbers Authority (IANA), the Internet Society (ISOC),¹³ and IP address registries RIPE-NCC in Europe and APNIC in Asia. All were organized as private sector nonprofits. Though centered in the United States, from the beginning, the IETF and ISOC involved computer scientists/engineers in Europe and Asia and thus were international in scope.

From the origin of the Internet domain name system in 1980 until about 1996, this technical community had *de facto* control of the management of Internet identifiers. When the commercialization of the Internet and the World Wide Web transformed domain names into valuable commodities and raised legal and commercial issues, new stakeholders and interests emerged whose demands impinged on the Domain Name System's (DNS) management and threatened the technologists' position. This stakeholder group, therefore, resisted traditional forms of international collective action and favored private sector arrangements based on their own organically developed institutions. ICANN was originally conceived as a "new IANA," implying continuity with their past efforts.¹⁴ The respected technologist, Jon Postel, who had contracted with the U.S.

¹³ The Internet Society formally incorporated the Internet Architecture Board (IAB), a small committee that represented the leadership of the technical community. The IAB in turn claimed responsibility for designating an "Internet Assigned Numbers Authority" (IANA) that would manage the top of the name and address space hierarchies. IANA was composed of Jon Postel and his staff at the Information Sciences Institute (ISI) of Marina del Rey, California.

¹⁴ There are still online records of an email sent by Jon Postel to a wide variety of Internet discussion lists on June 28, 1998 pointing the community to a draft of the Postel-Sims proposal for what became

government to perform the IANA functions since the beginning of the Internet, prepared the initial plans for ICANN in consultation with his lawyer. The main reason ICANN was organized as a *California* nonprofit was 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 Rey, largely because that is where Postel worked.

4.2 The role of the U.S. government in ICANN

The U.S. government has played a special role in the supervision of ICANN throughout the Internet's brief history. This role evolved from the fact that it was U.S. government contractors and researchers, such as Jon Postel and a company known as Network Solutions, Inc. (now, VeriSign) that established the original coordinating mechanisms of the Internet. These oversight mechanisms were supposed to be short-term transitional agreements to help maintain the stability and accountability of the experiment in private sector global governance that ICANN represented. After 2000, however, the U.S. government showed greater interest in retaining some form of oversight to ensure stability and security, and, consequently, these "transitional" arrangements are now in their eleventh year. The U.S. Department of Commerce retains oversight of ICANN using three instruments:

- (a) The Memorandum of Understanding and Joint Project Agreement;
- (b) The IANA contract; and
- (c) A cooperative agreement with VeriSign.

As will be evident from my explanation of each of these, U.S. oversight is supposed to have a very limited function. In the Department of Commerce's own words, "The U.S. government] plays no role in the internal governance or the day-to-day operations of [ICANN] . . . [rather, the U.S. government] monitors and ensures that ICANN performs MOU tasks,¹⁵ and offers expertise and advice on certain discrete issues."¹⁶

ICANN and referring to it as a "new IANA." See, e.g., <http://mailman.anu.edu.au/pipermail/link/1998-June/033763.html>.

¹⁵ Including technical tasks such as the assignment of Internet address blocks, the development of accreditation procedures for registrars to ensure stability and security, the development of technical procedures for the operation, stability, and security of the primary root server, etc.

¹⁶ Testimony of John Kneuer, Acting Assistant Secretary for Communications and Information, United States Department of Commerce before the Subcommittee on Telecommunications and the Internet and the Subcommittee on Commerce, Trade and Consumer Protection and the Committee on Energy and Commerce, United States House of Representatives, September 21, 2006.

4.2.1 The Memorandum of Understanding and the Joint Project Agreement

When ICANN was first created, the U.S. Department of Commerce entered into a Memorandum of Understanding (MOU) with ICANN, first executed on November 25, 1998 (and subsequently amended). The MOU was the primary supervisory document used to describe the tasks and responsibilities of ICANN. It provided a list of policy-making 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.¹⁷ The Department of Commerce revised the MOU six times between October 1998 and September 30, 2006. In September 2006, the MOU was replaced with a Joint Project Agreement (JPA). In keeping with the widely expressed desire to make ICANN more independent of the U.S. government, the JPA's goals were less specific than those of the MOU, including such things as "encourag[ing] greater transparency, accountability, and openness in the consideration and adoption of policies" and promoting the stability and security of the Internet's DNS.¹⁸ Like its predecessor, the JPA styles itself as a transitional kind of oversight. The JPA's Preamble says 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."¹⁹ The current JPA expires on September 30, 2009, and there is a vigorous public discussion on whether it should be allowed to expire or be renewed.²⁰

¹⁷ Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (MOU), Section V (Responsibilities of the Parties), November 25, 1998. Available at: <http://www.icann.org/en/general/icann-mou-25nov98.htm>.

¹⁸ Joint Project Agreement Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (JPA), Section V.B, September 29, 2006. Available at: <http://www.icann.org/en/general/JPA-29sep06.pdf>.

¹⁹ JPA, Preamble. The technical management of the DNS, entrusted to ICANN through the MOU and JPA, constitutes serving as the gatekeeper for the "root zone file," the single authoritative list of TLDs, which tells any computer in the world where it can find the domain names registered within the hierarchy under the existing TLDs. See *infra*, section 5.1.

²⁰ For a sample of this debate, see the public comments filed in the NTIA *Notice of Inquiry*, October 30, 2007, "The Continued Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System: Midterm Review of the Joint Project Agreement," U.S. Department of Commerce, National Telecommunications and Information Administration, Docket No. 071023616-7617-01. Available at: http://www.ntia.doc.gov/ntiahome/frnotices/2007/ICANN_JPA_110207.html.

4.2.2 The IANA contract

The IANA contract, originally dated February 2, 2000 and amended or replaced five times, is a zero-price, sole-source contract between ICANN and the U.S. government authorizing ICANN to perform the technical functions of the IANA.²¹ These functions involve administrative activities such as allocating IP address blocks, editing the root zone file, and coordinating the assignment of unique protocol numbers.²² The IANA contract does not authorize the contractor to make or change the policies that guide the performance of the IANA functions; it must rely on ICANN processes to make and change policies (*e.g.*, create a procedure for adding TLDs to the root). Any changes in the root zone file must be audited (that is, reviewed to ensure that the requested changes are technically correct and that the requestor is authorized to make the request) and approved by the U.S. Department of Commerce.²³ Without this contract, ICANN would have little, if any, influence over the coordination of the Internet's identifier systems.

4.2.3 The VeriSign Cooperative Agreement

VeriSign, the registry operator of the *.com* and *.net* domains and the world's largest commercial domain name registry, has a cooperative agreement with the U.S. Department of Commerce, first executed on January 1, 1993 (and subsequently amended). The agreement, which dates back to the early days of the public Internet, authorizes VeriSign to run the hidden master server that publishes the official root zone file to the Internet's root servers. In effect, whereas ICANN is responsible for making the *policies* that govern the root server system, VeriSign has *operational* control of the authoritative root zone information and its dissemination. VeriSign also runs the "A root server," one of 13 computers that distribute the root zone file information worldwide,

²¹ The latest version is available at: <http://www.icann.org/en/general/iana-contract-14aug06.pdf>. For a discussion of the nature of this contract in relation to U.S. administrative law, see Michael Froomkin, "Bring on the IANA competitors," ICANN Watch, February 3, 2003. Available at: <http://www.icannwatch.org/article.pl?sid=03/02/03/2251256&mode=thread>.

²² See ICANN/U.S. Government Contract for Performance of the IANA Function, Section C.2 (Contractor Requirements), August 14, 2006. Available at: <http://www.icann.org/en/general/iana-contract-14aug06.pdf>.

²³ Letter from Meredith Baker, Acting Assistant Secretary for Communications and Information, to Peter Dengate Thrush, Chairman of the Board of Directors of ICANN, July 30, 2008. Available at: http://www.ntia.doc.gov/comments/2008/ICANN_080730.pdf.

under this agreement.²⁴ 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;²⁵ and (2) it compelled VeriSign to conform to the ICANN regime's regulations on registries and registrars.

4.2.4 "Authority" over the authoritative root zone file

In addition to the above three formal instruments, the U.S. Department of Commerce has asserted what it calls "authority" over any modifications of the DNS root zone file since October 1998.²⁶ When the U.S. first asserted this authority, it was done mainly for competition policy reasons, because Network Solutions, Inc., the predecessor of VeriSign, essentially enjoyed a monopoly on gTLD registrations. If Network Solutions had the power to decide which new TLDs would be added to the root, or could otherwise manage the root zone file, then the market's dominant, commercial supplier of gTLD registrations would be in a position to decide who its competitors were, how many competitors there would be, and what criteria they had to meet to enter the market. The U.S. established 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 a neutral and open facilitator of Internet coordination.

Obviously, then, after one considers the founding documents, history, and roles of the parties involved, it is clear that the U.S. government has limited residual authority over the root zone file to ensure its security and stability and to prevent its use for anti-competitive purposes, but not to interfere in the day to day decision making of ICANN or

²⁴ "NSI agrees to continue to function as the administrator for the primary root server for the root server system and as a root zone administrator until such time as the USG instructs NSI in writing to transfer either or both of these functions to NewCo or a specified alternate entity." Amendment 11 to Cooperative Agreement Between NSI and U.S. Government, October 6, 1998. Available at: <http://www.icann.org/en/nsi/coopagmt-amend11-07oct98.htm>.

²⁵ Under Amendment 11 of this agreement (dated October 6, 1998), VeriSign agreed not to modify the root zone file without approval of the U.S. government. The U.S. government did not have any formal authority over the content of the root zone file until this Amendment was agreed to by VeriSign (which was still called Network Solutions, Inc. at that time). VeriSign was pressured to give up this authority in order to shield itself from an antitrust lawsuit by Name.Space, Inc., which was attempting to add new TLDs to the root. See also July 30, 2008 Baker letter, *supra* note 23.

²⁶ The assertion of policy authority came in Amendment 11 of the Cooperative Agreement with Network Solutions, Inc., and takes this form: "While NSI continues to operate the primary root server, it

to impose its opinions regarding content decisions, considerations of morality, etc.²⁷

4.3 The role of other governments in ICANN

The private, contractually-based governance model upon which ICANN was founded implied minimizing the role of governments in its affairs – except, of course, on some level, the United States. During the creation of ICANN, the U.S. repeatedly indicated that it would relinquish its own residual authority over the DNS root and that its oversight function was a temporary aspect of the “transition” or privatization of the Internet.²⁸ To this day, the Bylaws require 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.”²⁹ According to the ICANN Bylaws, “responsibility for developing and recommending to the ICANN Board substantive policies relating to generic top level domains” lies with the Generic Names Supporting Organization (GNSO).³⁰ Within that Supporting Organization, governments are not recognized as a constituency group. Instead, business and civil society groups, such as trademark holders, noncommercial users, registries and registrars are so recognized. The only formal place for governments in the ICANN governance and policy making process is the Governmental Advisory Committee (GAC).³¹ As the name suggests, it is intended to be only an *advisory* body.

4.3.1 The Governmental Advisory Committee

In its earliest manifestation, the GAC was described as a committee that “should consider and provide advice on the activities of the Corporation as they relate to concerns

shall request written direction from an authorized [U.S. government] official before making or rejecting any modifications, additions or deletions to the root zone file.”

²⁷ See Testimony of John Kneuer, *supra* note 16 and accompanying text, where Mr. Kneuer denies that the U.S. government is involved in ICANN’s policy making.

²⁸ The White Paper: “the U.S. Government would continue to participate in policy oversight until such time as the new corporation was established and stable, phasing out as soon as possible, but in no event later than September 30, 2000. The U.S. Government would prefer that this transition be complete before the year 2000. To the extent that the new corporation is established and operationally stable, September 30, 2000 is intended to be, and remains, an ‘outside’ date.”

²⁹ Bylaws for Internet Corporation for Assigned Names and Numbers, as amended effective May 29, 2008 (ICANN Bylaws), Article VI, Section 4.1. Available at: <http://www.icann.org/en/general/bylaws.htm>.

³⁰ ICANN Bylaws, Article X, Section 1.

³¹ Of course, as has always been the case since ICANN’s inception, individual members of the GAC or individual governments or their representatives may attend meetings and send correspondence, etc.

of governments, particularly matters where there may be an interaction between the Corporation's policies and various laws, and international agreements."³² In other words, the GAC played an informational role in the formulation or approval of policy. The GAC did not participate in making new policies, but passively advised and informed the ICANN Board of any adverse "interactions" between ICANN's activities and existing laws and international agreements. The original Bylaws even imply that the advisory capacity of the GAC had to be requested by the Board: "the Board will notify the chair of the Governmental Advisory Committee of any proposal for which it seeks comments under Article III, Section 3(b) and will consider any response to that notification prior to taking action."³³

4.3.2 Political pressures for a stronger governmental role

The formal exclusion of governments from a direct policy-making role, coupled with the special status of one government, the United States, in ICANN, was highly objectionable to some governments and became especially controversial during the World Summit on the Information Society (WSIS). The WSIS was a United Nations negotiation, held from 2002 – 2005, to promote global initiatives on information and communications policy. Although it was initially set up to focus on global action to bridge the digital divide, the WSIS process was practically overwhelmed by the Internet governance issue. More specifically, WSIS became the vehicle for an attempt by rival governments and international institutions to attack ICANN and the United States' unilateral control of the Internet domain name and addressing systems.³⁴ Governments and the International Telecommunication Union (ITU) challenged both the unilateral power held by the U.S. government over ICANN, and the prevalence of private sector,

³² Original ICANN Bylaws proposal, October 1998. Available at: <http://www.ntia.doc.gov/ntiahome/domainname/proposals/icann/bylaws.htm>.

³³ *Ibid.*

³⁴ This is reflected in both the press coverage at the time and in the Tunis Agenda, the final negotiated, politically binding document produced by the Summit. Paragraph 68 says that all governments, not just the US, should have "an equal role and responsibility" for the DNS root and for Internet public policy oversight. Paragraphs 69 and 70 of the Tunis Agenda call for the development of "globally-applicable principles on public policy issues associated with the coordination and management of critical internet resources." Paragraphs 71 and 72 propose mechanisms for developing these principles. WSIS, Tunis Agenda for the Information Society, November 18, 2005. Available at: <http://www.itu.int/wsisis/docs2/tunis/off/6rev1.html>.

non-governmental policy-making mechanisms for the Internet.³⁵ Interestingly, the concerns of other governments about internationalizing ICANN or ameliorating the United States' unilateral control over ICANN and the root played an important role in how the .xxx application was treated.

Some of the pressures came from within ICANN. For example, in 2002, at a period of time when ICANN seemed to be failing and needed more international support, ICANN President Stuart Lynn made the controversial suggestion that government representatives be placed on the Board. This was rejected, but as a result of these and other political pressures, ICANN modified its Bylaws in December 2002 to more formally account for governmental advisory input within its processes. The description of ICANN's "Core Values" introduced at that time (and still in the current Bylaws) included the concept of "public policy matters" as a domain over which governments held special authority.³⁶ In particular, the new Core Value number 11 stated that ICANN, while remaining rooted in the private sector, had a Core Value of "...recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations."³⁷

This new "Core Value" was given procedural form in ICANN's Bylaws, Article XI, Section 2, which noted that:

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.³⁸

In short, the GAC's role of advising ICANN's Board on matters deemed to be relevant to public policy became more institutionalized. Of course, that did not mean that the GAC could intervene at any time and in any matter and veto or change actions that

³⁵ For background information documenting this problem, see the paper "Political Oversight of ICANN: A Briefing for the WSIS Summit," Internet Governance Project, November 1, 2005. Available at: <http://internetgovernance.org/pdf/political-oversight.pdf>.

³⁶ ICANN Bylaws, amended as effective December 15, 2002, Article I, Section 2.

³⁷ *Ibid.*

³⁸ ICANN Bylaws, amended as effective December 15, 2002, Article XI, Section 2.

ICANN had already undertaken; in fact, the Bylaws specifically require that the GAC's advice be "timely presented."³⁹ Nor did these amendments state or imply that the GAC could force ICANN to act in contradiction to ICANN's Bylaws or Articles of Incorporation.

To summarize, ICANN as an institution was not designed to make governments full-fledged participants in the policy-formulation process, nor was it intended to give the GAC a blanket veto power over ICANN Board decisions. On the contrary, it was designed to keep governments at arms length and to delegate DNS policy-making authority to nonstate actors. One can readily appreciate, however, how the December 2002 Bylaw revisions, coupled with outside challenges to the United States' control over the root and the eruption of demands for a stronger governmental role in Internet governance at the World Summit on the Information Society, created political pressures to which certain actors within ICANN may have been tempted to pander, or which could have intimidated the Board into deviating from its Bylaws and the institutionalized advisory role of the GAC.

5 How ICANN Operates Under its Bylaws

The preceding sections explained the general framework under which ICANN was created. Writing both as an academic and as someone with first hand experience of ICANN's activities, I will now discuss ICANN's Bylaws and how the concept of ICANN has been operationalized.

The Bylaws are the basic procedural and substantive rules that are supposed to govern all of ICANN's activities. Although ICANN is a private corporation, its exclusive power over certain Internet functions and its role in formulating globally applicable policy for Internet identifier resources gives its Bylaws the character of the procedural rules that govern what is effectively an international regulatory agency. The Bylaws define who gets how much representation in which decision-making process, how many votes are needed, whether they require notice and comment periods, and articulate, *inter alia*, standards of fairness, objectivity, transparency, and nondiscrimination, that govern how ICANN is to carry out its activities. Because there are many contending interests and

³⁹ ICANN Bylaws, Article III, Section 6 and Article XI, Section 2.

factions within ICANN, and high economic stakes, the Bylaws serve as the common “rules of order” that allow the stakeholders to plan and interact fairly and transparently. For that reason, it is important for ICANN to follow its Bylaws and, of course, its own rules require it to do so.⁴⁰ This requirement takes on even greater significance in light of the fact that ICANN’s actions have important consequences for the operation of a key global resource. Because of the importance of ICANN’s actions for individuals and entities around the world, it is important that all stakeholders, regardless of their culture, language, or industry, understand and can participate in ICANN’s processes. With a community as large and as diverse as ICANN’s, it is difficult enough to ensure that everyone is informed and aware even if documented policies are carefully followed. If ICANN acts arbitrarily or departs from its documented policies and procedures, informed participation from the community will become impossible. ICANN has been given responsibility for a global resource, and its actions should be held to a commensurately high standard to match. From the perspective of someone involved who has studied, written about, and often participated in ICANN’s functions and activities, the most often referenced part of ICANN’s Bylaws are its Mission and Core Values, which serve as reference points in disputes over the proper scope of ICANN’s actions, though, of course, they must be read in the context of the Bylaws as a whole, along with ICANN’s Articles of Incorporation, which include principles such as transparency, nondiscrimination, objectivity and fairness.⁴¹

5.1 The nexus between policy and technical coordination

One of the most important areas of concern in this new regime has been the relationship between ICANN’s mandate to serve as a *technical coordinator* of the Internet’s unique identifiers (domain names and IP addresses) and its role as a maker of *policy*. The relationship between these two roles is especially salient in ICM Registry’s case because of the claim that an .xxx domain somehow conflicted with the “public policy” concerns of governments.

