

# **Exhibit 1**

ARIF HYDER ALI

Contact Information Redacted

January 15, 2018

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning the Independent Review of the Community Evaluation Process by FTI Consulting**

Dear ICANN:

We write on behalf of our client dotgay LLC ("dotgay") to request documents from ICANN pursuant to ICANN's Documentary Information Disclosure Policy ("DIDP"). dotgay submits this request to obtain the documents provided by ICANN to FTI Consulting ("FTI") in connection with FTI's so-called independent review of ICANN's Community Priority Evaluation ("CPE"), which purports to encompass the CPE review of dotgay's community application for the .GAY gTLD.

ICANN published the results of FTI's review on 13 December 2017 in the form of three reports. ICANN did not, however, publish the documents supporting the discussion or conclusions in those reports. "Transparency is one of the essential principles in ICANN's creation documents, and its name reverberates through its Articles [of Incorporation] and Bylaws."<sup>1</sup> ICANN is therefore required to act in a transparent manner under the Articles and Bylaws,<sup>2</sup> and must disclose the materials and research used by FTI in its independent review.

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<sup>1</sup> *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 Jul. 2016), ¶ 101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>2</sup> ICANN Articles of Incorporation, Art. 2(III); ICANN Bylaws (22 Jul. 2017), Art. 1(1.2)(a), Art. 3(3.1), Art. 4(4.1).

Therefore, dotguy requests the materials identified below pursuant to ICANN's DIDP. The DIDP is "intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."<sup>3</sup> None of the reasons for nondisclosure of these documents are applicable here.<sup>4</sup>

For instance, the attorney-client privilege does not bar disclosure of any requested document.<sup>5</sup> Under California law, ICANN waived the attorney-client privilege when it sent the documents to FTI, a third party.<sup>6</sup> The disclosure was part of the ICANN Board's decision "to have some additional information with respect to the CPE Provider's CPE reports" and not based on any legal consultation.<sup>7</sup> Hence, the disclosure was not "reasonably necessary to accomplish the purpose for which a lawyer was consulted" and the attorney-client privilege does not bar ICANN from complying with the DIDP request.<sup>8</sup>

Even if any requested document falls within a Nondisclosure Condition, ICANN must still disclose the documents if "the public interest in disclosing the information outweighs the

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<sup>3</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>. In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*. ICANN staff first identifies all documents responsive to the DIDP request, and then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions. *Process for Responding to DIDP Requests*, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>4</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>.

<sup>5</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en> (identifying attorney-client privilege as a Nondisclosure Condition).

<sup>6</sup> Cal. Evid. Code § 912 (West) (stating that the privilege is waived "if any holder of the privilege, without coercion, has disclosed a significant part of the communication" and noting that a "disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client). . . when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer. . . was consulted, is not a waiver of the privilege."); see *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1236 (2004) ("[C]ourts of this state have no power to expand [the attorney-client privilege] or to recognize implied exceptions. . . . [E]videntiary privileges should be narrowly construed.").

<sup>7</sup> See Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

<sup>8</sup> *Behunin v. Superior Court*, 9 Cal. App. 5th 833, 845 (Ct. App. 2017), *review denied* (June 14, 2017).

harm that may be caused by such disclosure.”<sup>9</sup> We believe that there is significant relevant public interest in disclosure of the information sought in this request, which outweighs any (minimal) harm caused by disclosure of the documents. We are requesting documents that ICANN has already collected and disclosed to FTI as part of its independent review – a review that ICANN has already published<sup>10</sup> – that concerns a significant part of ICANN’s gTLD application process and affects all current and future stakeholders. Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and further compromise the integrity of FTI’s independent review.

Furthermore, this request does not place an undue burden on ICANN. The requested documents have already been collected by ICANN for FTI and therefore are already organized and under ICANN’s complete control. ICANN must simply copy the same documents it provided to FTI for dotgay.

Therefore, pursuant to the DIDP, we request that ICANN provide the following documents:

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;<sup>11</sup>
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and

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<sup>9</sup> ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>.

<sup>10</sup> ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>11</sup> FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017) (“Scope 1 Report”), p. 6, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017) (“Scope 2 Report”), p. 7, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;<sup>12</sup>

3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”<sup>13</sup>
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;<sup>14</sup>
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) “discuss[ ] the substantive of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”<sup>15</sup>
6. All draft CPE Reports concerning .GAY, both with and without comments;<sup>16</sup>
7. All draft CPE Reports concerning .GAY in redline form and/or feedback or suggestions given by ICANN to the CPE provider;<sup>17</sup>
8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN’s questions “regarding the meaning the CPE Provider intended to convey;”<sup>18</sup>
9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Cristina Flores, Russell Weinstein, and Christine Willett;<sup>19</sup>

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<sup>12</sup> Scope 1 Report, p. 6; Scope 2 Report, p. 7.

<sup>13</sup> Scope 1 Report, p. 10.

<sup>14</sup> Scope 1 Report, p. 10.

<sup>15</sup> Scope 1 Report, pp. 11-12.

<sup>16</sup> Scope 1 Report, p. 15.

<sup>17</sup> Scope 1 Report, pp. 13-16.

<sup>18</sup> Scope 1 Report, p. 16.

<sup>19</sup> Scope 1 Report, p. 13.

10. The 13 January 2017 engagement letter between FTI and ICANN;<sup>20</sup>
11. The original Request for Proposal (RFP) pertaining to FTI's review of the CPE process;
12. All of the "CPE Provider's working papers associated with" dotgay's CPE;<sup>21</sup>
13. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"<sup>22</sup>
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"<sup>23</sup>
15. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"<sup>24</sup>
16. FTI's investigative plan used during its independent review;<sup>25</sup>
17. FTI's "follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;"<sup>26</sup>
18. All communications between ICANN and FTI regarding FTI's independent review;

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<sup>20</sup> Reference Materials – Board Submission No. 2017.09.23.0a (23 Sep. 2017), p. 363, <https://www.icann.org/en/system/files/bm/briefing-materials-1-2-redacted-23sep17-en.pdf>.

<sup>21</sup> Scope 3 Report, p. 6.

<sup>22</sup> Scope 2 Report, p. 7.

<sup>23</sup> Scope 2 Report, p. 8.

<sup>24</sup> Scope 2 Report, p. 8.

<sup>25</sup> Scope 2 Report, p. 8.

<sup>26</sup> Scope 2 Report, p. 9.

19. All communications between ICANN and the CPE Provider regarding FTI's independent review;
20. All communications between FTI and the CPE Provider regarding FTI's independent review; and
21. All documents and communications regarding the scope of FTI's independent review.

We reserve the right to request additional documents based on the prompt provision of the above documents. Please promptly disclose the requested documents pursuant to the DIDP.

Sincerely,



Arif Hyder Ali  
Partner

# **Exhibit 2**

13 DECEMBER 2017

# COMMUNICATIONS BETWEEN ICANN ORGANIZATION AND THE CPE PROVIDER

PREPARED FOR JONES DAY



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# I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the New gTLD Program.<sup>1</sup> The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.<sup>2</sup>

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.<sup>3</sup> The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).<sup>4</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization in order to conduct the CPE Process Review.

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.<sup>5</sup> Among other things, he

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<sup>1</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>2</sup> *Id.*

<sup>3</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>4</sup> *Id.*

<sup>5</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.<sup>6</sup> On 2 June 2017, ICANN organization issued a status update.<sup>7</sup> ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.<sup>8</sup> The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

This report addresses Scope 1 of the CPE Process Review and specifically details FTI's evaluation and findings regarding ICANN organization's interactions with the CPE Provider with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program.

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<sup>6</sup> See *id.* The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

<sup>7</sup> <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

<sup>8</sup> <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

## II. Executive Summary

FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion is based upon FTI's review of the written communications and documents described in Section III below and FTI's interviews with relevant personnel. While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization.

## III. Methodology

FTI followed the international investigative methodology, which is a methodology codified by the Association of Certified Fraud Examiners (ACFE), the largest and most prestigious anti-fraud organization globally and which grants certification to members who meet the ACFE's standards of professionalism.<sup>9</sup> This methodology is used by both law enforcement and private investigative companies worldwide. This methodology begins with the formation of an investigative plan which identifies documentation, communications, individuals and entities that may be potentially relevant to the investigation. The next step involves the collection and review of all potentially relevant materials and documentation. Then, investigators interview individuals who, based upon the preceding review of relevant documents, may have potentially relevant information. Investigators then analyze all the information collected to arrive at their conclusions.

Here, FTI did the following:

- Reviewed publicly available documents pertaining to CPE, including:

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<sup>9</sup> [www.acfe.com](http://www.acfe.com). FTI's investigative team, which includes published authors and frequent speakers on investigative best practices, holds this certification.

1. New gTLD Applicant Guidebook (the entire Applicant Guidebook with particular attention to Module 4.2): <https://newgtlds.icann.org/en/applicants/agb>;
2. CPE page: <https://newgtlds.icann.org/en/applicants/cpe>;
3. CPE Panel Process  
Document: <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>;
4. CPE Guidelines  
document: <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>;
5. Updated CPE FAQs: <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>;
6. Contract and SOW between ICANN organization and the CPE Provider, available at: <https://newgtlds.icann.org/en/applicants/cpe>;
7. CPE results and reports:  
<https://newgtlds.icann.org/en/applicants/cpe#invitations>;
8. Preparing Evaluators for the New gTLD Application Process:  
<https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>;
9. New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest:  
<https://www.icann.org/news/announcement-2009-02-25-en>;
10. Evaluation Panels: <https://newgtlds.icann.org/en/program-status/evaluation-panels>;
11. Evaluation Panels Selection Process:  
<https://newgtlds.icann.org/en/about/evaluation-panels-selection-process>;
12. Application Comments:  
<https://gtldcomment.icann.org/applicationcomment/viewcomments>;
13. External media: news articles on ICANN organization in general as well as the CPE process in particular;
14. BGC's comments on Recent Reconsideration Request:  
<https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>;
15. Relevant Reconsideration Requests:  
<https://www.icann.org/resources/pages/accountability/reconsideration-en>;

16. CPE Archive Resources:  
<https://newgtlds.icann.org/en/applicants/cpe#archive-resources>;
17. Relevant Independent Review Process Documents:  
<https://www.icann.org/resources/pages/accountability/irp-en>;
18. New gTLD Program Implementation Review regarding CPE, section 4.1:  
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>;
19. Community Priority Evaluation Process Review Update:  
<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>;
20. Community Priority Evaluation>Timeline:  
<https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>;
21. Community Priority Evaluation Teleconference – 10 September 2013, Additional Questions & Answers:  
<https://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf>;
22. Community Priority Evaluation Process Review Update:  
<https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>;
23. Board Governance Committee:  
<https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>;
24. ICANN Bylaws:  
<https://www.icann.org/resources/pages/governance/bylaws-en>;
25. Relevant Correspondence related to CPE:  
<https://www.icann.org/resources/pages/correspondence>;
26. Board Resolution 2016.09.17.01 and Rationale for Resolution:  
<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>;
27. Minutes of 17 September 2016 Board Meeting:  
<https://www.icann.org/resources/board-material/minutes-2016-09-17-en>;
28. BGC Minutes of the 18 October 2016 Meeting:  
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>;

29. Letter from Chris Disspain to All Concerned Parties, dated 17 April 2016: <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; and
  30. New gTLD Program Implementation Review Report: <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>; and
  31. Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman: <https://omblog.icann.org/index.html%3Fm=201510.html>.
- Requested, received, and reviewed the following from ICANN organization:
    1. Internal emails among relevant ICANN organization personnel relating to the CPE process and evaluations (including email attachments); and
    2. External emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including email attachments).
  - Requested the following from the CPE Provider:
    1. Internal emails among relevant CPE Provider personnel, including evaluators, relating to the CPE process and evaluations (including email attachments);
    2. External emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments); and
    3. The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets.

FTI did not receive documents from the CPE Provider in response to Items 1 or 2. FTI did receive and reviewed documents from ICANN organization that were responsive to the materials FTI requested from the CPE Provider in Item 2 (i.e., emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments)). FTI received and reviewed documentation produced by the CPE Provider in response to Item 3.

- Interviewed relevant ICANN organization personnel

- Interviewed relevant CPE Provider personnel
- Compared the information obtained from both ICANN organization and the CPE Provider.

## IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.<sup>10</sup> CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.<sup>11</sup> CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).<sup>12</sup>

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.<sup>13</sup> In addition, the CPE Provider published the CPE Panel Process Document, explaining that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions.<sup>14</sup> The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.<sup>15</sup> The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process.