The need for an entity like ICANN starts with the technical requirements of the

⁴⁰ ICANN Bylaws, Article IV, Section 1 says that “ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws”

DNS. Some of the basic aspects of ICANN's administration of DNS are adequately explained in paragraph 13 of the ICM Registry Request and in paragraphs 11 – 13 of the ICANN Response. Missing from both accounts, however, is a reference to the DNS root, which is the basis of ICANN's influence over policy.

Domain names are organized in a hierarchical fashion. The top of the DNS hierarchy consists of a single authoritative list, known as the "root zone file," that tells any computer in the world which TLDs exist and where it can find the domain names registered under them. All domain names are dependent upon the maintenance of a unique entry in the root of the DNS so that they can remain globally interconnected in a reliable and open manner.

To oversimplify drastically, ICANN serves as the gatekeeper to the DNS root zone file. Its most basic technical function is to ensure that all TLDs entered into the root zone file are uniquely associated with a particular registry. But the performance of that seemingly simple technical function requires policy decisions to be made. Indeed, insofar as a business or user is dependent on the global functioning of domain names or on the right to operate a TLD registry, ICANN's position as gatekeeper to the DNS root could be exploited to exert various degrees of leverage over them. That leverage can be used sparingly or it can be exploited vigorously to implement a public policy.

Figure 1, below, illustrates this concept. It is a simple graph that arranges different approaches to coordinating the root zone on a spectrum ranging from "minimal policy" to "maximum policy leverage." At the "minimal policy" end of the spectrum, a lightweight ICANN could simply receive any and every application for a TLD, check to see if the name is already assigned to another registry, and if not, enter the new name into the root zone file on a first-come, first-served basis, allowing a new registry to go into business. If ICANN fully adhered to a minimalist model it would not regulate the technical standards used, it would not reject TLD applications that involved trademark conflicts, and it would not impose any contractual conditions upon applicants; it would just maintain a list of the TLD names and make sure that each name is unique. Note, however, that the use of first-come, first-served as the assignment mechanism is, itself, a policy decision. As a matter

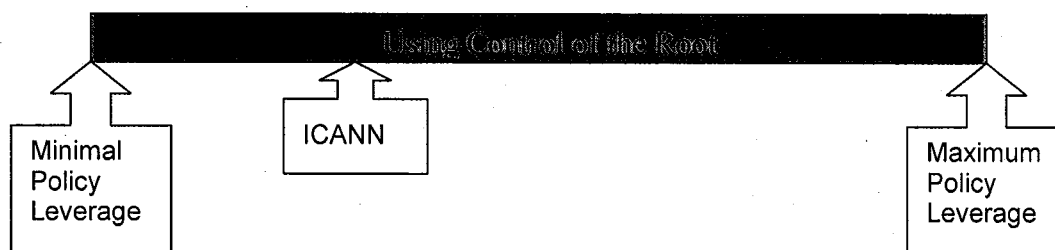
⁴¹ ICANN Bylaws, Article I, Sections 1 and 2. I will largely focus on the Bylaws, as the Bylaws govern the day-to-day actions of ICANN.

of policy, ICANN could decide to use auctions, popular votes, or merit reviews instead of a first-come, first-served strategy to resolve competing applications for the same string or to ration the number of TLDs. This is a good example of how even the most minimal approach to root zone file administration requires *some* policy decisions.

At the other extreme – maximum policy leverage – ICANN could exploit its control over the root of the DNS to influence or dictate a broad range of Internet-related behavior. It could try to make all TLD name registries sign contracts binding them to monitor and censor the content of all web sites registered under their domain. To cite some deliberately absurd examples, ICANN could attempt to promote a particular religion by refusing to maintain country code top level domains (ccTLDs) for any country that does not officially establish Zoroastrianism as the State Church; or it could require all domain name registries to contractually require the use of the Linux operating system by anyone who wants to register a domain. While these examples seem outlandish, it became evident during WSIS that some governments were interested in using ICANN’s leverage of the Internet industry to exert much more regulatory control.

Today, ICANN is located between these two extremes. The stated Mission and Core Values in the Bylaws are much closer to the minimal technical coordination side of the spectrum than to the wholesale exploitation of the root for regulation of Internet activity.

Figure 1: Spectrum of Policy Leverage over Control of the DNS Root



ICANN’s Bylaws define its Mission as threefold:

1. [ICANN] Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are
 - a. Domain names (forming a system referred to as “DNS”);

b. Internet protocol (“IP”) addresses and autonomous system (“AS”) numbers; and

c. Protocol port and parameter numbers.

2. [ICANN] Coordinates the operation and evolution of the DNS root name server system.

3. [ICANN] Coordinates policy development reasonably and appropriately related to these technical functions.”⁴²

Note in particular number 3, which confines ICANN’s policy-development activities to issues “reasonably and appropriately related” to the technical coordination functions mentioned in numbers 1 and 2. There is a strong consensus within ICANN that the regulation of the content of web sites or email communications is far outside of its mandate.⁴³

In addition to the simple coordination of the uniqueness of TLD names, however, ICANN uses its control of the root to impose a number of contractual conditions on the domain name supply industry. The contracts ICANN requires of TLD registries embody a number of rules, regulations, and standards that emerge from ICANN’s policy-development processes. These conditions fulfill *public policy* objectives. For example, ICANN promotes competition in the retail market for domain name registration by separating the market for registry (wholesale) services and registrar (retail) services and forbidding registries from acting as registrars. ICANN imposes price caps (a form of rate regulation) and a variety of other economic and technical regulations on the operators of registries. It also accredits registrars and has some minimal consumer protection regulations associated with the accreditation contracts. It requires registries and registrars to support a Whois service that identifies domain name registrants and their name servers, which has sparked privacy policy debates. It binds both registrants and registrars to a uniform dispute resolution policy to arbitrate trademark and domain name conflicts. There is, as I will explain later, no functional difference between these kind of policy decisions and what governments normally call public policy.

⁴² ICANN Bylaws, Article I, Section 1.

⁴³ The ICANN Response confirms this, as do other presentations and statements by ICANN staff. Andrew McLaughlin, General Counsel, ICANN, March 30, 2000, “ICANN: Goals, Principles and Mechanisms.” Available at: <http://www.icann.org/presentations/icann-studienkreis-leipzig-ajm.pdf>.

5.2 The creation of new top level domains

A TLD is an entry of a character string (such as *.com* or *.xxx*) into the root zone file, along with information about which name servers can be used to find the list of second level domain names under that TLD. Creating TLDs involves making an exclusive assignment of a string of characters to a particular registry operator, who can then sell domain name registrations under the TLD.

One should not make too much of the distinction between generic TLDs (gTLDs), country code TLDs (ccTLDs), or sponsored TLDs (sTLDs). From a technical point of view, TLDs are just TLDs. They all function in exactly the same way. The distinction between sTLDs, gTLDs, and ccTLDs are matters of their organizational status; each type has different obligations associated with them through the contracts created by ICANN, or, in the case of ccTLDs, in their nominal connection to national jurisdictions, which brings some presumed sovereignty interest into the making of their policies and the policies of ICANN. Those policy distinctions are important, of course. But since they emerge from the fine-grained detail of contracts, from interpretations and from political interactions, the boundary between them is often blurry. For example, ccTLDs were originally defined by ICANN as sponsored TLDs in which the government and local internet community were the “sponsors.”

The concept of sponsored TLDs (sTLDs) has been contested within ICANN and it is important to keep this in mind when considering the controversies surrounding ICM Registry’s status as a “sponsored” domain. Sponsored TLDs, as defined in the first and second rounds of ICANN’s TLD addition processes, involved the recognition of some kind of a linkage between a TLD name and a bounded community or category of registrants. Registrations within the sponsored domain are restricted to people or organizations who consider themselves to belong within that community or category and are recognized as such by the sponsoring organization. The restrictions can be imposed either by the registry’s own practices and choices, or imposed on the registrant through contractual obligations. Early, paradigmatic instances of so-called “sponsored” TLDs (although they were not called that when they were created) are the *.edu* and *.mil* TLDs. Historically, registrations in *.edu* have been confined to 4-year colleges and universities located in the United States (although there have always been exceptions, such as a few

universities outside the U.S. with *.edu* domains). Likewise, *.mil* is restricted to registrants within the U.S. Department of Defense.

Advocates of a minimalist ICANN have always disliked the notion of sponsored TLDs. That is because sTLDs place ICANN in the position of approving who the appropriate representative of a “community” is. Such a determination bears little direct connection to ICANN’s technical coordination mandate. Critics of the sponsorship concept do not oppose creating TLDs that, on the registry’s own initiative, restrict their services to specific self-defined communities, viewing that as one of many possible variations in registry business models. They just do not want sponsorship criteria to be incorporated into ICANN’s contracts, or for ICANN to bless specific individuals or organizations as the official, legitimate agents of a certain community. On the other hand, supporters of ICANN’s role in dispensing sTLDs have noted that there might be competing applications for a TLD string that is semantically associated with a specific group, such as *.navajo*, for example. They believe that it is incumbent upon ICANN to assign a name such as *.navajo* to legitimate representatives of the Navajo nation and not to simply give it to anyone who comes along. This is another example of how TLD selections of any kind can raise policy issues.

Regardless of one’s position on whether there should or should not be sTLDs, there is no doubt based on the facts of this case that ICANN treated the *.xxx* application for a sponsored top level domain in an unfair, arbitrary and discriminatory manner, as discussed in detail below.

5.3 The ICANN policy-making process

This discussion of ICANN process will be confined to the GNSO, which is an organ of ICANN that initiates the development of policy regarding domain names, and to the GAC, which intersected with the domain name policy process in the *.xxx* affair.

In order to facilitate the development of policies that are in the public interest, ICANN’s policy development process in the GNSO is based on a representational model composed of constituency groups that correspond to different segments of society. There were six constituency groups in the period of interest (*i.e.*, during the 2004 sTLD round). Two of them, registries and registrars, represented suppliers of domain name services, or more precisely, the “contracting parties” whose businesses are directly governed by

ICANN's contracts. Three other constituencies are based on user groups or consumers of domain name services: business users, trademark holders, and noncommercial users. Another constituency, Internet service providers, stands somewhere between users and suppliers but usually is aligned politically with the commercial users.

Ideally, ICANN policies follow a bottom-up development process. The process, known as the PDP or "policy development process," is described in ICANN's Bylaws.⁴⁴ It is not terribly relevant to describe the process in detail; suffice it to note that the PDP specifies how to initiate a policy process, what stages a proposal must go through, the duties of the ICANN staff in the process, when and how long a proposal is put up for public notice and comment, and what voting thresholds are needed for the proposal to progress through certain stages. Once a GNSO task force or working group is finished developing a policy it must be put before the GNSO Council for a vote. If it receives a supermajority (2/3) vote, it is considered a "consensus policy." It is then sent to the ICANN Board for final approval. The Board can only reject a "consensus policy" by a 66% vote. If the GNSO Council vote is not a consensus policy, the Board can adopt or reject the policy by majority vote.

The PDP, like all ICANN processes initiated after 2002, defines specific periods for commenting on reports and proposals. As is true of almost all policy-making institutions, if one does not comment within the allotted time period, one loses one's opportunity to have input. Occasionally comment periods will be extended for a few weeks if insufficient numbers of comments have been received, perhaps due to clashes with holiday periods, or because there are too many other proceedings underway. But comment periods are never reopened after a Council or Board vote has been held. The idea is for proposals that are still under development to be modified or improved in reaction to the comments received.

ICANN's process recognizes a distinction between "policy" and "implementation." The GNSO is responsible for developing policy, but the ICANN staff is responsible for implementation of the policy. Thus, in the case of the ICANN President's proposal to introduce new sponsored TLDs in 2002, the basic policy

⁴⁴ See ICANN Bylaws, Annex A. Available at <http://www.icann.org/en/general/bylaws.htm#AnnexA>.

decisions behind that call for applications were made through interactions between the ICANN President, the GNSO Council, GNSO constituencies, the At Large Advisory Committee, and other stakeholders who participated in the notice and comment periods. But the staff developed the actual text of the Request for Proposals (RFP). Once developed, the RFP was put up for public comment, modified again, and then approved by the Board.

5.4 Governments under the Bylaws

When describing the basic structure of ICANN in the prior section, I noted the December 2002 Bylaw amendments which mandated that “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.” There are two reasons why this change posed serious problems.

First, there is no definition of what constitutes “public policy matters” or of what differentiates such matters from the other things that ICANN does. Superficially, the Bylaw amendments imply that there is something called “policy” for domain names that is appropriately set by the private sector-led GNSO, and something else called “public policy” that is somehow reserved to national governments acting through the GAC. As an expert scholar who has studied and participated in the making of information and communication policy in national, local, and international contexts for 25 years, in my opinion, such a distinction does not exist. All domain name policies developed and implemented by the non-governmental actors in the GNSO are “public” in the sense that they define the technical and economic structure of the entire global domain name industry and so have important economic, technical, and political consequences for all Internet users, governments, and private sector service suppliers. Take, for example, the ICANN contractual provision that binds all customers of ICANN-accredited registrars to subject themselves to the Uniform Domain Name Dispute Resolution Policy. The UDRP protects trademarked names from misappropriation, which is obviously a public policy matter addressed in public national law and international treaties. No qualitative difference exists between the kind of policies produced by the GNSO and passed on to the ICANN Board, and the kind of policies discussed or recommended by governments in the GAC. A review of GAC communiqués and policy advice documents reveals that the

topics are all the same: how many and what kind of new TLDs should be created, who should have exclusive rights to which names, privacy in Whois, data escrow, various fraud and security protection measures, and so on.

A second problem is that, even if one could draw a bright line between “public policy” and other kinds of policy, governments do not speak with one voice on policy. Public policies vary tremendously around the world and can contradict each other. This rather obvious fact, as I noted earlier, was central to the rationale for making ICANN a nongovernmental entity in the first place. The idea was to detach DNS coordination and governance policies from the territorial jurisdiction of national states in order to avoid these conflicts. That is precisely why the GAC is institutionalized as simply a committee that advises the Board of Directors. If governments want to make applicable public policy about the Internet they do not need the GAC or ICANN to do so: they can commence negotiations on a treaty, or utilize existing intergovernmental organizations or take actions that apply specifically to their own jurisdiction.⁴⁵

During the policy development process for the 2004 round and during the pendency of the .xxx application, the GAC had several opportunities to monitor and influence ICANN’s activities, including at general meetings, through the open comment periods, in response to direct requests from the ICANN Board, and through the issuance of formal GAC communiqués. GAC communiqués address issues of special concern to GAC participants and are typically issued at the end of ICANN quarterly meetings. In this regard it is noteworthy that no GAC communiqué prior to the June 2005 vote ever expressed opposition to the .xxx TLD specifically, or rejected the concept of a specialized domain for adult content generically. Nor did any GAC communiqué issued prior to or during the sponsored TLD round in which ICM Registry participated insist on a GAC right to review or veto the results of an ICANN TLD approval. On the contrary, when

⁴⁵ Intergovernmental organizations include the International Telecommunication Union, the OECD, the World Intellectual Property Organization, or the World Trade Organization. Unilateral government action could take the form of adopting a nation-wide filter, as Australia is currently planning, or empowering censors to identify and remove content that violates the rules established by the national government, as China currently does. See Meraiah Foley, “Proposed Web Filter Criticized in Australia,” THE NEW YORK TIMES, December 11, 2008. Available at: <http://www.nytimes.com/2008/12/12/technology/internet/12cyber.html>; Kathrin Hille, “China Bolsters Internet Censors’ Scrutiny,” FINANCIAL TIMES, January 5, 2009. Available at: http://www.ft.com/cms/s/0/f858f9aa-dac8-11dd-8c28-000077b07658.html?nclick_check=1.

asked formally about the sTLD applications in April 2005, the GAC chair issued a written statement declaring that none of its members had any concerns with the pending applicants.⁴⁶

GAC has been most effective at influencing the policies adopted by ICANN when it has issued a communiqué or policy advice that precedes the finalization of a GNSO policy development process by a substantial time period. Examples are the GAC's principles on ccTLDs,⁴⁷ and the March 2007 GAC Principles on new gTLDs.⁴⁸ Both documents articulated policy principles well before any GNSO-developed policy was finalized. The new gTLD principles were subsequently used by ICANN staff to impose constraints on the development of policy by the GNSO. Indeed, one could see the GAC's new gTLD policy principles as an attempt to clean up the mess made during the .xxx affair, when it was evident that some members of the GAC wanted to retroactively influence an ICANN Board decision to approve .xxx but had no procedural or Bylaw basis for doing so.

6 Narrative of the .xxx Application's Treatment

I now turn to a more chronological narrative of the ICM Registry application process. I will strive to place the .xxx application in the context of the sTLD process as a whole, as that clarifies the allegations of arbitrary and discriminatory treatment.

Defining a process for the addition of new TLDs to the root was considered a part of ICANN's mandate from its inception in 1998. ICANN's attempt to meet that need began in 2000, with a process to add seven new gTLDs as an experiment or "proof of concept," followed by an evaluation. The initial round of new gTLD additions in 2000, however, was roundly criticized as arbitrary and amateurish.⁴⁹ A scholarly article by

⁴⁶ Letter from Mohamed Sharil Tarmizi, GAC Chairman, to Paul Twomey, ICANN President and CEO, April 3, 2005. Available at: <http://www.icann.org/correspondence/tarmizi-to-twomey-03apr05.htm>.

⁴⁷ See GAC Principles for the Delegation and Administration of ccTLDs, February 23, 2000. Available at: <http://www.icann.org/en/committees/gac/gac-cctldprinciples-23feb00.htm>.

⁴⁸ See GAC Principles Regarding new gTLDs. March 28, 2007. Available at: http://gac.icann.org/web/home/gTLD_principles.pdf.

⁴⁹ See Prepared Statement of A. Michael Froomkin, Professor of Law, University of Miami School of Law, before the Senate Commerce, Science and Transportation Committee Communications Subcommittee, hearings on *ICANN Governance*, February 14, 2001. In the first round, ICANN attempted to hold a one-day comparative hearing between more than 40 applicants, each of whom had submitted complex applications that referenced many proposed TLDs. During this process, each applicant was given only three minutes to speak in a large public meeting before the Board. ICANN's Board then proceeded to

Jonathan Weinberg, a law professor and former member of an interdepartmental working group in the U.S. government on domain names, called it a “badly dysfunctional” process, and noted that ICANN’s incoming chairman, Internet protocol pioneer Vinton Cerf, complained that ICANN needed to find a way to “extract” itself from making those kinds of decisions.⁵⁰ As a consequence, the first round of TLD additions resulted in nearly a dozen reconsideration requests.⁵¹

6.1 The design of the RFP process

ICANN’s prior performance in adding new gTLDs no doubt loomed large during the design of the RFP for the 2004 sponsored TLD round. Following the report of a GNSO task force evaluating the first round of new TLDs, the Board asked the GNSO for policy advice about “whether to structure the evolution of the generic top level domain name space and, if so, how to do so.”⁵² In doing this, then ICANN President, Stuart Lynn, was laying the groundwork for the development of a permanent, stable process for the addition of new gTLDs over the long term. He knew, as did all involved, that developing such a process would take years. So alongside these more general plans, President Lynn set in motion a short term plan to add a “limited new round of TLDs.”⁵³ This plan eventually received the support of the GNSO and then the Board, in line with ICANN process.⁵⁴ Throughout the policy development process, the GAC was informed of the plans and given the opportunity to comment on the processes and policies for the new sTLDs. More than once, ICANN staff appeared before the GAC to discuss the plans,

make a superficial and often arbitrary assessment of the applications; e.g., rejecting a proposal for a .iii TLD because someone on the Board objected that the name was difficult to pronounce, even though the ability to pronounce a proposed gTLD had never before been mentioned as a decision criterion.

⁵⁰ Jonathan Weinberg, “ICANN, “Internet Stability,” and New Top Level Domains,” 2002. Available at: <http://www.law.wayne.edu/weinberg/icannetc.pdf>.

⁵¹ See web site of ICANN Reconsideration Committee. Available at: <http://www.icann.org/en/committees/reconsideration/index.html>.

⁵² ICANN Board Minutes, December 15, 2002. Available at: <http://www.icann.org/en/minutes/minutes-annual-meeting-15dec02.htm>. Specifically, Stuart Lynn was asking the GNSO whether the name space should be structured as a fixed taxonomy imposed on users and suppliers from the top down, or whether the top level name space should be defined more flexibly through the proposals of prospective registries and the choices of users in the market. The latter option was favored by the GNSO.

⁵³ Stuart Lynn, ICANN President, A Plan for Action Regarding New TLDs, October 18, 2002. Available at: <http://www.icann.org/en/committees/ntepptf/new-gtld-action-plan-18oct02.htm>.

⁵⁴ GNSO meeting minutes of October 29, 2003. Available at: <http://gns0.icann.org/meetings/minutes-gns0-29oct03.shtml>. The author of this Report was a member of the GNSO Council at that time. See also ICANN Board Minutes, December 15, 2002, *supra* note 52.

answer questions, or listen to suggestions.⁵⁵

ICANN was more careful this time to define its criteria and to specify a more detailed and robust process. At the ICANN meeting in Brazil, in March 2003, President Lynn outlined his plan to post a draft paper outlining the methodology and evaluation criteria to be used, which would be followed by a public comment period.⁵⁶ The final RFP described four selection criteria to be used in evaluating applications: (1) technical; (2) business plan; (3) community value; and (4) sponsorship. In practice, there were three evaluation teams, and the “Sponsorship/Other” evaluation team assessed “community value” as well as sponsorship. The process was designed to protect the Board from the lobbying and unfettered discretion it had dealt with during the proof of concept round. Thus, it removed the Board from the initial evaluations of these criteria and instead delegated it to teams of disinterested expert consultants. The Board’s meeting minutes stress the “importance of the establishment of and adherence to *objective criteria* for review” by the third party consultants.⁵⁷ The Board’s role, according to the RFP, “will be either to accept or reject the findings of the consultant(s). The Board itself will not perform the evaluation.”⁵⁸

As this statement implies, and as the ICM Registry Request correctly asserts, the implementation of the RFP involved a two-step process. First, the independent Evaluation Team (ET) assessed the applicants’ conformity to the sponsorship, community value, business, and technical requirements. The ETs then conveyed a report to the applicant and the Board. Based on the content of the ET report and its recommendations, the Board would make the final determination as to whether the criteria had been met. If all the criteria were met, the applicant would move on to the second stage of the process, which was contract negotiations with the ICANN staff.

⁵⁵ See Minutes of the GAC Meeting 15 held in Rio de Janeiro from March 23-25, 2003, dated 16 June 2003, available at: http://gac.icann.org/web/meetings/mtg15/Rio_Executive_minutes.doc; Minutes of GAC Meeting 15 held in Montreal from June 22-25, 2003. Available at: http://gac.icann.org/web/meetings/mtg16/Montreal_Executive_minutes.doc.

⁵⁶ A first draft RFP was posted in June 2003, and the comment period closed in August 2003. The final RFP was posted December 15, 2003. The development of the process thus took place over a period of one year.

⁵⁷ ICANN Board minutes, September 9, 2003. Available at: <http://www.icann.org/en/minutes/minutes-09sep03.htm>.

⁵⁸ New sTLD Application, December 15, 2003. Available at: <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-application-parta-15dec03.htm>.

This was evident at the time in numerous statements by ICANN staff. Kurt Pritz, for example, in his March 4, 2004 description of the process at the ICANN Rome meeting, which I attended, said that evaluations would occur May through July, and that “with the 1st of August [2004], 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.”⁵⁹ Likewise, the March 19, 2004 public announcement of the receipt of 10 applications states very clearly that “[a]ll applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN...”⁶⁰ An even more complete and direct statement comes from Kurt Pritz’s presentation at the Capetown ICANN meeting on December 3, 2004. Pritz states that

there was, essentially, a two-step process. . . . First, the application was reviewed by a panel of independent evaluators. . . . So if all the contingencies weren’t resolved at the end of the independent evaluation, the application was passed to the board for a final determination as to whether the application met the stated criteria in the RFP. Those that were determined to meet that application then go on to negotiation. And then at the end of this negotiation, I will ask the board to confirm and authorize the formation of a new sTLD.⁶¹

The whole point of the Evaluation Teams was to weed out any applications that clearly did not meet the threshold criteria, obviating the need for any contract negotiations with applications that would never pass the criteria. It was obvious to me, as an observer of the RFP process and participant in ICANN meetings at which they were discussed, that a vote by the Board to conduct negotiations was a statement that the sponsorship, community value, business, and technical criteria had been met. It meant that the most important threshold had been crossed and all that remained was to work out the contractual details. That two-step process was repeatedly set forth by ICANN in a clear and unambiguous manner.

6.2 Public comment on the sTLD applications

As part of the elaborate application process, ICANN posted basic information

⁵⁹ ICANN meeting public forum, real-time captioning, Rome, March 4, 2004. Available at: <http://www.icann.org/en/meetings/rome/captioning-forum1-04mar04.htm>.

⁶⁰ March 19, 2004 Announcement, posting applications for public comment. Available at: <http://www.icann.org/en/announcements/announcement-19mar04.htm>.

about the sTLD applications it received for public comment. This allowed the Board to assess community sentiment about each of the proposals, and permitted knowledgeable observers in the community to identify issues or problems that should be taken into account. Public comments were open for approximately two months, during April and May of 2004.

ICANN's Response states that the .xxx application was unusually controversial. It was somewhat controversial, as anything associated with adult content is; but it was not, at this stage in the process, qualitatively different from other applications. There were 63 different comments filed about .xxx during the comment period, some supportive, some critical. The .mail application actually received the most critical commentary, with 74 comments posted, many of them attacking the proposal's financial arrangements or its eligibility as a sponsored domain. The .travel application attracted vehement opposition in the early stages, due to objections from a whistle-blowing, online travel journalist who alleged to have uncovered evidence of a "secret deal" between ICANN staff and the International Air Transport Association. These charges produced nearly three years of public controversy, including an unresolved Request for Independent Review.⁶² About 50 comments were made on the .travel proposal. The .asia and .cat applications each raised immediate questions about whether governments had some kind of a claim to be taken into consideration. The .asia proposal was explicitly opposed by the ccTLD registry for Hong Kong, reflecting a bitter division within the Asian region. In the case of .cat, there were concerns regarding global recognition of subnational units. The .mobi application was similarly controversial, and its claim to be a limited, sponsored domain was actively challenged. About 57 comments were filed about the .mobi application. The .mobi proposal prompted public criticism from World Wide Web founder Tim Berners-Lee, who claimed it would "break the Web architecture of links, and attack the universality of the Web."⁶³ Many observers scoffed at the construction of .tel as a sponsored TLD, asking what kind of a "restricted community" the world's 2 billion plus telephone users

⁶¹ ICANN meeting public forum, real-time captioning, Cape Town, December 3, 2004. Available at: <http://www.icann.org/en/meetings/capetown/captioning-public-forum-1-03dec04.htm>.

⁶² See the writings of Ed Hasbrouck available at: http://hasbrouck.org/blog/archives/cat_internet_domain_names.html.

⁶³ Tim Berners-Lee, "New Top Level Domains Considered Harmful." April 2004. Available at: <http://www.w3.org/DesignIssues/TLD>.

constituted. Thus while the .xxx application raised some objections and issues, as an sTLD application it was not significantly more controversial than the others during the 2004 comment period.

Moreover, that the content of a proposed sTLD might be considered by some to be “controversial” was never a criterion specified in connection with the RFP (nor would it have been a proper or appropriate criterion in any event). Indeed, it is fair to say that the .xxx proposal became significantly more controversial only *after* the Board’s vote on June 1, 2005.

It is important to keep in mind that the GAC as a whole, and individual governments within it, had ample opportunity to comment on the RFP, the process, and the proposals during this period. The record shows that there is no negative comment on the .xxx proposal from governments reflected in the posted public comments. Nor did any GAC communiqué address specific proposals. When the GAC’s opinion was solicited by ICANN management, the chair of the GAC at the time, Mohamed Sharil Tarmizi, wrote to ICANN’s President and CEO, Paul Twomey, on April 3, 2005, stating “[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round.”⁶⁴

6.3 Rejection of .xxx by the Sponsorship Evaluation Team

An evaluation by the three independent Evaluation Teams (ETs) was also conducted during this time period. The August 31, 2004 independent evaluation report held that while .xxx passed the technical and business-financial criteria set forth in the RFP with flying colors, it did not meet the sponsorship criteria. The Sponsorship ET’s findings are adequately summarized in the ICANN Response, paragraphs 49-51. The conclusion to reject .xxx based on the sponsorship criteria was strong: the “deficiencies cannot be remedied within the applicant’s proposed framework.”

The independent evaluation report sounds pretty damning until one considers it in conjunction with the following facts:

- (a) The team charged with evaluating compliance with sponsorship criteria only approved two of the ten applications.

⁶⁴ Letter from the Mohamed Sharil Tarmizi, to Paul Twomey, April 3, 2005, *supra* note 46.

- (b) Of the six applications that essentially failed the sponsorship test and did not withdraw, *all* eventually received a positive vote from the Board to proceed to contract negotiations, including .xxx.
- (c) Of the six applications that the Board passed on to contract negotiations, .xxx is the *only* one that did not make it eventually into the root.

This factual record shows that the negative findings of the Sponsorship ET had very little to do with the outcome of this sTLD process. It also indicates that there was indeed something quite exceptional about the treatment of the .xxx application.

ICANN's Response attempts to use the evaluation team's rejection recommendation as a basis for justifying and explaining its later decision. But, in fact, the initial rejection by the Sponsorship ET in 2004 powerfully undercuts ICANN's argument. ICANN's RFP procedure gave it two distinct opportunities to reject applications that did not meet the sponsorship requirements. First, it could have simply accepted the Sponsorship ET's findings. If the Sponsorship ET's arguments were valid why did the Board not eliminate ICM Registry from further consideration in the Fall of 2004? Second, regardless of the recommendation of the evaluation committee, the Board could have decided on its own, in mid-2005, that the application's status as a sponsored domain was inadequate or questionable, and it could have voted down the opportunity to continue with contract negotiations. As we know, it did not do either. ICANN allowed the .xxx application to pass both hurdles.

Had ICANN eliminated .xxx from consideration in 2004, there would be no basis for challenging its decision, as it would have followed its stated procedure. What happened instead is that ICANN's President, Paul Twomey, essentially overruled the sponsorship panel. He gave ICM Registry and all the other negatively affected applicants a chance to "clarify" their applications, and then – not only in the case of .xxx but also all other applications that had their sponsorship criteria questioned or rejected – the Board disregarded the Sponsorship ET's recommendations, conducted its own analysis and made its own determination, and moved forward to contractual negotiations.

To understand these outcomes and assess their relevance to ICM Registry's charge of unfair, arbitrary and discriminatory treatment, we have to step back and put it in the wider context of the ongoing debate about adding new TLDs. Ever since it was

created, ICANN had been gripped by a debate between advocates of a very liberal policy toward adding new TLD names and those who opposed any new additions. There was a widespread perception in the industry and among advocates of a more liberal policy that ICANN had been unduly restricting the market for new TLDs. There were equally adamant demands from trademark holders and some technical people to block all new TLDs.⁶⁵ For obvious political reasons, ICANN's policies always fell somewhere between these two poles. The plan for the addition of a few new sponsored TLDs in 2004 was an attempt to explore a new middle ground, the adding of new sponsored TLDs if they met specified criteria. Sponsored TLDs were more acceptable than open gTLDs to those who opposed any new TLDs at all. With narrowly defined communities and restricted eligibility, sTLDs minimized the risk of trademark infringement and the need for defensive registrations. But the first round of new sponsored TLDs added in 2000, such as *.museum* and *.coop*, were widely derided as complete failures.⁶⁶

Everyone recognized that new unsponsored TLDs, which are open to all users, can appeal to a larger target group of registrants and thus have more commercial value than the highly restrictive sTLDs. Thus, ICANN's sponsored TLD round carried within it a built-in tension between market entrants seeking a sustainable and profitable business model (which implied a TLD name space open to a larger number of registrants) and ICANN's demand for a restricted community (which implied fewer registrations and more extensive and costly reviews of prospective registrants). Because there is no precise definition of a "community," and, as noted earlier, the definition of a "sponsored TLD" rests entirely on humanly-constructed contractual conditions which can be stretched in various ways, the definition of sponsorship was contested and proved unclear throughout the process.

Early in the process, it became obvious that many constituencies within ICANN wanted the sponsorship criteria to be construed more liberally to allow more applications to be eligible. For example, in its first iteration, the draft RFP restricted sTLD applications to organizations that had applied in the first round. That requirement would

⁶⁵ A good summary of this debate is contained in the National Research Council report, *Signposts in Cyberspace: the domain name system and internet navigation*, Washington, DC: National Academies Press, 2005. Available at: http://www.nap.edu/catalog.php?record_id=11258.

have severely limited eligibility. But public comments from ICANN users⁶⁷ and objections from prospective applicants prompted ICANN to modify the RFP to allow applications from anyone, including those who had applied for open gTLDs in the 2000 round. The simple fact that ICANN allowed an application that only a few years earlier was presented to them as an open gTLD to be re-packaged as a sponsored TLD application, tells us a lot about how hard and fast a distinction “sponsorship” really is. Specifically, when applications arrived from *.mobi* and *.tel* – which were aimed at so-called “communities” that consisted of millions of web content providers for mobile devices, or billions of holders of telephone numbers – it was evident to all but the most obtuse observers that the concept of “sponsorship” was being stretched quite far in order to accommodate major commercial interests, such as the consortium of mobile equipment manufacturers and mobile service providers backing *.mobi*.

Thus, when assessing the sponsorship ET’s rejection of *.xxx*, one must bear in mind the fact that the sponsorship ET appears to have adopted a fairly literalist interpretation of the sponsorship criteria. It applied stricter criteria to all applications uniformly, regardless of how few applicants could meet the criteria. ICANN’s management, on the other hand, was under intense pressure from applicants and industry groups to open up the name space. Given ICANN’s fledgling status and need for support and financing, ICANN naturally wanted to accommodate business interests at that stage. And so, the Sponsorship ET was asked to reconsider the rejected applications. In the end, *every* application previously rejected by the Sponsorship ET that went on to a vote of the Board was approved.

Contrary to the theme in ICANN’s Response, *.xxx* was not the only application that generated concerns about its sponsored nature. Indeed, from a sponsorship standpoint *.xxx* made a lot more sense than *.mobi* or *.tel*, and was quite similar in character to the *.jobs* application, which targeted a self-defined community based on the kind of service content offered. The complaints that *.xxx* was not globally recognized to be associated with adult content, aside from being facially implausible to anyone with the slightest

⁶⁶ This point is evident if one considers the last time they encountered either of those sTLD domains from the 2000 round in their daily Internet use.

exposure to adult online content, seems especially discriminatory in the light of the quick and easy approval obtained by *.jobs*, which consists of an English word that is most assuredly incomprehensible to billions of Chinese, Arabic, Cyrillic, Japanese, and Korean-reading internet users, to name a few.