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<sup>10</sup> See Applicant Guidebook, Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>11</sup> See *id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

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

<sup>13</sup> <https://newgtlds.icann.org/en/applicants/agn>.

<sup>14</sup> See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

<sup>15</sup> See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

Based upon the materials reviewed and interviews with ICANN organization and CPE Provider personnel, FTI learned that each evaluation began with a notice of commencement from ICANN organization to the CPE Provider via email. As part of the notice of commencement, ICANN organization identified the materials in scope, which included: application questions 1-30a, application comments, correspondence, objection outcomes, and outside research (as necessary). ICANN organization delivered to the CPE Provider the public comments available at the time of commencement of the CPE process. The CPE Provider was responsible for gathering the application materials, including letters of support and correspondence, from the public ICANN organization website.<sup>16</sup>

The CPE Provider personnel responsible for CPE consisted of a core team, a Project Director, a Project Coordinator, and independent evaluators. Before the CPE Provider commenced CPE, all evaluators, including members of the core team, confirmed that no conflicts of interest existed. In addition, all evaluators underwent regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which was followed by regular training sessions to ensure that all evaluators had the same understanding of the evaluation process and procedures.<sup>17</sup>

Two independent evaluators were assigned to each evaluation. The evaluators worked independently to assess and score the application in accordance with the Applicant Guidebook and CPE Guidelines. According to the CPE Provider interviewees, each evaluator separately presented his/her findings in a database and then discussed his/her findings with the Project Coordinator. Then, the Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet. The interviewees stated

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<sup>16</sup> See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

<sup>17</sup> *Id.*

that, at times, the evaluators came to different conclusions on a particular score or issue. In these circumstances, the core team evaluated each evaluator's work and then referred to the Applicant Guidebook and CPE Guidelines in order to reach a conclusion as to scoring. Consistent with the CPE Panel Process Document, before the core team reached a conclusion, an evaluator may be asked to conduct additional research to answer questions that arose during the review.<sup>18</sup> The core team would then deliberate and come up with a consensus as to scoring. FTI interviewed both ICANN organization and CPE Provider personnel about the CPE process and interviewees from both organizations stated that ICANN organization played no role in whether or not the CPE Provider conducted research or accessed reference material in any of the evaluations. That ICANN organization was not involved in the CPE Provider's research process was confirmed by FTI's review of relevant email communications (including attachments) provided by ICANN organization, inasmuch as FTI observed no instance where ICANN organization suggested that the CPE Provider undertake (or not undertake) research. Instead, research was conducted at the discretion of the CPE Provider.<sup>19</sup>

ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report. Once the CPE Provider completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization. ICANN organization provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls.

## V. Analysis

FTI undertook its analysis after carefully studying the materials described above and evaluating the substance of the interviews conducted. The materials and interviews provided FTI with a solid understanding of CPE. The interviews in particular provided FTI with an understanding of the mechanics of the CPE process as well as the roles

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<sup>18</sup> CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

<sup>19</sup> See Applicant Guidebook §4.2.3 at 4-9 ("The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.").

undertaken both separately and together by ICANN organization personnel and the CPE Provider during the process.

FTI proceeded with its investigation in four parts, which are separately detailed below: (i) analysis of email communications among relevant ICANN organization personnel and between relevant ICANN organization personnel and the CPE Provider (including email attachments); (ii) interviews of relevant ICANN organization personnel; (iii) interviews of relevant CPE Provider personnel; and (iv) analysis of draft CPE reports.

#### **A. ICANN Organization’s Email Communications (Including Attachments) Did Not Show Any Undue Influence Or Impropriety By ICANN Organization.**

In an effort to ensure the comprehensive collection of relevant materials, FTI provided ICANN organization with a list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that “hit” on a search term. The search terms were designed to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI’s investigation. In FTI’s experience, it is a best practice to begin with a broader collection and then refine the search for relevant materials as the investigation progresses. As a result, the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website. FTI’s Technology Practice worked with ICANN organization to ensure that the materials were collected in a forensically sound manner. In total, ICANN organization provided FTI with 100,701 emails, including attachments, in native format. The time period covered by the emails received dated from 2012 to March 2017.

An initial review of emails produced to FTI confirmed FTI’s expectation that the initial search terms were overbroad and returned a large number of emails that were not relevant to FTI’s investigation. As a result, FTI performed a targeted key word search to

identify emails pertinent to the CPE process and reduce the time and cost of examining irrelevant or repetitive documents. FTI developed and tested these additional terms using FTI Technology's Ringtail eDiscovery platform, which employs conceptual analysis, duplicate detection, and interactive visualizations to assist in improving search results by grouping documents with similar content and highlighting those that are more likely to be relevant.

Based on FTI's review of email communications provided by ICANN organization, FTI found no evidence that ICANN organization had any undue influence on the CPE reports or engaged in any impropriety in the CPE process. FTI found that the vast majority of the emails were administrative in nature and did not concern the substance or the content of the CPE results. Of the small number of emails that did discuss substance, none suggested that ICANN acted improperly in the process.

### **1. The Vast Majority of the Communications Were Administrative in Nature.**

The email communications that FTI reviewed and which were provided by ICANN organization were largely administrative in nature, meaning that they concerned the scheduling of telephone calls, CPE Provider staffing, timelines for completion, invoicing, and other similar logistical issues. Although FTI was not able to review the CPE Provider's internal emails relating to this work, as indicated above, FTI did interview relevant CPE Provider personnel, and each confirmed that any internal email communications largely addressed administrative tasks.

### **2. The Email Communications that Addressed Substance did not Evidence any Undue Influence or Impropriety by ICANN Organization.**

Of the email communications reviewed by FTI, only a small number discussed the substance of the CPE process and specific evaluations. These emails generally fell into three categories. First, ICANN organization's emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider's draft reports. In these communications, however, FTI observed no instances

where ICANN organization recommended, suggested, or otherwise interjected its own views on what specific conclusion should be reached. Instead, ICANN organization personnel asked the CPE Provider to clarify language contained in draft CPE reports in an effort to avoid misleading or ambiguous wording. In this regard, ICANN organization's correspondence to the CPE Provider largely comprised suggestions on a particular word to be used to capture a concept clearly. FTI observed no instances where ICANN dictated or sought to require the CPE Provider to use specific wording or make specific scoring decisions.

Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization's efforts to understand how the CPE Provider came to its conclusions on a specific evaluation. Based on a plain reading, ICANN organization's questions were clearly intended to ensure that the CPE Provider had engaged in a robust discussion on each CPE criterion in the CPE report.

The third category comprised emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines.<sup>20</sup>

Across all three categories, FTI observed instances where the CPE Provider and ICANN organization engaged in a discussion about using the correct word to capture the CPE Provider's reasoning. ICANN organization also advised the CPE Provider that the CPE Provider's conclusions, as stated in draft reports, at times were not supported by sufficient reasoning, and suggested that additional explanation was needed. However, ICANN organization did not suggest that the CPE Provider make changes in final scoring or adjust the rationale set forth in the CPE report.

Throughout its review, FTI observed instances where ICANN organization and the CPE Provider agreed to discuss various issues telephonically. Emails would then follow

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<sup>20</sup> The CPE Provider may, at its discretion, provide a clarifying question (CQ) to be issued via ICANN organization to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified. See CPE Panel Process Document (<https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

these telephone calls and note that the latest drafts reflected the telephone discussions that had occurred. FTI reviewed the drafts as noted in these communications and compared them with prior versions of the draft reports that were exchanged and confirmed that there was no evidence of undue influence or impropriety by ICANN organization, as described further below.

Ultimately, the vast majority of ICANN organization's emails were administrative in nature. FTI found no email communications that indicated that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE Process.

## **B. Interviews With ICANN Organization Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.**

In March 2017, FTI met with several ICANN organization employees in order to learn more about their interactions with the CPE Provider. FTI interviewed the following individuals who interacted with the CPE Provider over time regarding CPE.

- Chris Bare
- Steve Chan
- Jared Erwin
- Cristina Flores
- Russell Weinstein
- Christine Willett

Each of the ICANN organization personnel that FTI interviewed confirmed that the interactions between ICANN organization and the CPE Provider took place via email (including attachments which were primarily comprised of draft reports with comments in red line form) and conference calls.

The interviewees explained that the initial draft reports received from the CPE Provider (particularly for the first four reports) were not particularly detailed, and, as a result,

ICANN organization asked the CPE Provider a lot of “why” questions to ensure that the CPE Provider’s rationale was sufficiently conveyed. The interviewees stated that they emphasized to the CPE Provider the importance of remaining transparent and accountable to the community in the CPE reports. Based on a plain reading of ICANN organization’s comments to draft CPE reports, none of ICANN organization’s comments were mandatory, meaning that ICANN organization never dictated that the CPE Provider take a specific approach. FTI observed no instances where ICANN organization endeavored to change the scoring or outcome of any CPE. This was confirmed by both ICANN organization personnel and CPE Provider personnel in FTI’s interviews. If changes were made in response to ICANN organization’s comments, they usually took the form of the CPE Provider providing additional information to explain its scoring decisions and conclusions.

The CPE reports became more detailed over time. The ICANN organization personnel who were interviewed noted that, over time, the majority of communications took place via weekly conference calls. Most of ICANN organization’s interaction with the CPE Provider consisted of asking for supporting citations to the CPE Provider’s research or that more precise wording be used. ICANN organization personnel noted that they observed robust debate among CPE Provider personnel concerning various criteria, but that the CPE Provider strictly evaluated the applications against the criteria outlined in the Applicant Guidebook and the CPE Guidelines. The interviewees confirmed that ICANN organization never questioned or sought to alter the CPE Provider’s conclusions.

### **C. Interviews With CPE Provider Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.**

FTI asked to interview relevant CPE Provider personnel involved in the CPE process. The CPE Provider stated that only two CPE Provider staff members remained. In June 2017, FTI interviewed the two remaining staff members, who were members of the core team for all CPEs that were conducted. During the interview, in addition to understanding the CPE process described above, see section IV above, FTI

endeavored to understand the interactions between the CPE Provider and ICANN organization.

The interviewees confirmed that ICANN organization was not involved in scoring the criteria or the drafting of the initial reports, but rather the CPE Provider independently scored each criterion. The interviewees stated that they were strict constructionists and used the Applicant Guidebook as their “bible”. Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

The CPE Provider also stated that ICANN organization provided guidance as to whether or not a particular report sufficiently detailed the CPE Provider’s reasoning. The CPE Provider stated that it never changed the scoring or the results based on ICANN organization’s comments. The only action the CPE Provider took in response to ICANN organization’s comments was to revise the manner in which its analysis and conclusions were presented (generally in the form of changing a word or adding additional explanation). The CPE Provider stated that it also received guidance from ICANN organization with respect to whether a proposed Clarifying Question was permissible under applicable guidelines.

In short, the CPE Provider confirmed that ICANN organization did not impact the CPE Provider’s scoring decisions.

#### **D. FTI’s Review Of Draft CPE Reports Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.**

FTI requested and received from the CPE Provider all draft CPE reports, including any drafts that reflected feedback from ICANN organization. ICANN organization provided feedback in redline form. Some draft reports had very few or no comments, while others had up to 20 comments. In some drafts, the comments were just numbered and not attributed to a particular person. As such, at times it was difficult to discern which

comments were made by ICANN organization versus the CPE Provider.<sup>21</sup> Of the comments that FTI can affirmatively attribute to ICANN organization, all related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions. This is consistent with the information provided by ICANN organization and the CPE Provider during their interviews and in the email communications provided by ICANN organization.

For example, FTI observed comments from ICANN organization personnel suggesting that the CPE Provider include more detailed explanation or explicitly cite resources for statements that did not appear to have sufficient factual or evidentiary support. In other instances, the draft reports reflected an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey. It is clear from the exchanges that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another.

In general, it was not uncommon for the CPE Provider to make revisions in response to ICANN organization's comments. As noted above, these revisions generally took the form of additional information to add further detail to the stated reasoning. However, none of these revisions affected the scoring or results. At other times, the CPE Provider did not make any revisions in response to ICANN organization's comments.

Overall, ICANN organization's comments generally were not substantive, but rather reflected ICANN organization's suggestion that a revision could make the CPE report clearer. Based on FTI's investigation, there is no evidence that ICANN organization ever suggested that the CPE Provider change its rationale, nor did ICANN organization dictate the scoring or CPE results.

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<sup>21</sup> Some comments to draft CPE reports followed verbal conversations between CPE Provider staff and ICANN organization; the CPE Provider stated that it did not possess notes documenting these conversations.

## VI. Conclusion

Following a careful and comprehensive investigation, which included several interviews and an extensive review of available documentary materials, FTI found no evidence that ICANN organization attempted to influence the evaluation process, scoring or conclusions reached by the CPE Provider. As such, FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE process.

# **Exhibit 3**

13 DECEMBER 2017

# ANALYSIS OF THE APPLICATION OF THE COMMUNITY PRIORITY EVALUATION (CPE) CRITERIA BY THE CPE PROVIDER IN CPE REPORTS

PREPARED FOR JONES DAY



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## I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the "process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the New gTLD Program.<sup>1</sup> The Board's action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.<sup>2</sup>

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.<sup>3</sup> The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).<sup>4</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization in order to conduct the CPE Process Review.

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<sup>1</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>2</sup> *Id.*

<sup>3</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>4</sup> *Id.*

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.<sup>5</sup> Among other things, he identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.<sup>6</sup> On 2 June 2017, ICANN organization issued a status update.<sup>7</sup> ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.<sup>8</sup> The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

This report addresses Scope 2 of the CPE Process Review and specifically details FTI's evaluation of whether the CPE Provider consistently applied the CPE criteria throughout each CPE.

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<sup>5</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>6</sup> *See id.* The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

<sup>7</sup> <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

<sup>8</sup> <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

## II. Executive Summary

FTI concludes that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook (Applicant Guidebook)<sup>9</sup> and the CPE Guidelines throughout each CPE. This conclusion is based upon FTI's review of the written communications and documents and FTI's interviews with the relevant personnel described in Section III below.

Throughout its investigation, FTI carefully considered the claims raised in Reconsideration Requests and Independent Review Process (IRP) proceedings related to CPE. FTI specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports. FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner. While some applications received full points for certain criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criteria. Rather, based on FTI's investigation, it was observed that the CPE Provider's scoring decisions were based on a consistent application of the Applicant Guidebook and the CPE Guidelines.

## III. Methodology

### A. FTI's Investigative Approach.

In Scope 2 of the CPE Process Review, FTI was tasked with evaluating whether the CPE Provider applied the CPE criteria consistently throughout each CPE. This type of evaluation is commonly referred to in the industry as a "compliance investigation." In a compliance investigation, an investigator analyzes applicable policies and procedures and evaluates whether a person, corporation, or other entity complied with or properly applied those policies and procedures in carrying out a specific task. Here, FTI

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<sup>9</sup> See Applicant Guidebook, Module 4.2 at Pgs. 4-7 to 4-19 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

employed the aforementioned compliance-focused investigative methodology and strategy in connection with Scope 2 of the CPE Process Review.

FTI also incorporated aspects of a traditional investigative approach promulgated by the Association of Certified Fraud Examiners (ACFE).<sup>10</sup> This international investigative methodology is used by both law enforcement and private investigative companies worldwide.

These types of investigations begin with the formation of an investigative plan which identifies documentation, communications, individuals, and entities that may be potentially relevant to the investigation. The next step involves the collection and review of all potentially relevant materials and documentation, including applicable procedures, materials, and communications pertaining to the subject of the investigation. After gaining a comprehensive understanding of the relevant background facts, investigators then interview relevant individuals deemed to have knowledge pertinent to the subject being investigated.

Investigators then re-review relevant documents and materials, compare information contained in those materials to the information obtained in interviews, identify any gaps, inconsistencies, or contradictions within the information gathered, and ascertain any need for additional information. This step also frequently results in follow-up interviews in order to either confirm or rule out any gaps, inconsistencies, or contradictions. Follow-up interviews also may be conducted to re-confirm with interviewees certain facts or ask for elaboration on certain issues.

Investigators then re-analyze all relevant documentation to prepare for writing the investigative report.

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<sup>10</sup> THE ACFE is the largest and most prestigious anti-fraud organization globally; it grants certification to members who meet its standards of professionalism. See [www.acfe.com](http://www.acfe.com). FTI's investigative team, which includes published authors and frequent speakers on investigative best practices, holds this certification.

## B. FTI's Investigative Steps for Scope 2 of the CPE Process Review.

Consistent with the above-described methodology, FTI undertook the following process to evaluate whether the CPE criteria were applied consistently throughout each CPE.

Specifically, FTI did the following:

- Reviewed publicly available documents pertaining to CPE, including:
  1. New gTLD Applicant Guidebook (the entire Applicant Guidebook with particular attention to Module 4.2):  
<https://newgtlds.icann.org/en/applicants/agb>;
  2. CPE page: <https://newgtlds.icann.org/en/applicants/cpe>;
  3. CPE Panel Process document: <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>;
  4. CPE Guidelines document: <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>;
  5. Updated CPE FAQs: <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>;
  6. Contract and SOW between ICANN organization and the CPE Provider, available at: <https://newgtlds.icann.org/en/applicants/cpe>;
  7. CPE results and reports: <https://newgtlds.icann.org/en/applicants/cpe#invitations>;
  8. Preparing Evaluators for the New gTLD Application Process: <https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>;
  9. New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest: <https://www.icann.org/news/announcement-2009-02-25-en>;
  10. Evaluation Panels: <https://newgtlds.icann.org/en/program-status/evaluation-panels>;
  11. Evaluation Panels Selection Process: <https://newgtlds.icann.org/en/about/evaluation-panels-selection-process>;

12. Application Comments:  
<https://gtldcomment.icann.org/applicationcomment/viewcomments>;
13. External media: news articles on ICANN organization in general as well as the CPE process in particular;
14. BGC's comments on Recent Reconsideration Request:  
<https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>;
15. Relevant Reconsideration Requests:  
<https://www.icann.org/resources/pages/accountability/reconsideration-en>;
16. CPE Archive Resources:  
<https://newgtlds.icann.org/en/applicants/cpe#archive-resources>;
17. Relevant Independent Review Process Documents:  
<https://www.icann.org/resources/pages/accountability/irp-en>;
18. New gTLD Program Implementation Review regarding CPE, section 4.1,  
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>;
19. Community Priority Evaluation Process Review Update:  
<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>;
20. Community Priority Evaluation>Timeline:  
<https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>;
21. Community Priority Evaluation Teleconference – 10 September 2013, Additional Questions & Answers:  
<https://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf>;
22. Community Priority Evaluation Process Review Update:  
<https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>;
23. Board Governance Committee:  
<https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>;
24. ICANN Bylaws:  
<https://www.icann.org/resources/pages/governance/bylaws-en>;
25. Relevant Correspondence related to CPE:  
<https://www.icann.org/resources/pages/correspondence>;

26. Board Resolution 2016.09.17.01 and Rationale for Resolution:  
<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>;
  27. Minutes of 17 September 2016 Board Meeting:  
<https://www.icann.org/resources/board-material/minutes-2016-09-17-en>;
  28. BGC Minutes of the 18 October 2016 Meeting:  
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>;
  29. Letter from Chris Disspain to All Concerned Parties, dated 17 April 2016:  
<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>;
  30. New gTLD Program Implementation Review Report,  
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>; and
  31. Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman, <https://omblog.icann.org/index.html%3Fm=201510.html>.
- Requested, received, and reviewed the following from ICANN organization:
    1. Internal emails among relevant ICANN organization personnel relating to the CPE process and evaluations (including email attachments); and
    2. External emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including email attachments).
  - Requested the following from the CPE Provider:
    1. Internal emails among relevant CPE Provider personnel, including evaluators, relating to the CPE process and evaluations (including email attachments);
    2. External emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments); and
    3. The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets.

FTI did not receive documents from the CPE Provider in response to Items 1 or 2. FTI did receive and reviewed documents from ICANN Organization that were

responsive to the materials FTI requested from the CPE Provider in Item 2 (i.e., emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments)). FTI received and reviewed documentation produced by the CPE Provider in response to Item 3.

- Interviewed relevant ICANN organization personnel.
- Interviewed relevant CPE Provider personnel.
- Compared the information obtained from both ICANN organization and the CPE Provider.

FTI understands that various applicants requested that they be interviewed in connection with the CPE Process Review. FTI determined that such interviews were not necessary or appropriate because FTI's task is to evaluate whether the CPE Provider consistently applied the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines, and neither of those governing documents provide for applicant interviews. Further, in keeping with the Applicant Guidebook and CPE Guidelines, the CPE Provider did not interview applicants during its evaluation process; accordingly, FTI determined that it was not warranted to do so in connection with Scope 2 of the CPE Process Review. FTI did obtain an understanding of applicants' concerns through a comprehensive review and analysis of the materials described above, including claims raised in all relevant Reconsideration Requests and IRP proceedings.

In the context of Scope 2 of the CPE Process Review, FTI examined all aspects of the CPE Provider's evaluation process in evaluating whether the CPE Provider consistently applied the CPE criteria throughout each CPE. Specifically, FTI's investigation included the following steps:

1. FTI formulated an investigative plan and, based on that plan, collected potentially relevant materials (as described above).
2. FTI analyzed all relevant materials (as described above) to ensure that FTI had a solid understanding of the CPE process and specifically the guidelines pertaining to the scoring of the CPE criteria.

3. With that foundation, FTI then evaluated the materials and email communications (including attachments) provided by ICANN organization and the CPE Provider (as described above). FTI also analyzed drafts and final versions of the CPE reports, as well materials submitted in relevant Reconsideration Requests and IRP proceedings challenging CPE outcomes. These documents were particularly relevant to Scope 2 of the CPE Process Review because they reflect the manner in which the CPE Provider applied the CPE criteria to each application and the concerns raised by various applicants regarding the CPE process.
4. FTI then interviewed relevant ICANN organization personnel separately. FTI asked each individual to describe the CPE process and his/her role in that process. FTI also asked each individual to explain his/her interaction with the CPE Provider and his/her understanding of the steps the CPE Provider undertook in order to perform CPE.
5. FTI then interviewed two members of the CPE Provider's staff and asked each to explain in detail his/her understanding of the CPE guidelines. As noted in FTI's report addressing Scope 1 of the CPE Process Review, these two individuals were the only two remaining personnel who participated in the CPE process (both were also part of the core team for all 26 evaluations). Each explained in detail his/her understanding of the CPE criteria. The interviewees also explained the evaluation process the CPE Provider undertook to perform CPE.
6. FTI then analyzed the CPE Provider's working papers associated with each evaluation, including documents capturing the evaluators' work, spreadsheets prepared by the core team for each evaluation and which reflect the initial scoring decisions, notes, and every draft of each CPE report including the final report as published by ICANN organization.
7. FTI engaged in follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided.
8. FTI then re-analyzed the Reconsideration Requests and materials submitted in IRP proceedings pertaining to CPE with a specific focus on identifying any claims that the CPE Provider inconsistently applied the CPE criteria.
9. FTI then reviewed the written materials produced by ICANN organization and the CPE Provider and prepared this report for Scope 2 of the CPE Process Review.

## IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.<sup>11</sup> CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.<sup>12</sup> CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).<sup>13</sup>

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.<sup>14</sup> The CPE Provider personnel interviewed by FTI stated that they were strict constructionists and used the Applicant Guidebook as their "bible." Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

In addition, the CPE Provider published the CPE Panel Process Document, explaining that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions.<sup>15</sup> The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including scoring rubrics,

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<sup>11</sup> See Applicant Guidebook, Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>12</sup> *Id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>13</sup> *Id.*

<sup>14</sup> <https://newgtlds.icann.org/en/applicants/agb>.

<sup>15</sup> See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

definitions of key terms, and specific questions to be scored.<sup>16</sup> The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process. As discussed in further detail below, the CPE Guidelines set forth the methodology that the CPE Provider undertook to evaluate each criterion.