To put this point even more bluntly, I am suggesting that ICANN's management and Board, in its pursuit of the laudable goal of expanding the name space and responding favorably to the proposals of major business interests to enter the market, essentially construed the sponsorship criteria broadly for some, and narrowly for others, evidencing a lack of conformity to rigid sponsorship criteria. Until the U.S. government changed its mind and pressured ICANN to reconsider its decision with respect to *.xxx*, ICANN's management was more interested in opening the name space to powerful players than it was in enforcing strict sponsorship criteria. It would have been arbitrary and discriminatory for ICANN to reject *.xxx* in June 2005 based on a rigid application of sponsorship criteria, while accepting and implementing applications with similar or weaker credentials. And, for ICANN to accept *.xxx* at one stage using one set of sponsorship criteria, and later, when faced with external political pressure, to apply stricter criteria exclusively to that applicant, can only be viewed as egregiously arbitrary and discriminatory.

6.4 The June 1, 2005 vote of the Board

The Board, responding to the concerns and questions about the *.xxx* application, and especially its association with adult content, delayed a vote on the ICM Registry application for some time. The Board's meeting minutes from April and May 2005, and ICANN's Response in this proceeding, talk about the extensive discussions that the Board had about *.asia* and *.xxx*. During early 2005, the Board and staff repeatedly express their feeling of unreadiness with respect to voting on the *.xxx* and *.asia* applications. These delays, in my view, support an interpretation of the June 1, 2005 Board vote as one that was held to resolve the question of whether *.xxx* met the sponsorship criteria. If the Board vote was not intended to resolve the open question about sponsorship, but instead

⁶⁷ See, e.g., At Large Advisory Committee (ALAC) Response to the Proposed sTLD RFP and Suggested Principles for New TLD Processes. Available at: <http://www.atlarge.icann.org/en/correspondence/response-stld-process-09oct03.htm>.

was nothing more than a noncommittal attempt to see where contractual negotiations might lead, there would have been no need to delay the vote; the “test” could have begun weeks or months earlier.

On June 1, 2005 the Board finally voted on .xxx and by a vote of 6 to 3, the Board decided that .xxx met the technical, business-financial, community value, and sponsorship criteria and authorized ICM Registry to begin contract negotiations with ICANN staff. ICANN now claims that the June 1, 2005 vote “was intended only to permit ICM to proceed with contract negotiations, *not* that ICM had satisfied the sponsorship criteria.”⁶⁸ This claim flies in the face of the surrounding factual evidence.

The factual record and ICANN’s Response stress again and again that the sponsorship issue was the *only* consideration holding up the ICM application. It notes that the Board engaged in lengthy and repeated discussions about “whether ICM’s application met the requisite sponsorship criteria.” 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? Bear in mind that being deemed a sponsored domain was a *requirement* of the process; it would make no sense for ICM and ICANN to enter into contract negotiations if .xxx hadn’t satisfied the Board of its status as a sponsored domain under the criteria of the RFP.

ICANN’s claim that the contract negotiations were intended to “test” the question of whether the registry agreement could answer the concerns regarding sponsorship is an after-the-fact rationalization of its later reversal. Contradicting this claim is the absence of any instructions or statements in the resolution associated with the vote about what the Board was looking for. If authorization of negotiations was really contingent on the outcome of specific issues, it would have been directly communicated to ICM Registry in the Board resolution. Footnotes 93 and 94 of the ICANN Response show that specific instructions were transmitted to .jobs and .mobi after they allowed contract negotiations to proceed. The .cat authorization also demanded that the applicant gain the approval of governmental authorities. Where was the corresponding statement accompanying the .xxx

⁶⁸ ICANN Response, para. 57.

application? There were no instructions. ICANN's inability to produce any supporting explanations or instructions to ICM Registry regarding the negotiations fatally undermines its contention.

6.5 The political reaction to the June 1, 2005 vote

The analysis in this section is built around the second factual question posed earlier: how can we characterize the interventions of the U.S. government and its allies in the GAC in the two and a half months after the June 2005 Board vote? This question leads to a number of subordinate factual questions: Were these interventions, as ICANN implies in its Response, a legitimate and to-be-expected part of a well-defined process in which governments advise ICANN on public policy concerns? Or were they extraordinary disruptions that essentially broke the defined process?

By referencing a break in the process I mean five things: (1) Were the governmental interventions untimely? (2) Did they have the effect of reversing a decision that had already been made? (3) Did they impose on ICANN and ICM a timetable and set of requirements that disregarded the process set out in the Request for Proposals? (4) Was there a sudden and precipitous change in the U.S. Department of Commerce's position, which improperly caused a sudden and precipitous change in ICANN's position? (5) Was there anything improper or inappropriate about the United States government's actions? The answer to all five of these questions is yes.

As a result of a Freedom of Information Act (FOIA) request by ICM Registry to the U.S. Department of Commerce and U.S. Department of State, publicly available internal U.S. government memos and documents reveal quite a bit about how ICANN's June 1, 2005 decision about .xxx impacted the U.S. government.⁶⁹ The internal documents make it clear that the staff of the National Telecommunications and Information Administration (NTIA), a bureau within the U.S. Department of Commerce which directly supervises ICANN, were favorable to the .xxx application at the time of ICANN's decision.⁷⁰ The Department of Commerce seems to have supported .xxx

⁶⁹ The documents are posted on the Web at <http://www.internetgovernance.org/pdf/xxx-foiapage.pdf>.

⁷⁰ The NTIA's Meredith Attwell sent an email to the NTIA's Robin Layton and Suzanne Sene ardently asking for "talking points on why this (xxx) is a good thing and why we support it." Email from Meredith Attwell to Jeffrey Joyner, Robin Layton, and Suzanne Sene, June 15, 2005. Available at: <http://www.internetgovernance.org/pdf/xxx-foiapage.pdf>.

because of its ability to identify adult content so that it could be more easily filtered or avoided by those who did not want exposure to it. They also make it clear that the NTIA at this time saw nothing wrong with ICANN's process for vetting the TLD proposals, and that the NTIA still believed that it should not interfere with ICANN decisions.⁷¹ The NTIA at that time claimed that "the department has a strictly technical role in the implementation of new top level domains, but we do not make policy decisions with respect to domain names or internet content."⁷²

Higher-level political appointees in the Department of Commerce, on the other hand, were immediately concerned about the political appearance of the decision. News of the decision hit the media on June 2, 2005. Immediately, these officials started asking themselves whether the decision would "cause us any problems."⁷³ Those fears proved to be justified as conservative anti-pornography groups began to mobilize. Many of these groups simply reacted in a knee-jerk fashion to the association between an ICANN decision and adult content on the Internet. They did not seem to understand the way in which a .xxx domain had the potential to contain and accurately identify adult content. But regardless of whether their position was right or wrong, the pressure they exerted was enormous and outside of the oversight contemplated by the White Paper, the MOU/JPA, or the IANA contract.

The political pressures began on June 14, 2005 as the Department of Commerce heard from the Family Research Council (FRC) asking about the Department's authority over the root zone file. Obviously the FRC was interested in whether the Department of Commerce could be pressured to overrule the ICANN decision. Then the Department of Commerce heard from the office of Representative Charles W. Pickering, Republican from Mississippi, whose staffer noted that "I had read that you guys will have to

⁷¹ On June 16, 2005, the Commerce Department met with a group of representatives of four conservative anti-pornography groups and U.S. Representative Charles W. Pickering's staff person and told them that "they [NTIA] do not have authority to approve the substance of domain names - only the technical aspects of it." Email from Mike Hurst, Counsel and aide to Representative Pickering, to conservative groups, June 16, 2005. Available at: <http://www.internetgovernance.org/pdf/xxx-foiaprogram.pdf>.

⁷² Email from Clyde Ensslin, NTIA Public Affairs, to Robert MacMillan, *Washington Post*, June 17, 2005. Available at: <http://www.internetgovernance.org/pdf/xxx-foiaprogram.pdf>.

⁷³ Email from Fred Schwien, Executive Secretary of the Department of Commerce, to Assistant Secretary of Commerce Michael Gallagher and Acting Assistant Secretary for Communication and Information John Kneuer, June 2, 2005. Available at: <http://www.internetgovernance.org/pdf/xxx-foiaprogram.pdf>.

approve” and that the Hill is “reviewing its options” (including legislation to make .xxx compulsory for adult material).⁷⁴ On June 16, 2005 U.S. government officials met with four anti-pornography groups and Representative Pickering’s staff person. On June 21, 2005, John Kneuer, the Acting Assistant Secretary for Communication and Information, and the NTIA’s public relations person met with FRC and Concerned Women for America. Still, during this period, the NTIA staff persons who directly supervise ICANN and attend its meetings, Suzanne Sene and Meredith Attwell, (correctly) told the groups they had no authority over the decision and strove to redirect conservative rage over .xxx to ICANN.

On June 16, 2005, however, Fred Schwien, Executive Secretary at the U.S. Department of Commerce sent an email to Michael Gallagher, the head of NTIA, Meredith Attwell, and others, that started to change the tone of the debate. He said “who really matters in this mess is Jim Dobson [head of Focus on the Family and founder of the Family Research Council].” Schwien continued:

What [Dobson] 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. My suggestion is that someone from the White House ought to call him ASAP and explain the situation, including that the White House doesn't support the porn industry in any way, shape or form.⁷⁵

From this point on, the prophylactic relationship between the Department of Commerce and ICANN began to erode, although it did not break down completely until some time in late July or early August 2005. It is clear that the approach to the issue was becoming increasingly political and less one of neutral supervision of ICANN. NTIA official Attwell said on June 21, “I think there will be a call for [U.S. Department of Commerce] Secretary Gutierrez to weigh in to urge ICANN not to approve it. I don't know where we will go if that happens.”⁷⁶

⁷⁴ Email from Mike Hurst, Legislative Director/Counsel to Congressman Charles W. Pickering, to Jim Wasilewski, June 14, 2005. Available at: <http://www.internetgovernance.org/pdf/xxx-foiapage.pdf>.

⁷⁵ Email from Fred Schwien to Michael Gallagher, June 16, 2005. Available at: <http://www.internetgovernance.org/pdf/xxx-foiapage.pdf>.

⁷⁶ Email from Meredith Attwell, NTIA, June 21, 2005. Available at: <http://www.internetgovernance.org/pdf/xxx-foiapage.pdf>.

6.6 The change in the U.S. government's position

In the second week of July 2005, ICANN held its quarterly meeting in Luxembourg. Evidence of the U.S. government's activities and expressions of opinion in that meeting are critical facts for the Panel to consider. At that time, the NTIA had already received about 4,000 emails expressing opinions against the .xxx TLD. These emails were generated by a campaign from the Family Research Council. And yet, NTIA's Suzanne Sene, who represented the Department of Commerce in the GAC at the Luxembourg meeting, refrained from exerting any formal pressure to delay or stop .xxx. On the contrary, GAC minutes show that Ms. Sene tried to prevent GAC from expressing negative views of .xxx "at this late stage." She stated that "the process had been public since the beginning, and the matter could have been raised before at Plenary or Working group level."⁷⁷

Those comments were made openly in the GAC meeting; a few days later Ms. Sene's internal report on the meeting to her supervisors criticizes as untimely the GAC complaints regarding the process, revealing that the U.S. did not share the opinion that GAC should have been asked again for its views before ICANN voted to approve .xxx.⁷⁸ Ms. Sene's email does reveal that some GAC members, especially in Europe, were dissatisfied about not being asked about the Board's approval of .xxx, but also indicates that they were resigned to the Board's decision. Some European GAC members (Denmark, the European Union, and the Netherlands) seem to have been motivated, not by intrinsic opposition to .xxx, but to the process that ICANN followed in approving it. In particular, some GAC members were unable to understand why the Sponsorship ET's recommendation had been overruled. There was also a feeling that ICANN and the U.S. marginalized other governments in the Internet governance process. Recall that, at this time, the WSIS Summit meeting was approaching and many governments were on the offensive against ICANN and the way it shifted policy-making authority away from governments to private actors. Despite all this, GAC refrained from addressing .xxx in its Luxembourg communiqué. As Ms. Sene wrote in her internal memo, "happily. . . there is

⁷⁷ Minutes of GAC Meeting 22, held in Luxembourg from July 11-12 2005, dated November 23, 2005. Available at: http://gac.icann.org/web/meetings/mtg22/LUX_MINUTES.doc.

⁷⁸ Email from Suzanne Sene to Department of Commerce colleagues "re gac communiqué", July 13, 2005. Available at: <http://www.internetgovernance.org/pdf/xxx-foihomepage.pdf>.

no mention ofxxx in the final gac communiqué.”⁷⁹ The GAC instead chose to concentrate its attention on the development of policy principles to guide ICANN’s plans for progressive addition of new TLDs in the future.⁸⁰

This proves that the official U.S. position, as late as July 25, 2005, still favored moving forward with .xxx, and therefore the U.S. government hadn’t yet decided to exert pressure on ICANN to reverse its decision. Also, the minutes of the open meeting between GAC and the ICANN Board representatives show that ICANN’s management was still willing to stand up for its vote to approve .xxx.⁸¹ Thus, as long as the U.S. government and ICANN’s President weren’t opposed to .xxx, complaints from within the GAC were contained. This set of facts shows that ICANN could have maintained the integrity of its process and moved forward into negotiations with ICM Registry and its eventual entry into the root. Objections from a few governments that did not congeal into a formal statement in the communiqué could have been addressed and managed.

So what changed?

The decisive variable in the turnaround of ICANN’s decision was a politically-driven change in the U.S. government’s position. ICANN’s Response rather cleverly obscures this fact, making it appear as though .xxx had always been a focal point of large-scale opposition, and that there was a long, gradual, slide toward rejection. This is incorrect. The record shows a very sharp and time-specific reversal in the fate of .xxx. The date is August 11, 2005.

The change in the U.S. government’s position took place some time in the short period following Ms. Sene’s Luxembourg report and the U.S. Department of Commerce’s production of a letter to Paul Twomey and Vinton Cerf on August 11, 2005. One can infer that at some point between the week after the Luxembourg meeting and

⁷⁹ *Ibid.*

⁸⁰ I note here that ICANN’s Response in this proceeding, at paragraph 60, misrepresents the Luxembourg GAC communiqué as referencing the .xxx application. In fact, the GAC communiqué statement that “introduction of new TLDs can give rise to significant public policy issues” goes on to conclude, “[a]ccordingly, the GAC welcomes the initiative of ICANN to hold consultations with respect to the implementation of the new Top Level Domains strategy. The GAC looks forward to providing advice to the process.” Available at: <http://gac.icann.org/web/communiqués/gac22com.rtf>. Obviously this was not advice pertinent to .xxx, but referred to the GAC’s attempt to develop principles that could guide ICANN’s policy and process for adding new TLDs in the future.

⁸¹ Minutes of GAC meeting 22, held in Luxembourg, *supra* note 77. Vinton Cerf, Paul Twomey, and other ICANN Board members participated in the plenary portion of this GAC meeting.

August 9 or 10, 2005, a decision by higher-level officials in the Department of Commerce, or perhaps the Bush administration, was made to halt the progress of the .xxx application. A letter was drafted and transmitted from Michael Gallagher of NTIA to Vinton Cerf and Paul Twomey on August 11, 2005. The letter asked ICANN to delay a decision on .xxx and expressed the U.S. government's concerns about the opposition to the application. Ms. Sene, of the NTIA, transmitted this letter by email to a dozen countries on August 12, 2005. The list of recipients included Mohamed Sharil Tarmizi, Chairman of the GAC,⁸² and Australian GAC delegate, Ashley Cross. Both the documentary record and my own conversations with the people involved indicate that the Department of Commerce letter preceded the subsequent letter from Mohamed Sharil Tarmizi. This is quite significant, because in its public relations campaign, ICANN used Chairman Tarmizi's letter as the excuse for delaying a decision on .xxx. It is now clear that this was done to deflect responsibility for the delay away from the U.S. government. On its web site, ICANN dated the Department of Commerce letter *August 15, 2005*, even though the record proves that they had received it via email on August 12, 2005, and ICANN's own Response admits that the letter's date was August 11, 2005.⁸³ ICANN posted the GAC Chair's letter on its home page, while burying the Department of Commerce letter in the "Correspondence" section of its web site. The trick worked, as many news media reported that the GAC had requested the delay (instead of the U.S. government). Note also that ICANN's Response misrepresents the nature of Chairman Tarmizi's letter.⁸⁴ ICANN refers to it as an action by the GAC, when in fact it was not anything close to being official GAC policy advice or an official communiqué. It was simply a letter requested by Paul Twomey to serve as cover for the Department of Commerce's reversal. As noted previously, the GAC had numerous clear opportunities to call for a delay in processing .xxx and declined to do so in its official communiqués. Even if one grants that governments have some right to intervene in the process, the treatment of the .xxx application is the epitome of a nontransparent, arbitrary, and untimely action.

⁸² This is the same Mohamed Sharil Tarmizi who wrote to ICANN's Paul Twomey, on April 3, 2005, stating that "[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round." Available at: <http://www.icann.org/correspondence/tarmizi-to-twomey-03apr05.pdf>.

⁸³ ICANN Response, paragraph 61, footnote 101.

⁸⁴ See ICANN Response, paragraph 63.

In assessing the motivation for the U.S. government intervention, the specific form it took, and the attempt to utilize the GAC as the proxy, two factors must be kept in mind. First, any attempt by the U.S. Department of Commerce to directly block .xxx on the grounds of the TLD's meaning or the web site content that might be associated with it could be considered "state action" and thus would open the Department of Commerce to charges that it was perpetrating an illegal act of censorship under the First Amendment to the U.S. Constitution. Second, and probably more importantly at the time, the action came in the thick of the WSIS controversies about the U.S. government's dominant role in ICANN. A decision by the U.S. government to directly overrule an ICANN decision (i.e. to put .xxx on the root), coming in the midst of a global uproar over the United States' unilateral control of the DNS root, would have inflamed these tensions and undermined the United States' negotiating position at the upcoming WSIS Summit meeting in Tunisia in November, 2005.

Prior to August 11, 2005, ICM Registry's application had fared relatively well. Although it was controversial among some, it had successfully weathered the ET process and Board vote. Entry into the root zone was imminent. GAC objections up to then – disorganized, untimely and rather muted – had been discounted by both ICANN's management as well as by the U.S. Department of Commerce. After August 11, 2005 everything changed. Even with the major redactions, the FOIA documents show that U.S. government policy toward ICANN and the .xxx application was improperly influenced by domestic political pressure from a limited but vocal and influential constituency. These documents indicate that the U.S. government altered its policy toward ICANN because of this pressure, and that the alteration was precipitous, occurring only two weeks after the U.S. representative had defended ICANN's approval of .xxx at a public ICANN meeting. The U.S. government suddenly abandoned its position that it had no interest in the "substance of domain names" and, instead, actively lobbied against the .xxx domain.