Based upon the materials reviewed and interviews with ICANN organization and CPE Provider personnel, FTI learned that each evaluation began with a notice of commencement from ICANN organization to the CPE Provider via email. As part of the notice of commencement, ICANN organization identified the materials in scope, which included: application questions 1-30a, application comments, correspondence, objection outcomes, and outside research (as necessary). ICANN organization delivered to the CPE Provider the public comments available at the time of commencement of the CPE process. The CPE Provider was responsible for gathering the application materials, including letters of support and correspondence, from the public ICANN organization website.<sup>17</sup>

The CPE Provider personnel responsible for CPE consisted of a core team, a Project Director, a Project Coordinator, and independent evaluators. Before the CPE Provider commenced CPE, all evaluators, including members of the core team, confirmed that no conflicts of interest existed. In addition, all evaluators underwent regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which was followed by regular training sessions to ensure that all evaluators had the same understanding of the evaluation process and procedures.<sup>18</sup>

Two independent evaluators were assigned to each evaluation. The evaluators worked independently to assess and score the application in accordance with the Applicant

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<sup>16</sup> See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

<sup>17</sup> See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

<sup>18</sup> *Id.*

Guidebook and CPE guidelines. During its investigation, FTI learned that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, "Is the community clearly delineated?"; the same question appears in the CPE Guidelines. The Answer section had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a "yes" or "no" response. In the Evidence section, the evaluator provided his/her reasoning for his/her answer. In the Source section, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including but not limited to, the application (or sections thereof), reference material, or letters of support or opposition. The same questions were asked and the same criteria were applied to every application, and the responses and resulting evaluations formed the basis for the evaluators' scoring decisions.

According to the CPE Provider interviewees, each evaluator separately presented his/her findings in the database and then discussed his/her findings with the Project Coordinator. Then, the Project Coordinator created a spreadsheet that included sections detailing the evaluators' answers to the Question section in the database and summarizing the evaluators' conclusions on each criterion and sub-criterion. The core team then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet. The interviewees stated that, at times, the evaluators came to different conclusions on a particular score or issue. In these circumstances, the core team evaluated each evaluator's work and then referred to the Applicant Guidebook and CPE Guidelines in order to reach a conclusion as to scoring. Consistent with the CPE Panel Process Document, before the core team reached a conclusion, an evaluator may be asked to conduct additional research to answer

questions that arose during the review.<sup>19</sup> The core team would then deliberate and coming up with a consensus as to scoring.

The process of drafting a CPE report would then commence. Each sub-criterion and the scoring rationale were addressed in each relevant section of the draft report. As discussed in further detail in FTI's report relating to Scope 1 of the CPE Process Review, ICANN organization had no role in the evaluation process and no role in the writing of the initial draft CPE report. Based upon FTI's investigation, the CPE Provider followed the same evaluation process in each CPE.<sup>20</sup> The CPE Provider's role was to determine whether the community-based application fulfilled the four community priority criteria set forth in Section 4.2.3 of the Applicant Guidebook. As discussed in detail below, the four criteria include: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement. The sequence of the criteria reflects the order in which they will be assessed by the panel.<sup>21</sup> To prevail in CPE, an application must receive at least 14 out of 16 points on the scoring of the foregoing criteria, each of which is worth a maximum of four points.<sup>22</sup> The CPE criteria is discussed further below.

## A. Criterion 1: Community Establishment.

The Community Establishment criterion evaluates "the community as explicitly identified and defined according to statements in the application."<sup>23</sup> The Community Establishment criterion is measured by two sub-criterion: (i) 1-A, "Delineation;" and (ii) 1-B, "Extension."<sup>24</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> See Report Re: Scope 1 of CPE Process Review.

<sup>21</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-10-4-17 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>22</sup> *Id.* at Pg. 4-10.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

An application may receive a maximum of four points on the Community Establishment criterion, including up to two points for each sub-criterion, which are Delineation and Extension. To obtain two points for Delineation, the community must be "clearly delineated, organized, and pre-existing."<sup>25</sup> One point is awarded if a community is a "clearly delineated and pre-existing community" but does not fulfill the requirements for a score of 2.<sup>26</sup> Zero points are awarded if there is "insufficient delineation and pre-existence for a score of 1."<sup>27</sup>

To obtain two full points for Extension, the community must be "of considerable size and longevity."<sup>28</sup> One point is awarded if the community is "of either considerable size or longevity, but not fulfilling the requirements for a score of 2."<sup>29</sup> Zero points are awarded if the community is "of neither considerable size nor longevity."<sup>30</sup>

For sub-criterion 1-A, Delineation, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the community clearly delineated?<sup>31</sup>
- Is there at least one entity mainly dedicated to the community?<sup>32</sup>
- Does the entity have documented evidence of activities?<sup>33</sup>
- Has the community been active since at least September 2007?<sup>34</sup>

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<sup>25</sup> *Id.*

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

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

<sup>28</sup> *Id.*

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

<sup>30</sup> *Id.*

<sup>31</sup> See CPE Guidelines at Pg. 3 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

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

<sup>33</sup> *Id.*

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

The CPE Guidelines provide additional guidance on factors that can be considered when evaluating these four questions.<sup>35</sup>

For sub-criterion 1-B, Extension, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the community of considerable size?<sup>36</sup>
- Does the community demonstrate longevity?<sup>37</sup>

## B. Criterion 2: Nexus between Proposed String and Community.

The Nexus criterion evaluates "the relevance of the string to the specific community that it claims to represent."<sup>38</sup> The Nexus criterion is measured by two sub-criterion: (i) 2-A, "Nexus"; and (ii) 2-B, "Uniqueness."<sup>39</sup>

An application may receive a maximum of four points on the Nexus criterion, including up to three points for Nexus and one point for Uniqueness. To obtain three points for Nexus, the applied-for string must "match the name of the community or be a well-known short-form or abbreviation of the community."<sup>40</sup> For a score of 2, the applied-for string should closely describe the community or the community members, without overreaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for ".TENNIS") then it would not

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<sup>35</sup> *Id.* at Pgs. 3-5.

<sup>36</sup> *Id.* at Pg. 5.

<sup>37</sup> *Id.*

<sup>38</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-13

(<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>39</sup> *Id.* at Pgs. 4-12-4-13.

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

qualify for a 2.<sup>41</sup> Zero points are awarded if the string "does not fulfill the requirements for a score of 2."<sup>42</sup> It is not possible to receive a score of one for this sub-criterion.

To obtain one point for Uniqueness, the applied-for string must have "no other significant meaning beyond identifying the community described in the application."<sup>43</sup> Uniqueness will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for Uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrase "beyond identifying the community" in the score of 1 for Uniqueness implies a requirement that the string does identify the community, i.e. scores 2 or 3 for Nexus, in order to be eligible for a score of 1 for Uniqueness.<sup>44</sup> It should be noted that Uniqueness is only about the *meaning* of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."<sup>45</sup> Zero points are awarded if the string "does not fulfill the requirements for a score of 1."<sup>46</sup>

For sub-criterion 2-A, Nexus, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.<sup>47</sup>

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at Pg. 4-13.

<sup>44</sup> *Id.* at Pgs. 4-13-4-14.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See CPE Guidelines at Pg. 7 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

For sub-criterion 2-B, Uniqueness, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the string have any other significant meaning (to the public in general) beyond identifying the community described in the application?<sup>48</sup>

### C. Criterion 3: Registration Policies.

The Registration Policies criterion evaluates the registration policies set forth in the application on four elements: (i) 3-A, "Eligibility"; (ii) 3-B, "Name Selection"; (iii) 3-C, "Content and Use"; and (iv) 3-D, "Enforcement."<sup>49</sup> An application may receive a maximum of four points on the Registration Policies criterion, including one point for each of the four sub-criterion stated above.

For sub-criterion 3-A, Eligibility, one point is awarded if "eligibility is restricted to community members."<sup>50</sup> If there is a "largely unrestricted approach to eligibility," zero points are awarded.<sup>51</sup>

For sub-criterion 3-B, Name Selection, one point is awarded if the policies set forth in an application "include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD."<sup>52</sup>

For sub-criterion 3-C, Content and Use, one point is awarded if the policies set forth in an application "include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD."<sup>53</sup>

For sub-criterion 3-D, Enforcement, one point is awarded if the policies set forth in an application "include specific enforcement measures (e.g., investigation practices,

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<sup>48</sup> *Id.* at Pgs. 9-10.

<sup>49</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-14-4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>50</sup> *Id.* at Pg. 4-14.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at Pg. 4-15.

<sup>53</sup> *Id.*

penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms."<sup>54</sup>

For sub-criterion 3-A, Eligibility, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Is eligibility for being allowed as a registrant restricted?<sup>55</sup>

For sub-criterion 3-B, Name Selection, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Do the policies set forth in the application include name selection rules?<sup>56</sup>
- Are name selection rules consistent with the articulated community-based purpose of the applied-for gTLD?<sup>57</sup>

For sub-criterion 3-C, Content and Use, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Do the policies set forth in the application include content and use rules?<sup>58</sup>
- If yes, are the content and use rules consistent with the articulated community-based purpose of the applied-for gTLD?<sup>59</sup>

For sub-criterion 3-D, Enforcement, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Do the enforcement policies set forth in the application include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms?<sup>60</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> See CPE Guidelines at Pg. 11 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

<sup>56</sup> *Id.* at Pg. 12.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at Pg. 13.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at Pg. 14.

## D. Criterion 4: Community Endorsement.

The Community Endorsement criterion evaluates community support for and/or opposition to an application."<sup>61</sup> The Community Endorsement criterion is measured by two sub-criterion: (i) 4-A, "Support"; and (ii) 4-B, "Opposition."<sup>62</sup> An application may receive a maximum of four points on the Community Endorsement criterion, including up to two points for each sub-criterion.

To obtain two points for the Support sub-criterion, an applicant must be the recognized community institution/member organization or have documented support from the recognized community institution/member organization, or have otherwise documented authority to represent the community.<sup>63</sup> "Recognized" community institutions are those institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.<sup>64</sup> In cases of multiple institutions/organizations, there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.<sup>65</sup> To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.<sup>66</sup>

One point is awarded if the applicant has submitted documented support with its application from at least one group with relevance,<sup>67</sup> but does not have documented support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent

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<sup>61</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-17  
(<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>62</sup> *Id.*

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

<sup>64</sup> *Id.* at Pgs. 4-17-4-18.

<sup>65</sup> *Id.* at Pg. 4-18.

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

<sup>67</sup> *Id.* at Pg. 4-17.

the community with its application.<sup>68</sup> Zero points are awarded if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community.<sup>69</sup>

To obtain two points for the Opposition sub-criterion, there must be "no opposition of relevance" to the application.<sup>70</sup> One point is awarded if there is "relevant opposition from one group of non-negligible size."<sup>71</sup> Zero points are awarded if there is "relevant opposition from two or more groups of non-negligible size."<sup>72</sup> When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for "Opposition." To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.<sup>73</sup>

For sub-criterion 4-A, Support, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the applicant the recognized community institution or member organization?<sup>74</sup>
- Does the applicant have documented support from the recognized community institution(s)/member organization(s) to represent the community?<sup>75</sup>

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<sup>68</sup> *Id.* at Pg. 4-18.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at Pg. 4-17.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at Pgs. 4-18-4-19 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>74</sup> See CPE Guidelines at Pgs. 16-17 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

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

- Does the applicant have documented authority to represent the community?<sup>76</sup>
- Does the applicant have support from at least one group with relevance?<sup>77</sup>

For sub-criterion 4-B, Opposition, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the application have any opposition that is deemed relevant?<sup>78</sup>

## V. The CPE Provider Applied The CPE Criteria Consistently In All CPEs.

FTI assessed whether the CPE Provider consistently followed the same evaluation process in all CPEs, and whether the CPE Provider applied the CPE criteria on a consistent basis throughout the evaluation process. FTI found that the CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE. In particular, as explained in detail below, the CPE Provider evaluated each application in the same way. While some applications received full points, others received partial points, and others received zero points for any given criterion, the scoring decisions were not the result of any inconsistent or disparate treatment by the CPE Provider. Instead, the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI also evaluated whether the CPE Provider was consistent in the use of Clarifying Questions, and concludes that a consistent approach was employed.

FTI's investigation was informed by the concerns raised in the Reconsideration Requests, IRP proceedings and correspondence submitted to ICANN organization related to the CPE process. Reconsideration is an accountability mechanism available under ICANN organization's Bylaws and involves a review process administered by the

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

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

<sup>78</sup> *Id.* at Pg. 19.

BGC.<sup>79</sup> Since the commencement of the New gTLD Program, more than 20 Reconsideration Requests have been filed where the requestor sought reconsideration of CPE results. FTI reviewed in detail these requests and the corresponding BGC's recommendations and/or determinations, as well as the Board's actions associated with these requests.<sup>80</sup> Several requestors made claims that are of particular relevance to Scope 2 of the CPE Process Review. Specifically, FTI observed several claims that certain CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports, particularly with respect to the Community Establishment and Nexus criteria. FTI also reviewed claims raised by various claimants in IRP proceedings challenging CPE outcomes. FTI factored the CPE-related claims raised in both the Reconsideration Requests and the IRPs into its investigation. It is noted, however, that FTI's task is to evaluate whether the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines were applied consistently throughout each CPE.<sup>81</sup> FTI was not asked to re-evaluate the applications. Ultimately, as detailed below, FTI found no evidence of inconsistent or disparate treatment by the CPE Provider.