6.7 The broken process

After the U.S. government intervention, ICANN's original RFP process became mangled beyond recognition. In effect, an entirely new evaluation and approval process, centered on the GAC, was improvised as ICANN responded to the political crosswinds emanating from domestic U.S. politics, GAC, WSIS, and some adult content providers

who were opposed to .xxx. Here is a partial list of specific ways in which the process was broken:

- (a) ICANN abandoned its June 2005 decision that ICM Registry had met the sponsorship criteria. The issue of whether .xxx met the sponsorship criteria was reopened in 2006.
- (b) The GAC demanded the public posting of the Evaluation Team reports, which the prior process had specified should be kept private until the process was complete.⁸⁵
- (c) The whole process was returned to the public comment stage that, according to the original RFP, was supposed to have ended in May 2004 (more than a year before). The U.S. government, which had argued in July 2005 that the “GAC had several opportunities to raise questions...as the process had been open for several years,”⁸⁶ pushed to get more comment while actively soliciting other governments to send in negative comments about the .xxx application.⁸⁷ The delay also afforded an opportunity for some representatives of the adult content industry, many of whom saw the clear labeling of adult content as facilitating censorship or regulation, to mobilize a major letter-writing campaign against the domain.
- (d) The GAC was retroactively afforded a veto over ICANN’s approval of the contract, even though this kind of review was not included in the original process. The U.S. government in particular took a special interest in the .xxx proposal, actually reviewing and critiquing contract language. It did not engage in similar action with any of the other TLD proposals.
- (e) In what was probably the most unfair and irrational aspect of the off-the-

⁸⁵ See, among other documents, the letter from Peter Zangl, Deputy Director of the European Commission’s Information Society Directorate, to Vinton Cerf, September 16, 2005, asking to delay the Board’s consideration of .xxx in order to allow the GAC to review the Evaluation Team reports. Available at: <http://www.icann.org/correspondence/zangl-to-cerf-16sep05.pdf>. The GAC Communiqué of Vancouver, dated November 28 – December 1, 2005, welcomes the Board’s decision to postpone consideration of .xxx until the GAC was able to review the evaluation report and “the additional information requested from ICANN.” Available at: <http://gac.icann.org/web/communiques/gac23com.pdf>.

⁸⁶ Minutes of GAC Meeting 22, held in Luxembourg, *supra* note 77.

⁸⁷ I personally spoke with representatives of two governments who confirmed that the Department of Commerce sent emails to the entire GAC and followed up with phone calls pushing governments to weigh in with negative opinions on .xxx.

rails process, the negotiations over the terms and conditions of the ICM Registry contract were transformed by the U.S. and some members of the GAC into a proxy for regulating all adult content on the Internet. Worse, even while ICANN management catered to some GAC members' demand to leverage ICM's contract to "address concerns about offensive content,"⁸⁸ it later asserted that the application should be rejected because it involved ICANN in monitoring and regulation of Internet content. Thus, ICANN used self-contradictory criteria in its approval process.

7 Assessing the Board Resolution Rejecting .xxx

In this section I describe the rationale ICANN used to reject the application as spelled out in the March 30, 2007 Board resolution. This section specifically rebuts ICANN's Response, which purports to show that ICANN's actions conformed to its Mission, Core Values, and Bylaws.⁸⁹ In my assessment I will pay special attention to Article I, Section 2, paragraph 8 of the ICANN Bylaws, which articulates ICANN's Core Value of "*making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*" I will also focus on Article II, Section 3 of the Bylaws, which requires nondiscriminatory treatment. Those two areas are where ICANN deviated most severely from its Bylaws.

7.1 The .xxx application failed to meet sponsorship criteria

ICANN's March 2007 resolution rejecting .xxx asserted that ICM Registry's application did not meet sponsorship criteria. This came twenty-one months after a vote by the Board in June 2005 that the application *did* meet the sponsorship criteria. The 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. At the Luxembourg ICANN meeting in July 2005, Vinton Cerf, Chairman of the ICANN Board, informed the GAC that the .xxx proposal "met the three main criteria, financial, technical,

⁸⁸ See ICANN Board Minutes, Lisbon, Portugal, March 30, 2007, where the Board resolution rejected one proposed contract because it did "not address GAC's concern for offensive content and similarly avoids the GAC's concern for the protection of vulnerable members of the community." Available at: <http://www.icann.org/en/meetings/lisbon/transcript-board-30mar07.htm>.

⁸⁹ See ICANN Response, para. 105.

sponsorship.” He noted that “there were doubts expressed about the last [sponsorship] criteria which were discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters.”⁹⁰ Similar statements exist from other Board members.⁹¹ Contrary to ICANN’s assertions in paragraph 57-59 of its Response, there is no conditionality in Chairman Cerf’s or other Board members’ statements. Thus, .xxx’s “failure to meet sponsorship criteria” alleged in the final Board resolution constituted a *reversal* of an earlier determination. That reversal, in and of itself, is a signal that there was something more going on than the objective and neutral application of documented policies. As I demonstrated above, the reversal is explained entirely by a change in the position of the United States government, not by ICM Registry’s failure to conform to documented policies. Not until ICANN received the August 11, 2005 email from the U.S. Department of Commerce was the sponsorship issue reopened.

Based on these facts, one can only conclude that ICANN’s actions with respect to the sponsorship criteria were arbitrary. The RFP process established independent Evaluation Teams to assess conformity to sponsorship and other criteria. This resulted in an initial, negative evaluation, but this assessment was reconsidered and overruled – not just in the case of ICM Registry, but for *most* of the other sTLD applications. This by itself did not violate the process, however, for under the RFP the Board clearly retained the authority to accept or reject the ET’s recommendations. Where ICANN obviously deviated from its process, however, was by reopening the question of sponsorship after its June 1, 2005 vote. ICANN had repeatedly stated that each proposal that was approved would proceed to contract negotiations. Each proposal that was approved did proceed to negotiations. And each proposal that proceeded to negotiations resulted in a contract – except for .xxx – on the purported grounds that it had not, after all, received approval. Nothing in the documented procedure permitted it to do this.

Further bolstering the conclusion of discriminatory treatment, if one compares ICM Registry’s concept of a sponsored community to that of other successful applicants, one

⁹⁰ Minutes of GAC meeting 22 in Luxembourg, *supra* note 77.

⁹¹ Board member Joichi Ito wrote on his blog, two days after the vote, “the .xxx proposal, in my opinion, has met the criteria set out in the RFP. Our approval of .xxx is based on whether .xxx met the criteria.” Available at: <http://joi.ito.com/weblog/2005/06/03/some-notes-on-t.html>.

finds no important difference. This is especially evident in the cases of *.mobi* and *.jobs*. ICM Registry proposed a *.xxx* top level domain that would be restricted to adult content providers who agreed to conform to certain guidelines regarding the publication of their materials. In other words, the sponsored community was self-selecting. Clearly, nothing in this sponsored model requires all or even most adult content providers to participate. Indeed, it is obvious that many adult content suppliers, *e.g.* those who trade on luring in traffic from people who are not looking for explicit material, those concerned about the extra costs of maintaining additional domains, or those concerned about being blocked by filters, would have an incentive not to support the *.xxx* initiative. For ICANN to suggest that *.xxx* needs the support of those people to qualify as a sponsored domain seems disingenuous at best.

In much the same way, the *.mobi* and *.jobs* domains involve self-selected communities. In the case of *.mobi*, the self-selected group consisted of providers of content on the Internet who agreed to follow certain style sheets and configurations that would facilitate access by mobile devices. There are many web site providers for mobile content who do not participate in the *.mobi* initiative for various reasons. In the case of *.jobs*, the sponsored community meant anyone who agreed to supply a specific kind of service on the Internet. There are many job-oriented web sites that do not make *.jobs* their primary home, *monster.com* being one of the largest and most obvious examples. Incredibly, ICANN also allowed *.tel* to pass sponsorship criteria, although I cannot understand how a domain that describes itself as a domain to “store, update and publish all your contact information, web links and keywords directly on the internet” can be classified as a sponsored domain.⁹² In short, there seems to be no clear or consistent concept of what qualifies as sponsorship emerging from ICANN’s sTLD decisions – yet all of them succeeded except *.xxx*. And, as I discussed before, each of these proposed sTLDs had considerable opposition when the applications were first made public; the level of objections to *.xxx* was very similar until the point when the U.S. government (prodded by a religious conservative campaign) publicly reversed its position on *.xxx*. I must conclude therefore that the only relevant difference explaining the treatment afforded these domains was that

⁹² Advertisement for *.tel* at a registrar site. Available at: http://we.register.it/domains/tel_ext.html?chglng=eng.

.xxx became politically controversial to the U.S. government while the other applications were not. Importantly, U.S. domestic political controversy is not contemplated in the founding documents, which set the parameters of the ICANN/US relationship. Thus political controversy inside the United States cannot serve as a justification for disregarding the rules established in the Bylaws, the Articles of Incorporation, or the specific rules developed to govern the sTLD application process.

7.2 The .xxx application raised public policy concerns

The March 30, 2007 Board resolution also claimed that ICM Registry's application raised "public policy" concerns and that these policy concerns could not be "credibly resolved with the mechanisms proposed by the applicant." I believe that this statement reflects an inherently arbitrary and discriminatory standard of judgment for two reasons.

My first objection relates to the inherent arbitrariness of any attempt to make ICANN's globally applicable decisions reflect the policy concerns of 200+ national governments. ICANN was created to make public policy for the global domain name system precisely because territorial governments and their different legal regimes and jurisdictional boundaries are not suited to the global coordination that the DNS requires. Had .xxx been approved, individual national governments would retain the full authority to pass national laws regarding online adult content, and in several ways the existence of the .xxx domain might help them to do so (see discussion in 7.3 below). The .xxx case is a perfect example of the kind of paralysis that ensues when territorial governments attempt to extend their differing "public policies" into those aspects of Internet administration that must be globally coordinated. When it comes to content regulation and standards of sexual conduct there is a large amount of heterogeneity across governments and societies. Unless all governments in the world agree – and it is manifest that they did *not* have a common position on adult content or .xxx – the concept that an ICANN decision must satisfy any and all governments "public policy" concerns is a fiction. So, in asking ICM Registry to respond to these heterogeneous policy concerns, ICANN (and, I believe, the U.S. government) knew perfectly well that it was asking for the impossible.

The other objection relates to process. On December 15, 2003, ICANN published an RFP which described the process, timetable, and criteria for evaluating sTLD

applications. In that RFP, the words “public policy” do not appear at all and there were no requirements that applicants be prepared to resolve whatever public policy concerns might be asserted by governments. ICANN’s Bylaws did allow the GAC to provide advice on public policy to the Board, but the Bylaws are clear that GAC’s role is *advisory*, and that the ICANN Board has the full capability to reject the GAC’s advice so long as it provides an explanation. Furthermore, 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.⁹³ It is evident from the factual record that governments were expected to provide their advice during the public comment period and in the run up to the Board’s vote on June 1, 2005. Prior to the U.S. government’s change in position, ICANN’s Board and the U.S. government both argued that any objections by individual GAC members to .xxx were too late. If governments fail to participate in a process or, worse, signal to ICANN that they have no concerns and then, after crucial decisions have been made, belatedly decide that they do not like the results and demand a reversal, this not only deviates from basic standards of fair and nonarbitrary treatment, but is a fundamental subversion of their obligation to govern in a lawful and accountable way. Further, when one uniquely important government argued for the .xxx application in mid-July 2005 and then changed its mind two weeks later for purely political reasons that have nothing to do with ICANN’s documented policies, the 2004 round clearly became a very arbitrary process.

ICANN’s March 2007 decision and its IRP Response in this dispute imply that the Board must defer indiscriminately to any claim of public policy concerns raised by any member of the GAC at any time. But this is not true. Even though ICANN was under political pressure, it still had the authority to explain to the U.S. government and the GAC that it had already made a determination that ICM Registry’s application met the RFP criteria. Nothing required it to reopen that decision. ICANN could also have explained to the GAC that it was not supposed to take content into account in assigning TLDs, as it was not contemplated in the RFP. It even could have explained that the creation of the .xxx domain had the potential to facilitate national governments’ regulation of adult

⁹³ ICANN Bylaws, Article III, Section 6 and Article XI, Section 2.

content, by making it easier for them to identify or filter certain kinds of content within such a domain. ICANN had many options. What ICANN lacked, in this case, was a commitment to its documented policies and processes. Its Board and management did not have to accede to demands to derail its process. They could have maintained the integrity of their own process by sticking to documented policies applied objectively and with fairness. They chose not to.

7.3 The agreement did not address the GAC's concern for offensive content and the protection of vulnerable members of the community

The Board resolution asserted that governments' concerns regarding offensive content and vulnerable community members could not be "credibly resolved with the mechanisms proposed by the applicant." While I recognize that many people are concerned about offensive content, such content could appear on other TLDs approved by ICANN, and yet none of the other applicants were required to provide assurances that they would resolve government concerns about such content. A very large amount of offensive content on the Internet today, including images of child abuse, is registered under the *.com* domain, and could be registered under other sTLDs, for that matter. And nobody asks ICANN to work concerns about "offensive content" into the registry agreement of *.com*.

ICANN's RFP did not make any mention of "offensive content" or content regulation issues. And regardless of how legitimate concerns about offensive content are, ICANN is not supposed to take a position on a domain name application based on the content to appear under the domain. Content regulation is not within ICANN's limited policy authority. ICANN's lack of authority over content does not mean that governments have no control over Internet content. Individual governments can take their own measures to respond to any ICANN decision in a way that gives effect to their own public policies. For example, as everyone at the time knew, individual governments could, if they wished, require their national Internet service providers to completely block (or fail to resolve) a new *.xxx* domain.⁹⁴ Or they could require local web site operators to

⁹⁴ For instance, the United Arab Emirates "has a wide-ranging filtering system that prevents its citizens from accessing an unusually high percentage of Internet content," including a block against the

register within that domain. Indeed, the voluntary segregation of adult content into a specific domain could actually enhance the ability of national governments to enforce their own policies in this area. Thus, there was no need for the .xxx application to propose mechanisms to resolve government concerns about content. In fact, proposing such mechanisms would run afoul of ICANN's concern that the .xxx sTLD would involve ICANN in content management, as discussed below.

Placed in context, the so-called "public policy" objections meant little more than that .xxx was singled out for special treatment because of its association with adult content. The .xxx application suffered because some governments clung to the illusion that they could somehow affect all adult content on the Internet by preventing one new TLD. It suffered because governments who were already predisposed against the United States' unilateral control of ICANN saw the potentially embarrassing link to adult content as a handy stick with which to beat ICANN and the U.S. government. It suffered because some governments and advocacy groups saw opposition to the .xxx application as a way to posture in public as being against online adult content – conveniently ignoring the fact that large amounts of online pornographic materials already exist under many other TLDs.

7.4 The application raised law enforcement compliance issues and there are "credible scenarios" in which ICANN would be forced to become involved in content regulation

The fourth and fifth reasons set out in the Board resolution rejecting ICM Registry's application were both stating the same thing, so they are grouped together in the discussion here. They both assert that the revised ICM contract – which GAC members insisted on and ICANN negotiated – would, because of variation in what is considered offensive content across countries, require ICANN to monitor ICM's applications of the terms, thus engaging it in content and conduct regulation. As a rationale for rejecting the .xxx application, this argument recalls the child who murdered her parents, and then asked for clemency on the grounds that she was an orphan. In this

entire Israeli ccTLD (.il). OpenNet Initiative, Internet Filtering in the United Arab Emirates in 2004-2005: A Country Study. Available at: <http://opennet.net/studies/uae>. See also the discussion in *supra* footnote 45.

case, ICANN itself (responding to pressure from GAC and especially the U.S. government) was responsible for inserting into the .xxx contract terms and conditions that required monitoring of compliance by the registry. It then used those very same features as the basis for rejecting the application. This problem emerged precisely because ICANN discarded its documented process and allowed the GAC to become deeply involved in the negotiation and approval of specific contractual conditions. In doing so, ICANN created a situation in which governments attempted to use the contract to control “offensive content” and to assert a much stronger role in ensuring certain kinds of compliance based on the nature of the content posted on .xxx web sites.

But this concern is clearly a discriminatory and arbitrary one, because the issue of monitoring compliance with the rules governing the sponsored community is inherent in any and every sponsored domain. For example, .cat is supposed to be a vehicle for the Catalan community. But what happens if there is a severe division within the Catalan community regarding who does or does not qualify as Catalan? If the group running the domain decides that one faction that wants to be considered Catalan does not qualify and discriminates against its members, ICANN could be confronted with a challenge to the legitimacy of the registry’s policies. If the Spanish government and/or subregional governments became involved in such a dispute (perhaps because one faction or another was alleged to be associated with terrorists) such a problem could indeed raise “public policy matters” of a serious nature. In deciding whether or not to renew the domain, ICANN would necessarily be drawn into making judgments about how the registry determined who is a legitimate representative of the Catalan community or about content of web sites and the domain’s policies regarding who or what is “Catalan.” I noted earlier that many people within ICANN opposed the concept of sponsored domains precisely for this reason.

The larger point, however, is that all issues of compliance with the registry’s policies are matters of contract, be it regarding the .xxx domain or any other sponsored domain. With sponsored TLDs, ICANN essentially delegates to a registry the authority to apply some criterion to include or exclude prospective domain name registrants, based on the registry and sponsoring organization’s rules, not based on any individual country’s laws or regulations. All ICANN has to do is determine whether the registry is following

its stated terms of inclusion or exclusion. ICANN does not directly monitor or regulate web site content or end users, it monitors compliance with the contract. The same issues related to compliance and content are raised by any sponsored domain. Here, .xxx was singled out for special treatment simply because of the politicization of online adult content.

My opinion, based on a review of the foregoing facts, is that ICM Registry's application was rejected not because it failed to meet the RFP criteria but simply because the concept of a domain for adult content became too politically controversial and embarrassing to ICANN and the U.S. government. The factual record clearly demonstrates that the most important factor affecting the fate of the .xxx application was not its relationship to documented criteria but the favor or disfavor of the U.S. government. Throughout the review process, ICANN applied its stated criteria for evaluation loosely, relying primarily on another, unstated criterion that was inherently discriminatory and subjective: namely, an apparent desire to placate powerful stakeholders in order to build favor and support for ICANN as an organization, or to forestall attacks on its legitimacy. Accordingly, ICANN first stretched its criteria to accommodate applicants and then, in response to untimely political pressure, changed its standard to single out an applicant that some felt had become too controversial.

8 Conclusion: ICANN and Accountability

In this section I address the importance of the Panel's decision in this case. The Independent Review Process is, at the current time, the only viable protection that the Internet community has against arbitrary and discriminatory behavior by ICANN (which can apparently occur at the behest of, or with the support of, one or more governments, or any other powerful player).

The question of whether ICANN is subject to meaningful external checks has become increasingly salient in the last three years. ICANN and its community of participants are still working out the ramifications of the U.S. government's 1998 decision to privatize the administration of the DNS. It is still not entirely clear how this *de facto* international organization should be held accountable, to whom it should be held accountable, and how it should relate to traditional national governments and national law. More specifically, it is widely recognized that ICANN's establishment as a

California not-for-profit corporation and its oversight by one national government are problematic for an organization that administers critical *global* resources such as Internet domain names and addresses. Just how problematic this is became evident during the WSIS, the politics of which, as I showed above, played an important role in ICANN's handling of ICM Registry's application.

In the wake of the November 2005 WSIS summit, ICANN's management has been exploring the continued internationalization of ICANN's legal status to overcome some of the political and legal problems associated with its foundation in one country's corporation law and its oversight by the U.S. Department of Commerce. Thus in December 2005, only a few weeks after the final WSIS meeting, ICANN President Paul Twomey asked his President's Strategy Committee to commence a series of consultations on how to "strengthen and complete the ICANN multi-stakeholder model." The Strategy Committee was preoccupied in particular with the "question of whether the international operations and perception of ICANN would benefit from establishing a secondary or parallel legal presence" outside of the United States.⁹⁵

In the process of seeking independence from the U.S. government that this goal implied, ICANN learned that its community of participants is deeply concerned about the need for *accountability* and *independent review*.⁹⁶ In February 2008, the new Board Chair, Peter Dengate Thrush, initiated consultations on "Improving Institutional Confidence."⁹⁷ These consultations started in conjunction with a Department of Commerce hearing on the future of ICANN's JPA with the U.S. Department of Commerce, the expiration of which in September 2009 could remove one form of oversight.⁹⁸ One conclusion of the consultations was that ICANN should "[e]stablish additional accountability mechanisms that allow the community to request the re-

⁹⁵ Report of the President's Strategy Commission, October 2007. Available at: <http://www.icann.org/en/psc/report-2007.pdf>.

⁹⁶ Final President's Strategy Commission Report, March 23, 2007. Available at: <http://www.icann.org/en/psc/psc-report-final-25mar07.pdf>. ("[If ICANN is internationalized] the Board should ensure, however, that appropriate full accountability and review mechanisms are established, including utilizing international arbitration panels.")

⁹⁷ See the web page for the "Improving Institutional Confidence" consultation. Available at: <http://www.icann.org/en/jpa/iic/>.

⁹⁸ Midterm Review of the Joint Project Agreement between NTIA and ICANN, February 28, 2008. Available at: http://www.ntia.doc.gov/ntiahome/frnotices/2008/ICANN_transcripts_080228.pdf.

examination of a decision from the Board...”⁹⁹ ICANN has begun to develop Accountability and Transparency Framework and Principles in response to these concerns.

In this background information one sees several important points. One sees a longstanding concern about ICANN’s accountability to a global community that does not have a single government to act on its behalf. One sees that independent review of ICANN decisions is widely demanded and expected by its constituencies, and is regularly invoked by its current President and Board as a signal of its commitment to responsibility and fairness.¹⁰⁰ One also sees a very intense ongoing debate and discussion about the role of national governments in ICANN, an issue that loomed large in the fate of ICM Registry’s .xxx application.

All of these factors combine to make this first use of ICANN’s Independent Review Process extremely important to the institution itself. ICANN is subject to strong political tensions and pressures from many different sources. ICANN’s existing IRP has never been used; no stakeholder with the resources to lodge a dispute has come along until now. That makes this proceeding a critical step in the evolution of ICANN’s accountability. The accountability standards that emerge from the IRP’s decision in ICM Registry v. ICANN will have a long-term influence on the future of ICANN as an international institution, and through that, on the global governance of the Internet.

Insofar as it has any reason to exist, the IRP exists to hold ICANN accountable. ICANN should not, therefore, be asking for any deference to its prior decision. It should welcome the opportunity to have an Independent Review Panel fully assess the extent to which it applied the evaluation criteria of the sponsored TLD process in a fair, nonarbitrary and nondiscriminatory manner. In the highly politicized environment of Internet governance, it is essential that ICANN be required to apply its rules and procedures impartially and objectively, in order to establish the credibility and legitimacy of this young international regulatory regime.

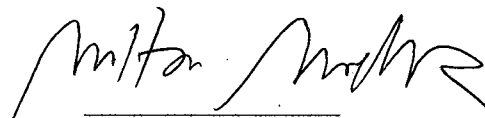
⁹⁹ Improving Institutional Confidence in ICANN, September 2008, p. 4 (Proposal for Discussion). Available at: <http://www.icann.org/en/psc/iic/improving-confidence-revised-en.pdf>.

¹⁰⁰ The House Subcommittee on Commerce, Trade, and Consumer Protection, hearing on *ICANN Internet Governance: Is it Working?*, September 21, 2006, p. 19, Serial No. 109-142. During his testimony in this hearing, Paul Twomey comments that “ICANN does have well established principles and processes

I have relied upon the documents, publicly available, cited herein to prepare this Expert Report and hereby declare that I have prepared this Expert Report to the best of my knowledge and belief.

Date:

12 Jan 2009



Dr. Milton Mueller

for accountability in its decision making and bylaws. . . . [T]here is the ability for appeal to a review committee, and then . . . to an independent review panel and independent arbitration.”

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1989: Ph.D., University of Pennsylvania, Annenberg School
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PUBLICATIONS

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PREVIOUS POSITIONS

1/98 - 9/03: Associate Professor. Syracuse University School of Information Studies.
8/92-7/97: Assistant Professor. Department of Communication, School of Communication, Information, and Library Studies, Rutgers University, New Brunswick, New Jersey. Promoted to Associate Professor, July 1997.
1/97 - 7/97 Visiting Professor. Hong Kong University of Science and Technology, Department of Information and Systems Management. Also 7/95 - 12/95.
8/91 - 8/92: Assistant Director. International Center for Telecommunications Management. College of Business Administration, University of Nebraska at Omaha. Research Associate, 8/89 - 8/91.

PRESENTATIONS, LECTURES, CONFERENCES

<too many to keep up with since 2005>

Invited speaker, "ICANN Studienkreis" conference on Internet governance, Brussels, Belgium, October 21, 2005.

Invited speaker, "Re:Activism conference," Central European University, Budapest Hungary, October 15, 2005.

Invited speaker, "Age of Networks" Seminar, University of Illinois, Institute for Advanced Studies, October 3, 2005.

"Info-communism? A Critique of the Emerging Discourse on Property Rights in Information," TPRC Annual Conference, Alexandria, Virginia, September 24, 2005.

Speaker and organizer, "Regime Change on the Internet? Internet Governance After WGIG." Internet Governance Project, Washington DC, July 28, 2005.

Invited speaker, "IPv6 Resource Management," International Telecommunication Union, Geneva, Switzerland, June 22, 2005.

"Territorial States and the Global Internet: ICANN, Internet Governance, and the UN Secretary-General's Working Group on Internet Governance," International Communication Association, May 29, 2005.

"Info-communism? A Critique of the Emerging Discourse on Property Rights in Information," Governance, Regulations and Powers on the Internet Workshop, Paris, France, May 27-28, 2005.

"Movement in the Making? Communication-Information Policy and Transnational Collective Action by Civil Society," International Studies Association Annual Convention, Honolulu Hawaii, March 5, 2005.

Organizer and host, Symposium on "Internet Governance: Global Rules for Advancing the Information Society," Internet Governance Project, Syracuse University, 12 November 2004.

Invited Expert speaker, Consultation of the United Nations Working Group on Internet Governance, Geneva, Palais des Nations, September 20, 2004.

Invited speaker on Public Policy, "Informatics: Defining the Research Agenda," Indiana University School of Informatics, Bloomington, IN, September 10-12, 2004.

"Civil Society Activism and Communication Information Policy," Invited Presentation, Oxford Internet Institute, Oxford, UK. July 26, 2004.

Invited participant, Conference on "Code as Code," Institute on Information Policy (IvIR), University of Amsterdam, Amsterdam, NL. July 1-2, 2004.

"Internet governance policy in Japan, China and the US." Presented at "Partners Managing Risk: Danger and Opportunity in Pacific Rim Finance and Business Linking China, Japan and the USA. May 14-16, Qingdao, China. (Invited Presentation)

"Governing the Internet: ICANN, WSIS, and the Future of Global Networking." Seoul National University, April 24, 2004. (Invited presentation.)

"Identity Economics and Policy for Distributed Systems," First International Conference on Grid Economics and Business Models, Seoul, Korea, April 23, 2004. (Invited presentation.)

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"ICANN and new top-level domains." International Studies Association Annual Conference, Portland, OR, March 28, 2003. (Competitive paper submission).

ENUM and Broadband Cable Networks. PTC 2003, Pacific Telecommunication Council, Honolulu, HI, Jan. 2003. (competitive paper submission).

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Interest Groups and the Public Interest: Transnational Civil Society and the Globalization of Communications Policy. TPRC 30th Research Conference on Information, Communication and Internet Policy, Alexandria, VA, September 28-30, 2002. (competitive paper submission).

Research on ICANN's Uniform Dispute Resolution Policy. Trademarks in Cyberspace, International Trademark Association, New York, NY September 25-26, 2002. (invited)

Global rights to names: Control of the DNS root and the expansion of intellectual property rights. Annual convention of the International Communication Association, Seoul, Korea, July 15, 2002. (competitive paper submission)

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Dancing the Quango: ICANN and the Privatization of International Governance. Conference on New technologies and International Governance, School of Advanced International Studies, Johns Hopkins University, Washington DC, February 11-12, 2002. (invited)

Governments and Country Names: ICANN's Transformation into an Intergovernmental Regime. PTC 2002, Pacific Telecommunication Council, Honolulu, HI, Jan. 2002. (competitive paper submission)

Convergence: a reality check. Conference on audiovisual services, telecommunications and the WTO, World Trade Organization, Geneva, CH, November 2001. (invited)

Competing DNS roots: creative destruction or just plain destruction? TPRC 29th Research Conference on Information, Communication and Internet Policy, Alexandria, VA, Alexandria, VA, October 2001. (competitive paper submission)

Wealth redistribution and the diffusion of new technologies. Seminar on the digital divide, Columbia Institute for Tele-Information, Columbia University, New York, June 2001. (invited)

Organization and the Internet: Who is Making the Rules Online? New Economy Breakfast for Congressional staff, Washington, DC. Sponsored by Mercatus Center, George Mason University, February 16, 2001. (invited)

International Governance conference. Max Planck Institut Project Group on Law, Politics and Governance, Bonn Germany, February 2001. (invited)

Intellectual Property and Privacy in ICANN Policy, Pressing Issues II: Understanding and Critiquing ICANN's Policy Agenda, Marina Del Rey, California, November 12, 2000. (invited-b)

A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy, New York State Bar Association, Intellectual Property Law Section, Fall Meeting, October 12, 2000, Bolton Landing, New York. (invited)

Rough Justice: A statistical assessment of ICANN's Uniform Dispute Resolution Policy, 28th annual Telecommunications Policy Research conference, Alexandria, Virginia, September 28, 2000. (competitive paper submission)

ICANN and the Representation of Civil Society in Internet Governance, Transatlantic Information Exchange Service (TIES), "Is the Internet Civil society's Best Friend?" Paris, April 4-5, 2000. (invited)

ICANN and Internet Governance, MIT Technology and Culture Forum, Cambridge, Massachusetts, August 4, 2000. (invited)

ICANN and Intelsat: Global Communication Technologies and their Incorporation into International Regimes," 41st Annual Convention of the International Studies Association Los Angeles, California, March 15, 2000. (competitive paper submission)

Technology and Institutional Innovation: Internet Domain Names. 27th Annual Telecommunications Policy Research Conference, Alexandria, Virginia, September 27, 1999. (competitive paper submission).

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Creating Collaboration between Domain Name Registrars and Trademark Owners. ICM Conference on Corporate Domain Names, New York, NY October 13, 1998 (invited).

The 'Governance' Debacle: How the Ideal of Internetworking Got Buried by Politics. INET'98, (Annual Conference of the Internet Society) Geneva, Switzerland, 22 July 1998 (competitive paper submission).

Privatization in New Zealand Telecommunications. Center for Tele-Information, Columbia University, New York, 12 June 1998 (invited).

Spectrum Property Rights. Wireless Information Network Laboratory, Focus 98 on Unlicensed Spectrum, Long Branch, NJ, 22 June 1998 (invited).

Domain Names and Trademarks. Internet Executive Summit, Washington, DC, 4 February 1998. (invited)

The Political Economy of Internet Domain Naming. INET '97 (Annual Conference of the Internet Society) June 24-27, Kuala Lumpur, Malaysia. (competitive paper submission)

China's Telecommunication Sector and the WTO: Can China Conform to the Telecom Regulatory Principles? Conference on China as a Global Economic Power: Market Reforms in the New Millennium Cato Institute and Fudan University, Shanghai, China, June 16, 1997. (invited)

Universal Service: Who Needs it? Conference on Managing and Addressing Universal Service Obligations in a Competitive Telecoms Environment, 26-27 February, Hong Kong. (invited)

Implementing Universal Service: what have the FCC and Joint Board done with Section 254? Conference on Universal Service: Deregulation and Competition in Telecommunications, International Business Communications, Bethesda Maryland, USA, 9 December 1996. (invited)

Telecommunications Access in the Age of Electronic Commerce: Toward a Third-Generation Universal Service Policy. 24th Annual Telecommunications Policy Research Conference, Solomons, Maryland, USA, October 6, 1996. (competitive paper submission)

The Hong Kong Internet Exchange: A case study in the economics and institutional development of Asian internet infrastructure." Conference on Coordination and Administration of the Internet, Harvard University Information Infrastructure Project, Kennedy School of Government, Cambridge, Mass., USA, Sept 10, 1996.

Internet and Government Policy in Hong Kong--Pounding a square peg into a round hole? Center for Internet Exchange Technologies Forum, Chinese University of Hong Kong, August 28, 1996. (invited)

Towards a Political Economy of Communication and Information. International Communication Association, Chicago, Illinois, May 25, 1996. (competitive paper submission)

Interconnecting Cybernetworks. Conference on Telecommunications and Cybernetworks, Columbia Institute for Tele-Information, Columbia University Graduate School of Business, May 17, 1996. (invited)

Telecommunications and the NII. Panel organizer and presenter, INFORMS Spring 1996 meeting, Washington DC, May 7, 1996.

Controlling the Computer: China confronts the global Internet. Conference on Computers, Freedom and Privacy (CFP'96), Massachusetts Institute of Technology, Cambridge, March 30, 1996. (invited-b)

"Telecommunications Futures Forum" Co-organizer of conference sponsored by the Hong Kong University of Science and Technology, Department of Information and Systems Management, November 25, 1995.

"Telecommunications Reforms in a Socialist Market Economy: the Case of China." Seminar, Department of Journalism and Communication, the Chinese University of Hong Kong, October 26, 1995.

"A Structural Approach to Interconnection." Interconnection and InterOperation: A Blueprint for Public Policy, Workshop sponsored by the International Telecommunications Society, Wellington, New Zealand, October 18-20, 1995. (invited)

"Developing a Social Science Research Agenda for the National Information Infrastructure," special conference convened by the Computer and Information Science Division of the (USA) National Science Foundation, Washington, DC, June 1-2, 1995. (invited)

"Telephone Penetration and the Inner City: A Geographic and Demographic Analysis." paper presented at the annual convention of the International Communications Association, Albuquerque, New Mexico (USA), May 25-28, 1995. (competitive paper submission)

Invited Panel Chair and paper presenter, "Universal Service," 22nd Annual Telecommunications Policy Research Conference, October 2, 1994, Solomons Maryland. (Invited) (competitive paper submission)

Keynote speaker, "Establishing Market Share in a Competitive Telecommunications Market," Conference on Hong Kong Telecommunications and Network Competition, September 28-30, 1994 Furama Hotel, Hong Kong.

"Bargaining with a monopoly: deregulated interconnection in New Zealand," Conference on Competition in Network Industries, Columbia Institute for Tele-Information, Columbia University, New York, November 5, 1993. (invited)

"The historical development of Universal Service," Benton Foundation, CITI Universal Service Symposium, Washington DC, October 15, 1993. (invited)

Discussant, panel on "International experiences in telecommunications reform," 21st Annual Telecommunications Policy Research Conference, Solomons, Maryland, October 3, 1993. (competitive paper submission)

"International Trade and International Information Flows: Exploring an Unexamined Relationship." Panel organizer and presenter, International Communications Association Annual convention, May 31, 1993.

"Trade and Telecommunications in Greater China." Pacific Telecommunications Conference, Honolulu, Hawaii, January 18, 1993. (competitive paper submission)

"The User-Defined Network: the Present Extent of Private Networking in the U.S." Presented at the Conference on Private Networks and Public Objectives, Columbia Institute for Tele-Information, Columbia University, New York, December 11, 1992. (competitive paper submission)

"Contested Terrain: International Telecommunications in Hong Kong on the Eve of 1997." 9th International Conference of the International Telecommunications Society, Cannes, France, June 17, 1992. (competitive paper submission)

"Telecommunications Deregulation at the State Level: an Empirical Evaluation." 19th Annual Telecommunications Policy Research Conference, Solomons, Maryland, September 28, 1991. (competitive paper submission)

"Telecommunications Liberalization in the Asia-Pacific Region." Panel co-organizer and presenter, 1991 International Communications Association Convention, Chicago, May 24, 1991. (competitive paper submission)

"Universal Service as a Product of Competitive Struggle." Panel co-organizer and presenter, 1991 International Communications Association Convention, Chicago, May 24, 1991. (competitive paper submission)

"New Zealand's Revolution in Spectrum Management." Rethinking the Invisible Resource, a conference sponsored by the Federal Communications Commission, the National Telecommunications and Information Administration, and the Northwestern University Washington Program in Communications Policy, April 30, 1991. (invited)

Discussant, "Cable Industry's Future in the U.S. Telecommunications Infrastructure." Center for Telecommunications and Information Studies, Columbia University, New York, January 25, 1991.