### A. The Community Establishment Criterion (Criterion 1) was Applied Consistently in all CPEs.

To assess whether the Community Establishment criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, i.e., Delineation and Extension. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and

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<sup>79</sup> Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN organizations Bylaws, 1 October 2016, ART. 4, § 4.2 (e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN organization Bylaws, 22 July 2017, 4, § 4.2 (e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

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

<sup>81</sup> See <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>; see also <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

corresponding rationale for each sub-criterion for Community Establishment for each report and compared all reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Community Establishment criterion is measured by two sub-criterion: (i) Delineation (worth two points); and (ii) Extension (worth two points).<sup>82</sup> While some applications received full points for the Community Establishment criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on its investigation, FTI concludes that all applications were evaluated on a consistent basis by the CPE Provider.

## 1. Sub-criterion 1-A: Delineation

To receive two points for Delineation, the Applicant Guidebook and CPE Guidelines require that the community as defined in the application be clearly delineated, organized, and pre-existing.<sup>83</sup> FTI observed that all 26 CPE reports revealed that the CPE Provider methodically evaluated each element across all 26 CPEs. As reflected in twelve CPE reports, the relevant applications received the maximum two points;<sup>84</sup> as

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<sup>82</sup> Applicant Guidebook, Module 4.2.3 at Pg. 4-10 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>83</sup> *Id.* See also CPE Guidelines at Pg. 3 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

<sup>84</sup> Twelve CPE reports recorded the maximum two points. See OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

shown in one CPE report, the relevant application received one point;<sup>85</sup> and as noted in 13 CPE reports, the relevant applications received zero points.<sup>86</sup>

### a. Clearly Delineated

Two conditions must be met for a community to be clearly delineated: (i) there must be a clear, straightforward membership definition; and (ii) there must be awareness and recognition of a community as defined by the application among its members.<sup>87</sup>

FTI observed that "a clear and straightforward membership" definition was deemed to be sufficiently demonstrated where membership could be determined through formal registration, certification, or accreditation (i.e., license, certificate of registration, etc.).<sup>88</sup> This was the case even if the CPE Provider found the community definition to be

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<sup>85</sup> One CPE report recorded one point. See RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>86</sup> Thirteen CPE reports recorded zero points. See IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

<sup>87</sup> Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>88</sup> The CPE Provider determined that six of the 13 applications that received zero points for the Delineation sub-criterion were not "clearly delineated" because they did not demonstrate "a clear and straightforward membership." See ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>), GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

broad.<sup>89</sup> On the other hand, the CPE Provider determined that a community definition did not demonstrate a "clear and straightforward membership" if it was too broadly defined in the application and could not be determined through formal registration, or was "unbound and dispersed" because the community may not resonate with all stakeholders that it seeks to represent.<sup>90</sup> The CPE Provider also determined that a community definition showed a clear and straightforward membership where the membership was dependent on having a clear connection to a defined geographic area.<sup>91</sup>

FTI observed that the CPE Provider determined that there was "awareness and recognition of a community as defined by the application among its members" where membership could be determined through formal registration, certification, or accreditation (i.e., license, certificate of registration, etc.).<sup>92</sup> On the other hand, the CPE Provider determined that the community as defined in the application did not have awareness and recognition among its members if the affiliated businesses and sectors had only a tangential relationship with the core community. In those instances, the CPE Provider found that the affiliated businesses and sectors would not associate

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<sup>89</sup> See, e.g., TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

<sup>90</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>91</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); and CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>).

<sup>92</sup> See, e.g., MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

themselves with the community as defined.<sup>93</sup> The CPE Provider also determined that commonality of interest was not enough to satisfy the "awareness and recognition of a community" element because it did not provide substantive evidence of what the Applicant Guidebook defines as "cohesion."<sup>94</sup>

The applications underlying the 12 CPE reports that recorded two points, and the one CPE report that recorded one point satisfied both aspects of the clearly delineated prong of the Delineation sub-criterion: the applications demonstrated a "clear and straightforward membership" of community and an "awareness and recognition of a community as defined by the application among its members."<sup>95</sup> Of the applications underlying the 13 CPE reports that recorded zero points for the clearly delineated prong of the Delineation sub-criterion, six did not satisfy either element for the clearly delineated prong.<sup>96</sup> The applications underlying the seven CPE reports that recorded

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<sup>93</sup> See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); and LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

<sup>94</sup> See, e.g., ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>).

<sup>95</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>96</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report ([26](https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-</a></p></div><div data-bbox=)

zero points for the clearly delineated prong were determined to have demonstrated a "clear and straightforward membership" of community, but failed to demonstrate an "awareness and recognition of a community as defined by the application among its members."<sup>97</sup> The applications underlying all 13 of the CPE reports that recorded zero points failed to satisfy the "awareness" element of the clearly delineated prong of the Delineation sub-criterion.

## b. Organization

Two conditions must be met to fulfill the requirements for organization: (i) there must be at least one entity mainly dedicated to the community; and (ii) there must be documented evidence of community activities.<sup>98</sup>

FTI observed that, where the CPE Provider determined that there was not "at least one entity mainly dedicated to the community," then the existing entities did not represent a majority of the community as defined in the application.<sup>99</sup> If the CPE Provider determined that an application failed to satisfy either prong under the "clearly delineated" analysis (*see infra*), then the CPE Provider also determined that there was not "at least one entity mainly dedicated to the community" as defined in the application.<sup>100</sup> All applications that received two points for the Delineation sub-criterion

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46695-en.pdf); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

<sup>97</sup> TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); and SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

<sup>98</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>99</sup> See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

<sup>100</sup> See IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840->

were determined to have "at least one entity mainly dedicated to the community."<sup>101</sup> Of the applications underlying the 13 CPE reports that recorded zero points and the one report that recorded one point for the Delineation sub-criterion, all were deemed to lack "at least one entity mainly dedicated to the community" as defined.<sup>102</sup>

With respect to the "documented evidence of community activities" prong, FTI observed that an application was deemed to have satisfied this condition where community

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en.pdf); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

<sup>101</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

<sup>102</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

activities were documented through formal membership or registration.<sup>103</sup> On the other hand, if the CPE Provider determined that an application was unable to demonstrate that there existed at least one entity mainly dedicated to the community as defined, then that application did not satisfy this prong. Of the applications underlying the 12 CPE reports that recorded two points for the Delineation sub-criterion, all satisfied the "documented evidence of community activities" prong.<sup>104</sup> All of the applications underlying the 14 CPE reports that were deemed to lack "at least one entity mainly dedicated to the community" as defined in the application, were also deemed to lack "documented evidence of community activities."<sup>105</sup>

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<sup>103</sup> See, e.g., HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); and TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>).

<sup>104</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

<sup>105</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

### c. Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).<sup>106</sup>

Thirteen applications failed to satisfy the pre-existence prong;<sup>107</sup> twelve applications satisfied this prong.<sup>108</sup>

FTI observed that, if the community as defined in the application was determined by the CPE Provider to be a "construed" community,<sup>109</sup> then the CPE Provider also found that the community did not exist prior to September 2007, even if its constituent parts may have been active prior to September 2007.<sup>110</sup> Further, if the CPE Provider determined

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<sup>106</sup> Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>107</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

<sup>108</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>109</sup> Applicant Guidebook, Module 4.2.3 at Pg. 4-9 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>110</sup> See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>).

that an application failed to satisfy either prong under the "clearly delineated" analysis (see *infra*), then the CPE Provider also determined that the application did not satisfy the requirements for pre-existence.<sup>111</sup> Each of the applications underlying the 13 CPE reports that recorded zero points for the Delineation sub-criterion were deemed by the CPE Provider to set forth a "construed community."<sup>112</sup> Each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion were determined to have demonstrated pre-existence prior to September 2007.<sup>113</sup>

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18840-en.pdf); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); and ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

<sup>111</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-10

(<https://newgtlds.icann.org/en/applicants/agg/string-contention-procedures-04jun12-en.pdf>).

<sup>112</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

<sup>113</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

## 2. Sub-Criterion 1-B: Extension

The Applicant Guidebook and CPE Guidelines require a community of considerable size and longevity to receive full points for the Extension sub-criterion.<sup>114</sup>

### a. Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members. The CPE Provider determined that all community applicants defined communities of considerable size.<sup>115</sup> FTI observed that, where the CPE Provider determined that the community lacked clear and straightforward membership or there was not awareness of a community (i.e., where the CPE Provider found that the

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<sup>114</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-10, (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also CPE Guidelines at Pg. 5 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

<sup>115</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

community as defined in the application was not "clearly delineated"), then the CPE Provider determined that the size requirements could not be met.<sup>116</sup> All of the applications underlying the 13 CPE Reports that recorded zero points for the "clearly delineated" prong failed to demonstrate awareness of a community among its members.<sup>117</sup> Therefore, despite the fact that the CPE provider concluded that these 13 applications demonstrated communities of considerable size, all 13 that received zero points for the "clearly delineated" prong could not satisfy the size requirements.<sup>118</sup> Each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion satisfied the awareness requirement for the clearly delineated prong.<sup>119</sup> Consequently, each of the applications

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<sup>116</sup> See, e.g., MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) (application failed to satisfy size requirements because it did not satisfy the awareness requirement of the "clearly delineated" prong); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (application failed to satisfy size requirements because it did not satisfy either the clear and straightforward membership requirement or the awareness requirement of the clearly delineated prong).

<sup>117</sup> IMMO (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

<sup>118</sup> See *id.*

<sup>119</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>);

underlying the 13 CPE reports that recorded points for Delineation also satisfied the awareness requirement for size.<sup>120</sup>

## b. Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.<sup>121</sup> FTI observed that, where the CPE Provider determined that the community lacked clear and straightforward membership or there was not awareness of a community (i.e., where the CPE Provider found that the community as defined in the application was not "clearly delineated"), then the CPE Provider determined that the longevity requirement could not be met. Of the 13 CPE Reports that recorded zero points for the "clearly delineated" prong, all 13 corresponding applications failed to demonstrate awareness of a community among its members.<sup>122</sup> Therefore, each of the applications underlying the 13 CPE reports that recorded zero points for the "clearly delineated" prong could not satisfy the longevity requirements. Because each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion satisfied the awareness requirement for the "clearly delineated" prong as well as the pre-existence prong, each of the

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and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>120</sup> See *id.*

<sup>121</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11-4-12 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>122</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

applications that received points for Delineation satisfied both requirements for longevity.<sup>123</sup>

The CPE Guidelines state that if an application obtains zero points for Delineation, an application will receive zero points for Extension.<sup>124</sup> Accordingly, the 13 applications that received zero points for Delineation also received zero points for Extension.

One application received three out of a possible four points for the Community Establishment criterion.<sup>125</sup> For the Delineation sub-criterion, the application received one point because the CPE Provider determined that there was not one entity mainly dedicated to the community as defined in the application, and therefore the community as defined in the application was deemed not sufficiently organized.<sup>126</sup> The application received the full two points on the Extension sub-criterion.

Twelve applications received full points on the Community Establishment criterion. Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Community

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<sup>123</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>124</sup> See Applicant Guidebook, Module 4.2 at Pg. 4-12, (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>125</sup> RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>126</sup> *Id.* at Pgs. 2-3.

Establishment criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

## B. The Nexus Criterion (Criterion 2) was Applied Consistently in all CPEs.

To assess whether the Nexus criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, i.e., Nexus and Uniqueness. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Nexus for each report and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Nexus criterion is measured by two sub-criterion: (i) Nexus (worth three points); and (ii) Uniqueness (worth one point).<sup>127</sup> While some applications received full points for the Nexus criterion and others did not,<sup>128</sup> the CPE Provider's

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<sup>127</sup> Applicant Guidebook, Module 4.2.3 at Pgs. 4-12-4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>128</sup> Of the 26 CPE reports, the CPE Provider determined that 19 applications received zero points for Nexus. SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); SHOP CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); MUSIC (.music LLP) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085->

findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

## 1. Sub-Criterion 2-A: Nexus

To receive a partial score of two points for Nexus,<sup>129</sup> the applied-for string must identify the community. According to the Applicant Guidebook, "'Identify' means that the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community."<sup>130</sup> In order to receive the maximum score of three points, the applied-for string must: (i) "identify" the community; and (ii) match the name of the community or be a well-known short-form or abbreviation of the community.