"Cable and Wireless PLC: A study in global system building." Pacific Telecommunications Council, Honolulu, Hawaii, January 16, 1991. (competitive paper submission)

"The Indigenization of Foreign Culture in Three Chinese Cultural Settings: a Critique of Media Imperialism Theory." 1990 International Communications Association (ICA) convention, Dublin Ireland, June 24. (competitive paper submission)

"Separate System Competition: the Case of Hong Kong." 8th International Conference of the International Telecommunications Society (ITS), Venice, Italy, March 18-21, 1990. (competitive paper submission)

"The Great Information Migration: Historical Perspectives on Shifts in Dominant Media." International Communications Association (ICA) Conference, San Francisco, May 1989. Co-organizer of panel on broadband telecommunications. (competitive paper submission)

"Natural Monopoly and Competition: Myth and Reality in American History." Paper on telephone history presented at session of joint conference of the Organization of American Historians and the National Council on Public History, St. Louis, April 6-9, 1989. (competitive paper submission)

"Open Interconnection and the Economics of Networks: An Analysis and Critique of Current Policy." 16th Annual Telecommunications Policy Research Conference, Airlie House, Virginia, Oct. 30 - Nov. 1, 1988. (competitive paper submission)

"From Competition to Universal Service: The Emergence of Telephone Monopoly in the U.S., 1907-1921." Annual Meeting of the Society for the History of Technology, Wilmington, Delaware, October 21, 1988. (competitive paper submission)

"Capitalism Reborn: the revolution in property relations in U.S. telecommunications." Conference on Technology, Communication and the Humanities, sponsored by the Institute for Advanced Studies in the Humanities, University of Edinburgh, August 19, 1988.

"Letting the BOCs out of the Box." Commenter on presentations by Henry Geller and Herbert Marks on local exchange telephone deregulation, Cato Institute Policy Forum, Washington D.C., July 23, 1987.

I. Introduction

1. My name is Jack Goldsmith. I have been asked by Claimant ICM Registry, LLC, to give an opinion on certain questions of conflicts of law, international law, and Internet law as they relate to the captioned Request for Independent Review.

2. I am the Henry L. Shattuck Professor of Law at Harvard Law School. I have also been on the faculties of the University of Chicago Law School (1997-2003) and the University of Virginia Law School (1994-1997; 2003-2004). My fields of academic research, scholarship, and teaching include public international law, conflicts of law, and the law of the Internet. I have published numerous law review articles in these fields in, among other places, the *Harvard Law Review*, the *Yale Law Journal*, the *University of Chicago Law Review*, and the *European Journal of International Law*. I am also the co-author of, among other publications, *Who Controls The Internet?: Illusions of a Borderless World* (2006), and *The Limits of International Law* (2005). In addition, I am a member of the State Department Advisory Committee on International Law, the American Society of International Law, and the National Academy of Science Study of the Policy Consequences and Legal Ethical Implications of Offensive Information Warfare.

3. Before teaching at Harvard Law School, I was Assistant Attorney General, Office of Legal Counsel from 2003 to 2004, and Special Counsel to the General Counsel of the Department of Defense from 2002 to 2003. In addition, from 1991 to 1992, I was a legal assistant at the Iran-U.S. Claims Tribunal in The Hague, where I assisted George Aldrich, one of the American arbitrators.

4. I received a B.A., *summa cum laude*, from Washington and Lee University (1984), a B.A., first class honours, from Oxford University (1986), a J.D. from Yale Law

School (1989), and a Diploma in Private International Law from the Hague Academy (1992). I am admitted to practice law in Washington, D.C. (1993). My CV, including a complete list of my scholarship, is attached as Exhibit A.

II. Background and Scope of Analysis

5. The Internet is the global network of computers that communicate with one another through a decentralized data routing mechanism. The Internet is, however, centralized in one crucial respect: its naming and numbering system. This system matches the unique Internet Protocol address of each computer in the world (for example, 123.456.78.912) with a recognizable “domain name” like <mcdonalds.com> or <whitehouse.gov> or <metmuseum.org.> Computers around the world are able to find and communicate with one another on the Internet because these Internet Protocol addresses uniquely and reliably correlate with domain names.

6. Some organization must ensure that this crucial naming and numbering system operates properly. Some organization must also decide which top-level domains (such as .COM, .GOV, and .ORG) shall exist. And some organization must administer the distribution and use of these top-level domains. From the 1970s until the late 1990s, these and related functions were performed by the Internet Assigned Numbers Authority (“IANA”), an informal organization run by Professor Jon Postel at the University of Southern California, pursuant to various contracts and understandings with the U.S. government.¹ Since the late 1990s, these functions have been performed by the Internet Corporation for Assigned Names and Numbers (“ICANN”).

¹ See MILTON L. MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE 73-104 (2002); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE LAW J. 17, 51-69 (2000).

7. ICANN is a California non-profit corporation headquartered in Marina Del Rey, California. But it is perhaps the most unusual and powerful non-profit corporation in the world, for it creates and distributes billions of dollars of global property rights on the Internet. The mismatch between ICANN's ostensible private status and its plenary governance 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.²

8. In Article 4 of its Articles of Incorporation, ICANN assumed obligations, including obligations under international law. These obligations were designed to add legitimacy to ICANN's decisions and to address the concerns of those in the United States and the international community who believed that ICANN is, and should function as, an international organization. The original draft of ICANN's Articles of Incorporation did not contain any reference to international law. The first version of what became Article 4 of the Articles was introduced in the "fifth iteration" of the draft Articles of Incorporation in September 1998. It 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.³

² See, e.g., MUELLER, *supra* note 1, at 1-11, 141-184; Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 212-217 (2000).

³ See Internet Assigned Numbers Authority, Draft Articles of Incorporation – Fifth Iteration, available at <http://web.archive.org/web/19990220074640/www.iana.org/articles5.html>.

This “fifth iteration” draft explained that Article 4 “was added in response to various suggestions to recognize the special nature of this organization and the general principles under which it will operate.”⁴

9. This initial effort to acknowledge ICANN’s “special nature” and “the general principles under which it will operate” was viewed as inadequate. On November 21, 1998, following 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.”⁵ The Board voted to revise Article 4 to what became its final version:

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.

This final version of Article 4 amplified ICANN’s international law obligations. While the original version obliged ICANN to carry out its activities “with due regard for applicable . . . international law,” the final version obliged ICANN to carry out its activities “in conformity with relevant principles of international law and applicable international conventions.” As ICANN’s Interim Chairman of the Board explained to the Department of Commerce, these and other changes made to its Articles “reflect emerging

⁴ *Id.*

⁵ See Internet Corporation for Assigned Names and Numbers, Minutes of Special Meeting (Nov. 21, 1998), available at <http://www.icann.org/en/minutes/minutes-21nov98.html>.

consensus about our governance and structure.”⁶ She added that Article 4 in particular “mak[es] it clear that ICANN will comply with relevant and applicable international and local law.”⁷

10. ICANN in its Bylaws took complementary steps to bring basic due process mechanisms, including checks and balances, to its decision-making.⁸ Article 3(1) of the Bylaws provides that the corporation “shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” The Bylaws further state that “[i]n carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws.”⁹ These core values include “open and transparent policy development mechanisms that . . . promote well-informed decisions based on expert advice,” and a requirement to make decisions “by applying documented policies neutrally and objectively, with integrity and fairness.”¹⁰

11. The Bylaws additionally require ICANN to “have in place a separate process for independent third-party review of Board actions alleged by an affected party

⁶ *Joint Hearings before the Committee on Science Subcommittee on Basic Research and Subcommittee on Technology To Consider Department of Commerce Discussion Draft Proposal To Restructure and Privatize the Internet Domain Name System (DNS)*, 105th Cong. 336 (1998) (Letter of Nov. 23, 1998 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)

⁷ *Id.*

⁸ Bylaws for Internet Corporation for Assigned Names and Numbers, art. IV, § 3(b) (May 29, 2008), available at <http://www.icann.org/general/bylaws.htm>.

⁹ *Id.* at art. IV, § 1.

¹⁰ *Id.* at art. I, § 2.

to be inconsistent with the Articles of Incorporation or Bylaws.”¹¹ When a party affected by an adverse ICANN Board decision submits a request for “independent review” of the decision, the Independent Review Panel (“IRP”) “shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”¹²

12. This review process emerged from what ICANN’s first Chairman of the Board described as the “need for a way to obtain recourse in the event that someone may believe ICANN or its staff has broken our own bylaws or otherwise not followed the rules that we have set up for ourselves and our successors.”¹³ The process was included in ICANN’s Bylaws at “the insistence of the U.S. government” as a condition for delegating its control over the Internet’s naming and numbering system to ICANN.¹⁴ As Paul Twomey, ICANN’s President and CEO, recently told Congress, the “independent review panel and independent arbitration” are the ultimate guarantors of ICANN’s “accountability in its decision making.”¹⁵

13. This is the first ICANN IRP ever formed. The issue before the IRP grows out of ICANN’s rejection of an application by Claimant ICM Registry, LLC (“ICM”), a

¹¹ *Id.* at art. IV, § 3(1).

¹² *Id.* at art. IV, § 3(3).

¹³ Letter from Ester Dyson, *supra* note 6.

¹⁴ *See* Weinberg, *supra* note 2, at 228-229 & nn. 211-213.

¹⁵ *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*, 109th Cong. 19 (2006).

Delaware corporation with its principal place of business in Jupiter, Florida, for a sponsored top-level domain (“sTLD”). ICM alleges that ICANN had determined that it qualified for a sTLD under a detailed “request for proposal” but then, under belated pressure from national governments and the Government Advisory Committee (“GAC”), changed its mind and rejected ICM’s application. ICM further alleges that ICANN’s decision to deny ICM the .XXX sTLD, and the process leading up to that decision, were arbitrary, lacking in transparency, discriminatory, contrary to ICANN’s evaluation criteria, and outside ICANN’s mission, all in violation of ICANN’s Articles and Bylaws as well as international law and local law.

14. This Report will address some of the international law, conflicts of law, and Internet law issues raised by these allegations. Part III will explain why international law matters in this proceeding. Part IV will explain why the phrase “relevant principles of international law and applicable international conventions” in Article 4 of ICANN’s Articles of Incorporation includes general principles of law. Part V will describe the content of some of the general principles of law that apply in this Review.

III. Why International Law Matters in This Proceeding

15. ICANN Bylaws require the IRP to determine whether an ICANN Board decision is consistent with ICANN's Bylaws and Articles of Incorporation. Article 4 of the ICANN Articles states that ICANN "shall . . . carry[] out its activities in conformity with relevant principles of international law and applicable international conventions and local law. . . ."¹⁶ It follows straightforwardly from these provisions that this IRP 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."

16. 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. This Independent Review is governed by the International Arbitration Rules of the American Arbitration Association's International Centre for Dispute Resolution Procedures (hereinafter "ICDR Rules"), as modified by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process.¹⁷ Article 28 of the ICDR Rules provides that "[t]he tribunal shall apply the substantive law(s) or rules of

¹⁶ Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, art. 4 (Nov. 21, 1998), *available at* <http://www.icann.org/general/articles.htm>.

¹⁷ *See* American Arbitration Association, International Dispute Resolution Procedures [*hereinafter* IDRPs], *available at* <http://www.adr.org/sp.asp?id=33994>; Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process, *available at* <http://www.adr.org/sp.asp?id=32197>.

law designated by the parties as applicable to the dispute.”¹⁸ The parties to this dispute have designated the laws contained in Article 4 as applicable to this dispute.

17. An offer to arbitrate can be contained in a corporate charter or corporate bylaws.¹⁹ Such charters and bylaws typically concern arbitration with shareholders or partners, but there is no reason that a corporation’s charter or bylaws could not include an offer to arbitrate with affected third parties.²⁰ It is also well established that a party’s participation in arbitral proceedings without protest can be the basis for a valid arbitration agreement.²¹ Indeed, the ICDR Rules provide that any objections to arbitral jurisdiction must be raised in the statement of defense or are waived.²²

18. Just as a corporate charter or corporate bylaws can contain an arbitration agreement, so too they can contain a governing law clause. In addition, parties can consent to governing law through other methods that reveal unambiguous intent. As Born’s treatise notes, “[c]hoice-of-law agreements may be implied or tacit, as well as express. This is recognized in all developed legal systems and has particular importance

¹⁸ *See id.* at art. 28(1).

¹⁹ *See, e.g.*, UNIF. ARBITRATION ACT § 6, cmt. 1, 7 U.L.A. 14-15 (2005) (citing authorities); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1223-26 (2009) (same).

²⁰ *Cf.* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REVIEW 232 (1995).

²¹ *See, e.g.*, BORN, *supra* note 19, at 672 (citing arbitration legislation, national court decisions, and arbitral institution rules for proposition that “a party’s tacit acceptance of its counterparty’s initiation of arbitration, through participation in the arbitral proceedings without raising a jurisdictional objection, can provide the basis for a valid agreement to arbitrate.”).

²² *See* IDRPs Procedures, *supra* note 17, arts. 3, 15(3).

in the context of international commercial arbitration.”²³ Moreover, parties, including private parties, can choose to have their dispute governed by international law, including general principles of law.²⁴ In fact, Article 28’s reference to “rules of law” is a standard way to establish that parties can choose non-national laws, including international law, to govern their disputes.²⁵

19. Putting these principles together and applying them to this case, 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.” The Bylaws establish an offer to arbitrate board decisions under a standard of review of consistency with, among other things, “principles of international law.” ICM accepted this offer when it brought this proceeding, effectively establishing an agreement to arbitrate and an agreement on governing law. Any uncertainty in the nature or scope of the agreement on arbitration and governing law was resolved by ICANN’s Response, which acknowledged that the IRP must assess the consistency of its actions against the Articles of Incorporation, including Article 4’s international law standard.

20. The same conclusion follows even if the parties have not effectively designated the governing laws or rules of law. In such a case, Article 28(1) of the ICDR

²³ BORN, *s upra* note 19, at 2207; *see also* ALAN REDFERN & MARTIN HUNTER (WITH NIGEL BLACKABY & CONSTANTINE PARTASIDES), *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 2-76 (4th ed. 2004).

²⁴ *See* REDFERN & HUNTER, *s upra* note 23, at 2-46 (noting that there is “no reason in principle” why private parties and corporations “should not select public international law, or alternatively the general principles of law, as the law which is to govern their contractual relationship”).

²⁵ *See, e.g.*, BORN, *s upra* note 19, at 2144.

Rules requires the IRP 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.²⁶ California law permits a non-profit corporation like ICANN to limit its powers in its Articles of Incorporation without qualification.²⁷ And ICANN has in fact limited its power by agreeing to act in conformity with “relevant principles of international law and applicable international conventions and local law.” As a result, and once again, the IRP must assess whether ICANN’s actions are consistent with these laws in Article 4.

21. In sum, in an attempt to bring accountability and thus legitimacy to its decisions, ICANN (a) assumed in its Articles of Incorporation an obligation to act in conformity with “relevant principles of international law,” and (b) in its Bylaws extended to adversely affected third parties a novel right of independent review in this arbitration proceeding for consistency with ICANN’s Articles and Bylaws. The parties have agreed to international arbitration in this forum to determine consistency with the international law standards set forth in Article 4 of the Articles of Incorporation. California law allows a California non-profit corporation to bind itself in this way.

²⁶ This is so because, among other reasons, California law is “local law” within the meaning of Article 4 of the Articles of Incorporation and the law that would be chosen by all relevant state or national choice-of-law rules.

²⁷ See Cal. Corp. Code §§ 5131, 5140 (2007) (recognizing that a California nonprofit corporation’s “articles of incorporation may set forth a further statement *limiting the purposes or powers* of the corporation,” and that such a corporation has the powers of a natural person “[s]ubject to *any* limitations contained in the articles or bylaws.”) (emphases added).

IV. The Meaning of Article IV

22. The phrase “principles of international law and applicable international conventions and local law” refers to three types of law. “Local law” means California law. “Applicable international conventions” refers to treaties. The term “principles of international law” includes general principles of law.²⁸

23. The place to begin for understanding 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. It lists three primary sources of international law that the ICJ shall apply:

- 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; . . .²⁹

The phrase “principles of international law” would normally be interpreted to include all three of these sources. Since the first one, “international conventions,” is specified in the ICANN Articles, the reference to “principles of international law” in the Articles refers to the last two, customary international law and general principles of law.³⁰

²⁸ I also believe the phrase includes customary international law, but ICM has not asked me to address issues of customary international law in this Report.

²⁹ Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S 993.

³⁰ It is conceivable that the reference to “*principles* of international law” (as opposed to “rules” of international law or merely “international law”) was meant to pick out “general principles” but exclude customary international law. I doubt this is the correct interpretation. I know of no precedent for an entity to hold itself accountable to treaties and general principles and not custom, and I know of no reason why ICANN would wish to organize itself in this way. But in any event the important point is that Article 4 is best read to include a requirement to act in conformity with general principles of law.

24. This conclusion is confirmed by the drafting history of the ICANN Articles of Incorporation. 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 of the sources in Article 38 of the ICJ Statute. The final draft changed the standard of compliance from “due regard” to “conformity,” and changed “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.

25. This interpretation of “principles of international law” is further confirmed by the interpretation given to similar provisions in many other international law instruments. Most analogous is the Iran-U.S. Claims Tribunal, which is charged with applying “*principles of commercial and international law* as the Tribunal determines to be applicable.”³¹ The Tribunal has interpreted this phrase to include “general principles of law” and “general principles of international law.”³² Similarly, Article 31(3)(c) of the Vienna Convention on Treaties provides that, in interpreting treaties, account must be taken of “any *relevant rules of international law* applicable in the relations between the

³¹ Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, art. V, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 9 (1983) (emphases added).