FTI observed that the CPE Provider determined that the applications underlying 19 CPE reports received zero points for the Nexus sub-criterion because, in the CPE Provider's determination, the applications failed to satisfy both of the requirements described above. First, for the applications underlying 11 of the 19 CPE reports that recorded zero points for the Nexus sub-criterion, the CPE Provider determined that the applied-for string did not identify the community because it substantially overreached the

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en.pdf); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); and MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>).

<sup>129</sup> The Applicant Guidebook does not provide for one point to be awarded for the Nexus sub-criterion. An application only may receive two points or three points for the Nexus sub-criterion.

<sup>130</sup> Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

community as defined in the application by indicating a wider or related community of which the applicant is a part but is not specific to the applicant's community.<sup>131, 132</sup>

Second, for the applications underlying eight of the 19 CPE reports that recorded zero points for the Nexus sub-criterion, the CPE Provider found that the applied-for string did not match the name of the community or was not a well-known short form or abbreviation. In this regard, the CPE Provider determined that, although the string identified the name of the core community members, it failed to match or identify the peripheral industries and entities included in the definition of the community set forth in the application. Therefore, there was a misalignment between the proposed string and the proposed community.<sup>133</sup> In several cases, the CPE Provider's conclusion that the

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<sup>131</sup> MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

<sup>132</sup> See Applicant Guidebook, Module 4.2.3 Criterion 2 definitions and Criterion 2 guidelines at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

<sup>133</sup> GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>) ("While the string identifies the name of the core community members (i.e. companies with the legal form of a GmbH), it does not match or identify the regulatory authorities, courts and other institutions that are included in the definition of the community as described in Criterion 1-A."); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>) (where community is defined to include tangentially related industries, applied-for string name of "TAXI" fails to match or identify the peripheral industries and entities that are included in the defined community); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (applied for string identifies only the name of the core community members (primary and secondary real estate members), but fails to identify peripheral industries and entities described as part of the community by the applicant and does not match the defined community); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>) ("While the string identifies the name of the core community members (i.e. artists and organized members of the arts community) it does not match or identify the art supporters that are included in the definition of the community as described in Criterion 1-A" such as "audiences, consumers, and donors"); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>) (concluding that although applied-for string identifies the core community members—kids—it fails to closely describe other community members such as parents, who are not commonly known as "kids"); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>) (applied

string did not identify the entire community was the consequence of the CPE Provider's finding that the proposed community was not clearly delineated because it described a dispersed or unbound group of persons or entities.<sup>134</sup> Without a clearly delineated community, the CPE Provider concluded that the one-word string could not adequately identify the community.

Five CPE reports recorded two points for the Nexus sub-criterion.<sup>135</sup> FTI observed that these CPE reports recorded partial points because the CPE Provider determined that the underlying applications satisfied only the two-point requirement for Nexus: the applied-for string must identify the community.<sup>136</sup> The CPE Provider determined that, although the applied-for string identified the proposed community as defined in the application, it did not "match" the name of the community nor constitute a well-known short-form or abbreviation of the community name.<sup>137</sup> Specifically, the CPE Provider concluded that, for the applications underlying these five CPE reports, the community definition encompassed individuals or entities that were tangentially related to the proposed community as defined in the application and therefore, the general public may

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for string is over inclusive, identifying more individuals than are included in the defined community); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>) (the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part); and GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>) (applied-for string "GAY" is commonly used to refer to men and women who identify as homosexual but not necessarily to others in the defined community).

<sup>134</sup> See, e.g., KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

<sup>135</sup> HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>136</sup> Applicant Guidebook, Module 4.2.3 at Pgs. 4-12-4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>137</sup> See, e.g., ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>) (concluding that string "ECO" identifies community of environmentally responsible organizations, but is not a match or well-known name because the various organizations in the defined community are generally identified by use of the word "environment" or by words related to "eco" but not by "eco" itself or on its own).

not necessarily associate all of the members of the defined community with the string.<sup>138</sup> Thus, for these applications, there was no "established name" for the applied-for string to match, as required by the Applicant Guidebook for a full score on Nexus.<sup>139</sup> For all CPE reports that did not record the full three points for the Nexus sub-criterion, the CPE Provider's rationale was based on the definition of the community as defined in the application.

Two CPE reports recorded the full three points for the Nexus sub-criterion.<sup>140</sup> The CPE Provider determined that the applied-for string in the applications underlying these two CPE reports was closely aligned with the community as defined in the application,<sup>141</sup>

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<sup>138</sup> HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>) (applied-for string "HOTEL" identifies core members of the defined community but is not a well-known name for other members of the community such as hotel marketing associations that are only related to hotels); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) (concluding that because the community defined in the application is a collection of many categories of individuals and organizations, there is no "established name" for the applied-for string to match, as required by the Applicant Guidebook for a full score on Nexus, but that partial points may be awarded because the string "MUSIC" identifies all member categories, and successfully identifies the individuals and organizations included in the applicant's defined community); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>) (concluding that string "ECO" identifies community of environmentally responsible organizations, but is not a match or well-known name because the various organizations in the defined community are generally identified by use of the word "environment" or by words related to "eco" but not by "eco" itself or on its own); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>) (applied-for string "ART" identifies defined community, but, given the subjective meaning of what constitutes art, general public may not associate all members of the broadly defined community with the applied-for string); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>) (applied-for string "RADIO" identifies core members of the defined community but is not a well-known name for other members of the community such as companies providing specific services that are only related to radio).

<sup>139</sup> See, e.g., MUSIC (DotMusic Limited) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

<sup>140</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

<sup>141</sup> SPA CPE Report at Pg. 4 (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); and OSAKA CPE Report at Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

and/or was the established name by which the community is commonly known by others.<sup>142</sup>

## 2. Sub-Criterion 2-B: Uniqueness

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application.<sup>143</sup> According to the Applicant Guidebook and CPE Guidelines, if an application did not receive at least two points for the Nexus sub-criterion, it could not receive the one point available for the Uniqueness sub-criterion.<sup>144</sup> Therefore, the CPE Provider determined that the applications underlying the 19 CPE reports that recorded zero points for Nexus were ineligible for a score of one for Uniqueness. Each of the applications underlying the five CPE reports that recorded two points for Nexus,<sup>145</sup> as well as the applications underlying the two CPE reports that recorded three points for Nexus,<sup>146</sup> received one point for Uniqueness. For each of the applications underlying these seven CPE reports, the CPE Provider determined that the applied-for string had no other significant meaning beyond identifying the community described in the application.

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Nexus

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<sup>142</sup> SPA CPE Report at Pgs. 4-5 (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

<sup>143</sup> Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

<sup>144</sup> See CPE Guidelines at Pgs. 9-10, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>). See also Applicant Guidebook, Module 4.2.3 at Pg. 4-14 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

<sup>145</sup> HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (efflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>146</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Nexus criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

### C. The Registration Policies Criterion (Criterion 3) was Applied Consistently in all CPEs.

To assess whether the Registration Policies criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, (i) Eligibility, (ii) Name Selection, (iii) Content and Use; and (iv) Enforcement. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Registration Policies for each application and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Registration Policies criterion is measured by four sub-criterion: (i) Eligibility; (ii) Name Selection; (iii) Content and Use; and (iv) Enforcement, each of which is worth one point.<sup>147</sup> While some applications received full points for the Registration Policies criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

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<sup>147</sup> Applicant Guidebook, Module 4.2.3 at Pgs. 4-14-4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

## 1. Sub-Criterion 3-A: Eligibility

To fulfill the requirements for Eligibility, the registration policies set forth in the application must restrict the eligibility of prospective registrants to community members.<sup>148</sup> All applications received one point for Eligibility. The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point for Eligibility for all applications that underwent CPE because each application restricted eligibility to community members only, as required by the Applicant Guidebook.<sup>149</sup>

In particular, the CPE Provider found that each application contained a registration policy that restricted eligibility in one of the following ways: (i) by requiring registrants to be verifiable participants in the relevant community or industry;<sup>150</sup> (ii) by listing the professions that are eligible to apply;<sup>151</sup> (iii) by requiring proof of affiliation through licenses, certificates of registration or membership, official statements from

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<sup>148</sup> *Id.* at Pg. 4-14.

<sup>149</sup> *Id.*

<sup>150</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC CPE Report (.music LLC) (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); CPA (AICPA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

<sup>151</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

superordinate authorities, or owners of trademarks;<sup>152</sup> (iv) by requiring registrants to be members of specified organizations linked to or involved in the functions relating to the applied-for community;<sup>153</sup> (v) by requiring that the registered domain name be "accepted as legitimate; and beneficial to the cause and values of the radio industry; and commensurate with the role and importance of the registered domain name; and in good faith at the time of registration and thereafter."<sup>154</sup>

## 2. Sub-Criterion 3-B: Name Selection

To fulfill the requirements for Name Selection, the application's registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD.<sup>155</sup>

In the sub-criterion for Name Selection, five CPE reports recorded zero points.<sup>156</sup> The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to these five applications because each failed to satisfy a required element of the CPE Guidelines, including: (i) the name selection rules were too vague to be consistent with the purpose of the community;<sup>157</sup> (ii) there were no comprehensive name selection rules;<sup>158</sup> (iii) there were no restrictions or

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<sup>152</sup> TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>);

<sup>153</sup> MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); and GmbH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

<sup>154</sup> RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>155</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>156</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

<sup>157</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

<sup>158</sup> ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

guidelines for name selection;<sup>159</sup> (iv) the rules did not refer to the community-based purpose;<sup>160</sup> and (v) the applicant had not finalized name selection criteria.<sup>161</sup>

Twenty-one CPE reports recorded one point for Name Selection.<sup>162</sup> The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the applications set forth registration policies for name selection that were consistent with the articulated community-based purpose of the applied-for gTLD, as required by the Applicant Guidebook.<sup>163</sup>

The CPE Provider determined that the applications demonstrated adherence to the Name Selection sub-criterion by: (i) outlining a comprehensive list of name selection

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<sup>159</sup> MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

<sup>160</sup> SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

<sup>161</sup> MERCK (RH) CPE Report CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

<sup>162</sup> TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

<sup>163</sup> Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

rules;<sup>164</sup> (ii) outlining the types of names that may be registered, while the name selection rules were consistent with the purpose of the gTLD;<sup>165</sup> (iii) specifying that naming restrictions be specifically tailored to meet the needs of registrants while maintaining the integrity of the registry, and ensuring that domain names meet certain technical requirements;<sup>166</sup> (iv) specifying that the associated boards use their corporate name or an acronym, while foreign affiliates will also have to include geographical modifiers in their second level domains;<sup>167</sup> (v) specifying that the registrant's nexus with the community and use of the domain must be commensurate with the role of the registered domain, and with the role and importance of the domain name based on the meaning an average user would reasonably assume in the context of the domain name;<sup>168</sup> (vi) specifying that eligible registrants are entitled to register any domain name that is not reserved or registered at the time of registration submission while setting aside a list of domain names that will be reserved for major brands;<sup>169</sup> and (vii) outlining

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<sup>164</sup> TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

<sup>165</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

<sup>166</sup> TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>).

<sup>167</sup> MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>).

<sup>168</sup> RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>169</sup> HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

restrictions on reserved names as well as a program providing special provisions for trademarks and other rules.<sup>170</sup>

### 3. Sub-Criterion 3-C: Content and Use

To fulfill the requirements for Content and Use, the registration policies set forth in the application must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD.<sup>171</sup>

In the sub-criterion for Content and Use, six CPE reports recorded zero points.<sup>172</sup> The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to the applications underlying six of the CPE reports for one of three reasons: (i) the rules for content and use for the community-based purpose were too general or vague;<sup>173</sup> (ii) there was no evidence in the application of requirements, restrictions, or guidelines for content and use that arose out of the community-based purpose of the application;<sup>174</sup> or (iii) the policies for content and use were not finalized.<sup>175</sup>

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<sup>170</sup> ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

<sup>171</sup> Applicant Guidebook, Module 4.2.3 at Pg. 4-16 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>172</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

<sup>173</sup> IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

<sup>174</sup> MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

<sup>175</sup> MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

Twenty CPE reports recorded one point for Content and Use. FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the corresponding applications included registration policies for content and use that were consistent with the articulated community-based purpose of the applied-for gTLD. The CPE Provider found this to be the case when the application: (i) set forth specific registration policies for content and use that were tailored to the community-based purpose of the gTLD;<sup>176</sup> (ii) had policies that stated that content or use could not be inconsistent with the mission/purpose of the gTLD;<sup>177</sup> or (iii) had prohibitions on certain types of content and/or abuse.<sup>178</sup>

#### 4. Sub-Criterion 3-D: Enforcement

Two conditions must be met to fulfill the requirements for Enforcement: (i) the registration policies set forth in the application must include specific enforcement

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<sup>176</sup> CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); and GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

<sup>177</sup> TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>178</sup> OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

measures constituting a coherent set; and (ii) the application must set forth appropriate appeal mechanisms.<sup>179</sup>

In the sub-criterion for Enforcement, 14 CPE reports recorded zero points.<sup>180</sup> The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to the applications underlying 13 CPE reports because each of the relevant applications lacked appeal mechanisms.<sup>181</sup> The remaining CPE report recorded zero points because the corresponding application did not outline specific enforcement measures constituting a coherent set.<sup>182</sup> A coherent set refers to enforcement measures that ensure continued accountability to the named community, and can include investigation practices, penalties, and takedown procedures with

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<sup>179</sup> Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>180</sup> INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

<sup>181</sup> INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); and OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

<sup>182</sup> ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

appropriate appeal mechanisms. This includes screening procedures for registrants, and provisions to prevent and remedy any breaches of its terms by registrants.<sup>183</sup>

Twelve CPE reports recorded one point.<sup>184</sup> The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the corresponding applications set forth appeal mechanisms and outlined specific enforcement measures constituting a coherent set.

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Registration Policies criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Registration Policies criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

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<sup>183</sup> See CPE Guidelines at Pg. 14 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

<sup>184</sup> CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

## D. The Community Endorsement Criterion (Criterion 4) Was Applied Consistently in all CPEs.

To assess whether the Community Endorsement criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, (i) Support and (ii) Opposition. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Community Endorsement for each application and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.<sup>185</sup>

As noted above, the Community Endorsement criterion is measured by two sub-criterion: (i) Support; and (ii) Opposition, each worth two points. While some applications received full points for the Community Endorsement criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

### 1. Sub-Criterion 4-A: Support

To receive two points for Support: (i) the applicant must be the recognized community institution/member organization; (ii) the application has documented support from the recognized community institution(s)/member organization(s); or (iii) the applicant has

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<sup>185</sup> In its investigation, FTI observed that the CPE Provider engaged in the following process to evaluate the Community Endorsement criterion. The CPE Provider sent verification emails to entities that submitted letters of support or opposition in order to attempt to verify their authenticity. The CPE Provider's evaluators then logged the results into a database. Separate correspondence tracker spreadsheets also were maintained by the CPE Provider for each applicant. FTI reviewed all of these materials in the course of its investigation. See <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>; and <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>.

documented authority to represent the community.<sup>186</sup> To receive one point for Support, the application must have documented support from at least one group with relevance.<sup>187</sup> Zero points are awarded if the application has "insufficient proof of support for a score of 1."<sup>188</sup>

All 26 CPE reports recorded at least one point for Support. Of those, 17 CPE reports recorded only one point.<sup>189</sup> Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the CPE Provider determined that each application had sufficient documented support from at least one group with relevance, but could not receive a full score of two points because the applicant was not the recognized community institution/member organization, the applicant did not have documented support from the recognized community institution/member organization, nor did the applicant have documented authority to represent the community, as required by the Applicant Guidebook.<sup>190</sup> In each instance, the entity(ies) expressing support for the application was not deemed by the CPE Provider to constitute the recognized institutions that represent the community as

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<sup>186</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-17  
(<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>)

<sup>190</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-17  
(<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

defined in the application.<sup>191</sup> In some cases, this meant that, although the supporting entity was dedicated to the community, the supporting entity lacked reciprocal recognition from community members as the entity authorized to represent them.<sup>192</sup> In others, the supporting entity did not "represent" the community because the supporting entity was limited in geographic or thematic scope and, therefore, did not represent the entire community as defined in the application.<sup>193</sup>

Nine CPE reports recorded the full two points for Support. Of the applications underlying these nine CPE reports, FTI observed that four applications received two points because the CPE Provider determined that the applications had documented support from the recognized community institution/member organization.<sup>194</sup> For the other applications that received two points, the CPE Provider determined that the applicant was the recognized community institution/member organization with the authority to represent the community.<sup>195</sup> Whether the applicant or the supporting entity

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<sup>191</sup> See 204, *supra*.

<sup>192</sup> See, e.g., GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>) (concluding that supporting entity is clearly dedicated to the community and it serves the community and its members in many ways, but is not the "recognized" community institution because it lacked reciprocal recognition by community members of the organization's authority to represent it as required by the Applicant Guidebook).

<sup>193</sup> See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (relevant groups providing support do not constitute the recognized institutions to represent the community because they are limited in geographic and thematic scope); and ART (eFlux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>) (*same*).

<sup>194</sup> RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

<sup>195</sup> CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

constituted the recognized community institution was determined based upon consistent application of the Applicant Guidebook's definition of "recognized."<sup>196</sup>

## 2. Sub-Criterion 4-B: Opposition

To receive two points for Opposition, an application must have no opposition of relevance.<sup>197</sup> To receive one point, an application may have relevant opposition from no more than one group of non-negligible size.<sup>198</sup>

Nine CPE reports recorded one point for Opposition.<sup>199</sup> In each instance, the CPE Provider determined that the underlying applications received relevant opposition from no more than one group of non-negligible size. Opposition was deemed relevant on several grounds: (i) opposition was from a community not identified in the application but had an association to the applied-for string;<sup>200</sup> (ii) the application was subject to a legal rights objection (LRO);<sup>201</sup> or (iii) opposition was not made for any reason forbidden by the Applicant Guidebook, such as competition or obstruction.<sup>202</sup>

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<sup>196</sup> Applicant Guidebook, Module 4.2.3 at Pgs. 4-17 and 4-18 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>197</sup> *Id.* at Pg. 4-17.

<sup>198</sup> *Id.*

<sup>199</sup> MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>). No CPE reports recorded zero points for Opposition.

<sup>200</sup> LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); and INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

<sup>201</sup> MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

<sup>202</sup> GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

Seventeen CPE reports recorded the full two points for Opposition.<sup>203</sup> The CPE Provider determined that the applications corresponding to 17 CPE reports did not have any letters of relevant opposition.<sup>204</sup>

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Community Endorsement criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Community Endorsement criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

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1830-1672-en.pdf); and MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

<sup>203</sup> ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); and ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

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

## VI. The CPE Provider's Use of Clarifying Questions Did Not Evidence Disparate Treatment.

Throughout the CPE process, the CPE Provider had the option to ask Clarifying Questions of the applicant about the relevant application.<sup>205</sup> Clarifying Questions were not intended to permit an applicant to introduce new material or otherwise amend an application, but rather were a means for the applicant to make its application more clear and free from ambiguity.<sup>206</sup> The CPE Provider composed the Clarifying Questions and sent them to ICANN organization, which would transmit the Clarifying Questions to the applicants. FTI observed that ICANN organization would review the wording of Clarifying Questions prior to sending them to the applicants. The CPE Provider confirmed that was done to ensure that the wording of the question was appropriate insofar as it did not contravene the Applicant Guidebook's guideline that responses to Clarifying Questions may not be used to introduce new material or amend the application.<sup>207</sup> ICANN organization did not comment on the substance of any Clarifying Question.

Based on FTI's investigation, it was observed that the CPE Provider posed Clarifying Questions seven times in the CPE process. Based on a plain reading, five of the seven were framed to clarify information in the applications. For example, the CPE Provider asked a Clarifying Question where it found part of an application to be unclear or internally inconsistent insofar as the community was defined by the applicant differently in two different sections of the application.

Two Clarifying Questions related to letters of support. In one application, letters of support were referenced, but were not submitted with the application materials. Accordingly, the CPE Provider issued a Clarifying Question identifying the

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<sup>205</sup> See CPE Frequently Asked Questions at Pg. 4 (<https://newgtlds.icann.org/en/applicants/cpe/faqs-13aug14-en.pdf>).

<sup>206</sup> *Id.* at Pgs. 4-5. See also Board Determination, at Pgs. 15-16 (<https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>).

<sup>207</sup> *Id.*

administrative error. In the other, the applicant submitted multiple letters of support, but the CPE Provider was unable to verify the nature and relevance of the support that the applicant received because the CPE Provider's verification attempts were unsuccessful. As a result, the CPE Provider issued a Clarifying Question; this application ultimately received the full two points for the Support sub-criterion.

Based on FTI's investigation, the CPE Provider did not issue Clarifying Questions on an inconsistent basis; nor did the CPE Provider's use of Clarifying Questions reflect disparate treatment of any applicant.

## VII. The CPE Provider's Use of Outside Research.

FTI understands that "certain complainants [have] requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted."<sup>208</sup> This is the subject of Scope 3 of the CPE Process Review, where FTI will compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations that are the subject of pending Reconsideration Requests.

## VIII. Conclusion

Following a careful and comprehensive investigation, which included several interviews and an extensive review of available documentary materials, FTI concludes that the CPE Provider consistently applied the CPE criteria throughout all Community Priority Evaluations.

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<sup>208</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

# **Exhibit 4**

## REFERENCE MATERIALS – BOARD SUBMISSION NO. 2017.09.23.0a

**TITLE:** **Consideration of *Amazon EU S.à.r.l* vs. ICANN Independent Review Process Final Declaration**

### **Background Regarding the Amazon Applications:**

Amazon applied for .AMAZON and its Chinese and Japanese character equivalents (Amazon Applications). The Amazon Applications passed Initial Evaluation. The Geographic Names Panel determined that the Amazon Applications did not qualify as geographic names, as per the criteria established in the Applicant Guidebook (AGB). (Initial Evaluation Report <https://newgtlds.icann.org/sites/default/files/ier/bqe3so7p3lu2ia8ouwp7eph9/ie-1-1315-58086-en.pdf>.)

Various South American countries including Brazil and Peru, through the Governmental Advisory Committee (GAC), raised concerns about the Amazon Applications. The Guidebook allows for the GAC to provide a GAC Early Warning, which is a notice to an applicant that “the application is seen as potentially sensitive or problematic by one or more governments.” The governments of Brazil and Peru, with the endorsement of Bolivia, Ecuador and Guyana, submitted an Early Warning notice in November 2012 through the GAC, in which the concerned governments stated that: “[g]ranting exclusive rights to this specific gTLD to a private company would prevent the use of this domain for the purposes of public interest related to the protection, promotion and awareness raising on issues related to the Amazon biome. It would also hinder the possibility of use of this domain to congregate web pages related to the population inhabiting that geographical region.” (Early Warning <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197938/Amazon-BR-PE-58086.pdf>.) Amazon engaged with the concerned governments to discuss the GAC Early Warning, but there was no resolution of the issue.

The Amazon Applications were identified in the GAC Beijing Communiqué (April 2013) as requiring further GAC consideration. (GAC Beijing Communiqué <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>.) Pursuant to the New gTLD Program, applicants have the opportunity to respond to GAC advice, and Amazon provided a response stating that the GAC’s further consideration is “a new action in the process neither contemplated by the AGB or the community.” (Amazon Response to GAC

Beijing Communiqué <https://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1315-58086-en.pdf>.)

On 18 July 2013, the GAC provided consensus advice (GAC Advice) to the ICANN Board in the Durban Communiqué that the Amazon Applications should not proceed (<https://gacweb.icann.org/display/GACADV/2013-07-18-Obj-Amazon>). Amazon provided a response stating that the GAC Advice “is inconsistent with international law; would have discriminatory impacts that conflict directly with ICANN’s Governing Documents; and contravenes policy recommendations implemented within the AGB achieved by international consensus over many years.” (Amazon Response to GAC Durban Communiqué <https://newgtlds.icann.org/sites/default/files/applicants/03sep13/gac-advice-response-1-1315-58086-en.pdf>.) Following careful consideration of Amazon’s response, ICANN commissioned an independent, third-party expert, with respect to Amazon’s international law argument, “to provide an opinion on the well foundedness of various objections raised against the reservation of the new gTLD ‘.amazon’” (<https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf>). The conclusion of the expert supported the view that ICANN, within its processes, could either accept or reject the Amazon Applications and neither would be inconsistent with international law.

The Amazon Applications were each the subject of a community objection filed by the Independent Objector (IO). Amazon prevailed in each of the community objections. The ICC expert determination dismissing the IO’s community objections was issued on 27 January 2014 (<https://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1315-58086-en.pdf>).