³² See Grant Hanessian, *General Principles of Law in the Iran-U.S. Claims Tribunal*, 27 COLUM. TRANSNAT’L L. 309 (1989) (citing many examples); John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 A.J.I.L. 278 (1989) (same).

parties,” a term that has been interpreted to include general principles of law.³³

Arbitrators in the International Centre for Settlement of Investment Disputes (“ICSID”) are charged, in the absence of party choice, with applying “such rules of international law as may be applicable.”³⁴ Both the Report of the ICSID Executive Directors and ICSID Tribunals have interpreted “rules of international law” to include general principles of law.³⁵ NAFTA Chapter 11 similarly charges a Tribunal with applying “applicable rules of international law,” and that term too has been interpreted to include general principles.³⁶ In short, references to “principles of international law” and the related phrase “rules of international law” are commonly interpreted to include “general principles.”

26. It is perfectly appropriate to apply “general principles” in this IRP even though ICANN is technically a non-profit corporation and ICM is a private corporation. ICANN voluntarily subjected itself to these general principles in its Articles of Incorporation, something that both California law permits and that is typical in international arbitrations, especially when public goods are at stake. The “international” nature of this arbitration – which is evidenced by the global impact of ICANN’s

³³ See, e.g., Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, ¶158, WT/DS58/AB/R (Oct. 12, 1998).

³⁴ Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 42(1), opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

³⁵ See Executive Directors of the International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, para. 40 (Mar. 18, 1965), available at <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm>; CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY art. 42, para. 113 (2001).

³⁶ See *Methanex Corporation v. United States (NAFTA)*, Final Award on Jurisdiction and Merits (Ad hoc) (UNCITRAL) (Aug. 3, 2005), at para. II(B)3.

decisions, by ICANN's self-description as a "special . . . organization" that should be governed by international law,³⁷ 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 nominally a private corporation. It exercises extraordinary authority, delegated from 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. As explained above, the Article 4 limitations were a response to ICANN's legitimacy deficit and were designed to bring accountability and international legal order to ICANN's decisions.

27. While there is no doubt that ICANN can and has bound itself to general principles of law as that phrase is understood in international law, there is an issue about how general principles should be applied in conjunction with the other legal limitations ICANN assumed in Article 4, and, in particular, with its duty to act in conformity with "local law." When international law is included in a treaty or governing law clause as a source of law alongside national or local law, arbitrators sometimes conclude that international law, including general principles, should trump when in conflict with national law. Here, however, there are no conflicts between the various forms of law in Article 4. In fact, as explained below, the general principles relevant here complement, amplify, and give detail to the requirements of independence, transparency, and due process that ICANN has otherwise assumed in its Articles and Bylaws and under

³⁷ See *infra* text accompanying note 4.

California law. General principles thus play their classic supplementary role in this proceeding.

V. The Content of “General Principles of Law” in this Proceeding: Good Faith

28. The analysis thus far has shown that the IRP must assess whether ICANN’s decision to deny ICM a sTLD, and the process leading to that decision, were consistent with ICANN’s Articles of Incorporation and Bylaws, and that among the obligations assumed in the Articles was a substantive standard of conformity with general principles of law. I now turn to describe some of the “general principles” that apply in this proceeding.

29. The notion of “general principles” as originally articulated in the Permanent Court of International Justice referred to widely accepted principles recognized in national law, and was designed primarily as a gap-filler to avoid *non liquet* when treaties and custom did not address an issue. However, as international law has grown during the last sixty years, the concept of “general principles” has expanded to include general principles that emerge across different types of international legal relations and those that inhere in all forms of legal reasoning, domestic and international.³⁸ Brownlie correctly notes that “general principles” cannot be reduced to a

³⁸ See, e.g., Hermann Mosler, *General Principles of Law*, in THE ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW [hereinafter “ENCYCLOPEDIA”], vol. 2, at 511-512 (1992) (“general principles of law” can mean “principles applied as law generally in national law,” “principles having their origin directly in international legal relations,” and “principles recognized in all kinds of legal relations, regardless of the legal order to which they may belong”).

“rigid categorization of sources,” and that while many such principles can be “traced to state practice,” they are “primarily abstractions from a mass of rules and have been so long and generally accepted as to be no longer directly connected with state practice.”³⁹

30. There are many ostensible general principles of law, but perhaps none as settled or important – across domestic legal systems and in international law – as the principle of good faith.⁴⁰ The general principle of good faith is “the foundation of all law and all conventions.”⁴¹ As the International Court of Justice has noted, “the principle of good faith is a well-established principle of international law.”⁴² It is a fundamental principle of treaty law,⁴³ of the U.N. Charter,⁴⁴ of the law of the World Trade Organization,⁴⁵ of international commercial law,⁴⁶ and of international investment

³⁹ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 19 (7th ed. 2008).

⁴⁰ J.F. O’CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* 35 (1991) (noting that “[t]he principle of good faith probably receives more unqualified acceptance than any other in international law”).

⁴¹ BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 105 (*quoting* Megalidis Case, 8 T.A.M. 386, 395 (1928)); *see also* MALCOLM SHAW, *INTERNATIONAL LAW* 97 (2002) (“[p]erhaps the most important general principle, underpinning many international legal rules, is that of good faith”).

⁴² *Land and Maritime Boundary (Cameroon v. Nig.)*, 1998 I.C.J. 275, 296 (June 11).

⁴³ *See* Vienna Convention on the Law of Treaties, preamble (“*Noting* that the principles of free consent and of *good faith* and the *pacta sunt servanda* rule are universally recognized”) (emphasis added); art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); art. 31(1) (“A treaty shall be interpreted in good faith . . .”).

⁴⁴ U.N. Charter, art. 2, para. 2 (“All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”).

⁴⁵ *See* Helge Elisabeth Zeitler, ‘Good faith’ in the WTO Jurisprudence: Necessary Balancing Element or an Open Door to Judicial Activism, 8(3) J. INT’L ECON. L. 721 (2005).

⁴⁶ *See* UNIDROIT Principles of International Commercial Contracts 2004 [hereinafter “UNIDROIT Principles 2004”], art 1.7, *available at* <http://www.unidroit.org/english/principles/contracts/main.htm> (“[e]ach party must act in accordance with good faith and fair dealing in international trade”). Note that the UNIDROIT

law.⁴⁷ Good faith is also a prevalent general principle in domestic commercial laws.⁴⁸

31. ICANN voluntarily held itself to the good faith standard when, in Article 4 of its Articles of Incorporation, it obliged itself to act “in conformity with principles of international law.” The good faith principle has at least three related applications in this proceeding: (a) the requirement of good faith in complying with legal restrictions; (b) the requirement of good faith in the exercise of discretion, also known as the doctrine of non-abuse of rights; and (c) the requirement of good faith in contractual negotiations.

A. Good Faith in Complying With Legal Restrictions

32. As Shaw has noted, summarizing many arbitral decisions, good faith operates as “a background principle informing and shaping the observance of existing rules of international law and in addition constraining the manner in which those rules may legitimately be exercised.”⁴⁹ Shaw was writing about the good faith principle as it applied to relations among states governed by international law. But the good faith

Principles provide that “[t]hey may be applied when the parties have agreed that their contract be governed by general principles of law,” and as an interpretive guide and supplement to domestic law. UNIDROIT Principles 2004, Preamble.

⁴⁷ See, e.g., *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, Award, May 29, 2004, 43 ILM 133, para. 154; *Waste Management v. Mexico*, Final Award, Apr. 30, 2004, 43 ILM 967, para. 138; *Eureko B.V. v. Poland*, Partial Award, Aug. 19, 2005, para. 235; *Saluka B.V. v. Czech Republic*, Partial Award, Mar. 17, 2006, paras. 361-432.

⁴⁸ See, e.g., E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J.INT’L & COMP. L. 47 (1995).

⁴⁹ SHAW, *supra* note 41, at 98 (citing many sources). Shaw’s dictum about good faith applying to extant legal rules explains what the International Court of Justice meant when it said that good faith, while “one of the basic principles governing the creation and performance of legal obligations,” is “not in itself a source of obligation where none would otherwise exist.” *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69, 105 (Dec. 20).

principle is “equally applicable to relations between individuals and to relations between nations.”⁵⁰

33. The good faith principle attaches to the obligations and legal limitations that ICANN assumed in its Articles and Bylaws and demands that ICANN comply with them “honestly and fairly.”⁵¹ It “requires that one party should be able to place confidence in the words of the other,” and insists that “promises should be scrupulously kept so that . . . confidence . . . may be reasonably placed upon them.”⁵² Similarly, in the investment dispute context, arbitral tribunals have applied the good faith principle, often through the lens of the fair and equitable treatment standard, to require the state to uphold the investor’s legitimate law-based expectations.⁵³ The principle of good faith also encompasses the related principles of fairness, estoppel, and transparency.

34. Taking ICM’s allegations as true, ICANN acted inconsistently with the good faith standard when it denied ICM’s application for a .XXX sTLD, for ICANN did not apply its rules and procedures honestly and fairly and thus did not fulfill ICM’s legitimate expectations based on these rules and procedures. According to the allegations, ICANN departed from its stated sponsorship criteria and instead used

⁵⁰ CHENG, *supra* note 41, at 105.

⁵¹ Anthony D’Amato, *Good Faith*, in *ENCYCLOPEDIA* vol. 2, *supra* note 38, at 599; *see also* CHENG, *supra* note 41, at 119. It is important to note that the good faith principle imposes duties on top of ICANN’s many obligations under its Articles of Incorporation and Bylaws, and provides a legal framework for the analysis of ICM’s claims that numerous provisions of the Articles and Bylaws, including many that I do not mention here, were violated. My focus in this Report is only on the independent duties arising from ICANN’s decision to conform its behavior to principles of international law.

⁵² CHENG, *supra* note 41, at 107, 119.

⁵³ *See supra* note 47.

sponsorship criteria related to vague and undefined public policy and law enforcement concerns that are beyond, and inconsistent with, ICANN's technical mandate. Moreover, ICANN allegedly violated its Bylaws by, among other things, singling out a particular party for disparate treatment and not operating in an open and transparent fashion. These allegations, if true, violate ICANN's good faith obligations.

B. Good Faith In Exercising Discretion: Abuse of Rights

35. Closely related to the general principle of good faith, and indeed a specific application of it, is the general principle of non-abuse of right. The prohibition on abuse of right has many dimensions, but its core meaning is that the exercise of legal discretion or legal rights must be made in good faith.⁵⁴

36. In the *United States Nationals in Morocco Case*, for example, the ICJ held that French officials in Morocco had the legally circumscribed power to value U.S. goods at the Moroccan border, but concluded that the power "must be exercised reasonably and in good faith."⁵⁵ Similarly, in the *Anglo-Norwegian Fisheries Case*, the ICJ determined that Norway had committed no "manifest abuse" in part because its maritime delineation decisions were "moderate and reasonable."⁵⁶ And in the *Admissions of a State to the United Nations Case*, the ICJ held that Article 4 of the U.N. Charter prescribed the exclusive conditions that states could invoke in determining whether to admit a new

⁵⁴ See Complaint by United States, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶158, WT/DS58/AB/R (1998) (noting that "[o]ne application of this general principle [of good faith], the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights"); CHENG, *supra* note 41, at 121 (noting that the abuse of rights principle "is merely an application of this [good faith] principle to the exercise of rights").

⁵⁵ *Rights of Nationals of United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 212 (Aug. 27).

⁵⁶ *Anglo-Norwegian Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, 141-142 (Dec. 18).

nation to the United Nations, and added that “Article 4 does not forbid the taking of account of any factor which it is possible *reasonably and in good faith* to connect to the conditions laid down in that Article.”⁵⁷

37. In all of these cases, nations had legally circumscribed discretion to act, but this discretion was tempered by the good faith principle. Cheng deduces from these and many other arbitral decisions the following principle:

Where the right confers upon its owner a discretionary power, this must be exercised honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others. . . . They must not be exercised fictitiously so as to evade such obligations or rules of law, or maliciously so as to injure others. Violations of these requirements of the principle of good faith constitute abuses of right⁵⁸

Or as O’Connor states the rule, drawing on subsequent decisions not analyzed by Cheng, “the expression ‘abuse of rights’ may be taken to include cases where a legal right – whether arising from a treaty or by virtue of customary rules – is exercised arbitrarily, maliciously or unreasonably, or fictitiously to evade a legal obligation.”⁵⁹

38. Taking ICM’s allegations as true, ICANN violated the prohibition against abuse of right. There are many possible abuses of right alleged by ICM, but the one that strikes me as most obvious is the clearly fictitious basis ICANN gave for denying ICM’s application. ICANN’s reasons for denial included the following:

⁵⁷ Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. 57, 63 (May 28) (emphasis added).

⁵⁸ CHENG, *supra* note 41, at 136; *see also id.* at 132-34 (“discretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused. . . . Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that it must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interest of others.”).

⁵⁹ O’Connor, *supra* note 40, at 38; *see also* Alexandre Kiss, *Abuse of Rights*, in *ENCYCLOPEDIA* vol 1, at 4 (“In international law, abuse of rights refers to a State exercising a right . . . for an end different from that for which the right was created, to the injury of another state.”).

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.⁶⁰

This explanation appears fictitious, and thus an abuse of right, for at least two reasons.

39. First, the concern about "law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application" applies to many top-level domains besides .XXX. The website <pornography.com.> would be no less subject to various differing laws around the world than the website <pornography.xxx.> If anything, pornography on a website on the .XXX domain is *easier* for nations to regulate and exclude from computers in their countries because they can block all sites on the .XXX domain with relative ease but have to look at the content, or make guesses based on domain names, to block unwanted pornography on .COM and other top level domains.⁶¹ In short, this reason for ICANN's denial, if genuine, would extend to many top-level domains and would certainly apply to all generic top-level domains (like .COM,

⁶⁰ Adopted Resolutions from ICANN Board Meeting (Mar. 30, 2007), *available at* <http://www.icann.org/en/minutes/resolutions-30mar07.htm>.

⁶¹ On the techniques of Internet content blocking and their effectiveness, see *ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING* (Ronald Deibert, John Palfrey, Rafal Rohozinski, Jonathan Zittrain, eds., 2008).

.INFO, .NET, and .ORG) where pornographic websites can be found.⁶² But ICANN has only applied this reason for denial to the .XXX domain. This strongly suggests that the reasons for the denial are pretextual and thus that the denial is an abuse of right. Under the guise of content-neutrality, ICANN seems to be exercising power in a content-sensitive way; and it appears to be doing so without candor.

40. Second, and similarly pretextual, is ICANN's claim 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." In fact it is hard to imagine such circumstances. In the unlikely scenario that (a) a national court ordered ICM to shut down a .XXX site that violated a law in that country, and (b) ICM ignored the court order, and (c) the court had jurisdiction over ICANN, it is possible that ICANN could become involved in a national law Internet content dispute. It is implausible to assume that this scenario would be "ongoing." But more importantly, *the same logic applies to generic top level domains like .COM*. The identical scenario could arise if a national court ordered VeriSign (as the registry operator for .COM) to shut down one of the hundreds of thousands of pornography sites on .COM. But ICANN has only expressed concern about an "ongoing management and oversight role regarding Internet

⁶² The worry about multiple law enforcement is not limited to pornography, and .XXX is not the only sTLD that implicates the worry. National laws related to the Internet differ on scores of issues ranging from free speech to gambling to intellectual property to spam. And many sTLDs besides .XXX can potentially run afoul of these laws. For example, a website called <teens.jobs> that solicits the labor of teenagers would likely be illegal in some places and not in others. If national law enforcement compliance issues were a genuine reason not to grant a top-level domain, there would be many fewer top-level domains, and the Internet would be much less robust.

content” in connection with ICM’s application. This strongly suggests, once again, that its reasons are pretextual, and thus that the denial was an abuse of right.

C. Good Faith in Contract Negotiations

41. An additional way that the good faith principle applies here is in requiring ICANN to negotiate its contracts in good faith. It is settled that “[a]s a general principle of law, contracts must be *negotiated* and performed in good faith.”⁶³ In particular, a lack of candor in negotiations can violate the good faith principle.⁶⁴ The requirement of candor also flows from the UNIDROIT commercial principles. These principles apply in cases, like this one, that are governed by general principles.⁶⁵ They require that “each party must act in accordance with good faith and fair dealing in international trade,” and state that it is “bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.”⁶⁶

42. ICM has alleged an absence of good faith and a lack of candor on ICANN’s part in its contractual negotiations. ICM essentially contends that the ICANN Board authorized ICM to enter into contract negotiations over technical and commercial

⁶³ R. DOAK BISHOP, JAMES CRAWFORD, W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES AND CONTROVERSIES 15 (2005) (emphasis added); *see also* Nuclear Tests (Australia v. Fr.), 1974 I.C.J. 253, 268 (Dec. 20) (noting that principle of good faith is “one of the basic principles governing the *creation* and performance of legal obligations”) (emphasis added).

⁶⁴ *See* SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES: 1945-1986, at 173-74 (1989) (summarizing treaty and arbitral developments and concluding that “uncandidness . . . could well be taken as an indication that the negotiations were not being conducted in good faith”).

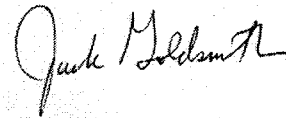
⁶⁵ *See* UNIDROIT Principles 2004, Preamble (noting that UNIDROIT principles “may be applied when the parties have agreed that their contract be governed by general principles of law”); Iran v. Cubic Defense Systems, 29 F. Supp. 2d 1168, 1173 (S.D. Cal. 1998) (confirming International Chamber of Commerce Tribunals Award that appeared to apply UNIDROIT Principles to the dispute as an instance of “general principles of international law”).

⁶⁶ UNIDROIT Principles 2004, arts. 1.7, 2.1.15.

matters without caveats or special instructions; that ICANN gave ICM every indication that ICM had satisfied the RFP evaluation criteria and that the contract negotiations would be straightforward and uncomplicated; that ICM negotiated agreement after agreement with the ICANN staff to meet the increasingly stringent demands imposed by the ICANN Board, acting under pressure from the GAC; and that the ICANN Board ultimately rejected the ICM proposed registry agreement on the basis of criteria that were unrelated to the original published evaluation criteria and beyond ICANN's mandate. These allegations, if true, suggest that the ICANN Board, after the GAC intervention, had no intention of reaching a registry agreement contract, and thus did not negotiate the contract in good faith.

* * *

43. I hereby declare that I have prepared this Expert Report to the best of my knowledge and belief.



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January 22, 2009

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