On 14 May 2014, the NGPC accepted the GAC Advice and directed ICANN not to proceed with the Amazon Applications. (Resolution 2014.05.14.NG03 <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en#2.b>.) As part of its deliberations, the NGPC considered various factors including but not limited to the GAC Early Warning, Amazon’s response(s) to the GAC Advice, correspondence received from various parties on the matter, and the expert analysis commissioned by ICANN organization. The NGPC’s decision was without prejudice to the continuing efforts by Amazon and members of the GAC to pursue dialogue on the relevant issues.

On 30 May 2014, Amazon submitted a Reconsideration Request (Request 14-27), which the NGPC denied on 8 September 2014 (<https://www.icann.org/resources/pages/14-27-2014-06-03-en>). On 1 March 2016, Amazon submitted a request for independent review of ICANN Board Resolution 2014.05.14.NG03 directing that the Amazon Applications should not proceed.

**Attachments:**

The following attachment is relevant to the Board's consideration of the Panel's Final Declaration in the Amazon EU S.à.r.l (Amazon) vs. ICANN Independent Review Process (IRP) regarding the Amazon Applications:

- Attachment A is the Panel's [Final Declaration](#) issued on 11 July 2017.

**Other Relevant Materials:**

The documents submitted during the course of the Amazon IRP are available at:

<https://www.icann.org/resources/pages/irp-amazon-v-icann-2016-03-04-en>.

Initial Evaluation Report for the .AMAZON application is available at:

<https://newgtlds.icann.org/sites/default/files/ier/bqe3so7p3lu2ia8ouwp7eph9/ie-1-1315-58086-en.pdf>.

GAC Early Warning against the Amazon Applications, issued on 20 November 2012, is available at:

<https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197938/Amazon-BR-PE-58086.pdf> .

GAC Beijing Communiqué issued on 11 April 2013, is available at:

<https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>.

Amazon Response to the GAC Beijing Communiqué issued on 10 May 2013, is available at:

<https://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1315-58086-en.pdf>.

GAC Durban Communiqué, providing GAC consensus advice that the Amazon Applications

should not proceed, issued on 18 July 2013, is available at:

<http://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf>.

Amazon Response to the GAC Durban Communiqué issued on 23 August 2013, is available at:

<https://newgtlds.icann.org/sites/default/files/applicants/03sep13/gac-advice-response-1-1315-58086-en.pdf>.

ICC expert determination on 27 January 2014 that the Independent Objector's Community Objections against the Amazon Applications did not prevail, is available at:

<https://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1315-58086-en.pdf>.

Expert analysis commissioned by ICANN, issued on 7 April 2014, is available at:

<https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf>.

NGPC Resolution 2014.05.14.NG03, accepting the GAC consensus advice and directing ICANN not to proceed with the Amazon Applications, is available at:

<https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en#2.b>.

Amazon's Reconsideration Request 14-27, the Board Governance Committee's recommendation, and the NGPC's determination are available at:

<https://www.icann.org/resources/pages/14-27-2014-06-03-en>.

Letter from the Brazilian Internet Steering Committee to ICANN Board regarding Amazon IRP Final Declaration, received on 10 August 2017, is available at:

<https://www.icann.org/en/system/files/correspondence/glaser-to-crocker-09aug17-en.pdf>.

Letter from Amazon to ICANN Board regarding Amazon IRP Final Declaration, received on 7 September 2017, is available at: <https://www.icann.org/en/system/files/correspondence/hayden-huseman-to-crocker-07sep17-en.pdf>.

Submitted by: Amy Stathos, Deputy General Counsel  
Date Noted: 7 September 2017  
Email: amy.stathos@icann.org

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**INDEPENDENT REVIEW PANEL**

ICDR No. 01-16-0000-7056

In the Matter of an Independent Review Process

Between:

**AMAZON EU S.A.R.L.,  
Claimant,**

**-and-**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,  
Respondent.**

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**FINAL DECLARATION**

IRP Panel:

Hon. Robert C. Bonner, Chair

Robert C. O'Brien, Esq.

Hon. A. Howard Matz (Concurring and partially dissenting)

1. Claimant Amazon EU S. a. r. l. ("Amazon") seeks independent review of the decision of the Board of the Internet Corporation for Assigned Names and Numbers ("ICANN"), acting through ICANN's New gTLD Program Committee ("NGPC"), denying its applications for top-level domain names of .amazon and its IDN equivalents in Chinese and Japanese characters. Amazon contends that in making the decision to deny its applications, the NGPC acted in a manner that was inconsistent with and violated

provisions of ICANN’s Articles of Incorporation, Bylaws and/or Applicant Guidebook for gTLD domain names (collectively, ICANN’s “governance documents”). ICANN contends, to the contrary, that at all times the NGPC acted consistently with ICANN’s governance documents.

2. After conducting a two-day in-person hearing on May 1–2, 2017 and having reviewed and considered the briefs, arguments of counsel and exhibits offered by the parties as well as the live testimony and the written statement of Akram Atallah, the written statement of Scott Hayden, the expert reports of Dr. Heather Forrest, Dr. Jerome Passa, and Dr. Luca Radicati di Bronzoli, the Panel declares that:

- a. The Board, acting through the NGPC, acted in a manner inconsistent with its Articles, Bylaws and Applicant Guidebook because, as more fully explained below, by giving complete deference to the consensus advice of the Government Advisory Committee (“GAC”) regarding whether there was a well-founded public policy reason for its advice, the NGPC failed in its duty to independently evaluate and determine whether valid and merits-based public policy interests existed supporting the GAC’s consensus advice. In sum, we conclude that the NGPC failed to exercise the requisite degree of independent judgment in making its decision as required by Article IV, Section 3.4(iii) of its Bylaws. (*See also* ICANN, Supplementary Procedures, Rule 8(iii) [hereafter “Supplementary Procedures”].)
- b. The effect of the foregoing was to impermissibly convert the strong presumption to be accorded GAC consensus advice under the Applicant

Guidebook into a conclusive presumption that there was a well-founded public policy interest animating the GAC advice.

- c. While the GAC was not required to give a reason or rationale for its consensus advice, the Board, through the NPGC, was. In this regard, the Board, acting through the NGPC, failed in its duty to explain and give adequate reasons for its decision, beyond merely citing to its reliance on the GAC advice and the presumption, albeit a strong presumption, that it was based on valid and legitimate public policy concerns. An explanation of the NGPC's reasons for denying the applications was particularly important in this matter, given the absence of any rationale or reasons provided by the GAC for its advice and the fact that the record before the NGPC failed to substantially support the existence of a well-founded and merits-based public policy reason for denying Amazon's applications.
- d. Notwithstanding the strong presumption, there must be a well-founded public policy interest supporting the decision of the NPGC denying an application based on GAC advice, and such public policy interest must be discernable from the record before the NGPC. We are unable to discern a well-founded public policy reason for the NGPC's decision based upon the documents cited by the NGPC in its resolution denying the applications or in the minutes of the May 2014 meeting at which it decided that the applications should not be allowed to proceed.

- e. In addition, the failure of the GAC to give Amazon, as a materially affected party, an opportunity to submit a written statement of its position to the GAC, despite Amazon's request to the GAC Chair, violated the basic procedural fairness requirements for a constituent body of ICANN. (*See* ICANN, Bylaws, art. III, § 1 (July 30, 2014) [hereinafter Bylaws].) In its decision denying the applications, the NGPC did not consider the potential impact of the failure of the GAC to provide for minimal procedural fairness or its impact on the presumption that would otherwise flow from consensus advice.
- f. In denying Amazon's applications, the NGPC did not violate the Bylaws' prohibition against disparate treatment.
- g. Amazon's objections to changes made to the Applicant Guidebook are untimely.

## **I. PROCEDURAL HISTORY**

The relevant procedural background of this Independent Review Process ("IRP") is:

3. The parties to the IRP are identified in the caption and are represented as follows:

Claimant: John Thorne of Kellogg, Hansen, Todd, Figel & Frederick

Respondent: Jeffrey LeVee of Jones Day

4. The authority for the Independent Review Process is found at Article IV, Section 3 of the ICANN Bylaws.

5. The applicable Procedural Rules are ICDR's International Dispute Resolution Procedures, as amended and in effect on June 1, 2014, as augmented by ICANN's Supplementary Procedures, as amended and in effect as of 2011.
6. On May 14, 2014, relying primarily upon the GAC's consensus objection, the NGPC rejected Amazon's applications.
7. Amazon's request for reconsideration was rejected by ICANN's Board Governance Committee on August 22, 2014.
8. Thereafter, Amazon notified ICANN of its intention to seek independent review under Article IV, Section 3 of ICANN's Bylaws, and Amazon and ICANN participated in a Cooperative Engagement Process in an attempt to resolve the issues related to Amazon's applications. No resolution was reached.
9. On March 1, 2016, Amazon filed a Notice of Independent Review with the International Centre for Dispute Resolution, and thereafter, this Independent Review Panel (the "Panel") was selected pursuant to the procedures described therein.
10. After a preliminary telephonic conference on October 4, 2016, the Panel issued Preliminary Conference and Scheduling Order No. 1, *inter alia*, establishing timelines for document exchange and granting Amazon's request for an in-person hearing to be held in Los Angeles, California. Thereafter, on November 17, 2016, in its Order No. 2, the Panel granted Amazon's application to permit live testimony at the hearing of Akram Atallah, the Interim President and Chief Executive Officer of ICANN, and denied its requests for live testimony by Amazon's Vice President and Associate

General Counsel for Intellectual Property Scott Hayden; Dr. Heather Forrest, an Amazon expert witness; and Heather Dryden, former chair of the GAC. After some adjustment, a schedule for pre-hearing briefs was established and the merits hearing dates were set for May 1–2, 2017.

11. On January 3, 2017, the Panel approved a Joint Stipulation Against Unauthorized Disclosure of Confidential Information (“Joint Stipulation”) providing for the good faith designation of proprietary and sensitive internal documents as CONFIDENTIAL or HIGHLY CONFIDENTIAL.
12. An in-person merits hearing was held in Los Angeles on May 1–2, 2017, at which Mr. Atallah’s testimony was taken, exhibits were produced and the matter argued. At the conclusion of the hearing on May 2, the Panel closed the proceedings, subject to receiving a transcript of the hearing and a consolidated exhibit list from counsel, and took the issues presented under submission.
13. Following the merits hearing, on June 7, 2017 the Panel issued its Order No. 3 denying Amazon’s objections to ICANN’s proposed redactions of the hearing transcript that disclosed information contained in several exhibits designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL under the Joint Stipulation.

## **II. FACTS**

The salient facts are:

14. Amazon is a global e-commerce company incorporated under the laws of Luxembourg. Marketing through retail websites worldwide, Amazon, together with its affiliates, is

one of the largest internet marketers of goods in the world, with hundreds of millions of customers globally. (Statement of Scott Hayden, ¶ 5-6 [hereinafter Hayden Statement].)

It has a well-recognized trade name of “Amazon” which is a registered trademark in over 170 nations. (Id., at ¶ 7.) For nearly two decades, Amazon has been granted and used a well-recognized second level domain name of amazon.com. (Id., at ¶ 15.)

15. In April 2012, Amazon applied to ICANN for the delegation of the top-level domain names .amazon and its Chinese and Japanese equivalents, pursuant to ICANN’s Generic Top-Level Domains (“gTLD”) Internet Expansion Program. (Id., at ¶12.)

16. There are significant security and operational benefits to a company having its own top level domain name, including its ability to “create and differentiate” itself and have its own “digital identity online.” (Tr. Akram Atallah Test., 82-83 [hereinafter Atallah Tr.].) Amazon saw the potential of having the .amazon gTLD, or string, as a “significant opportunity to innovate on behalf of its customers” and improve its service to its hundreds of millions of customers worldwide. (Hayden Statement, ¶ 7.) It also saw it as a means to safeguard its globally recognized brand name. (Id.)

17. ICANN is a non-profit, multi-stakeholder organization incorporated in the State of California, established September 30, 1998 and charged with registering and administering internet names, both second and top level, in the best interests of the internet community. (Request for Independent Review, 3.) ICANN operates pursuant to Articles of Incorporation and Bylaws. The Bylaws applicable to this IRP proceeding are those as amended in July 30, 2014. (Id., at 3-4; *see* Bylaws (designated as Ex. C-64).)

18. In 2008 ICANN proposed to expand top level domain names beyond .com, .edu, .org to generic top level domain names. (Request for Independent Review, 6-7.) Through its multi-stakeholder policy development process, over a several-year period ICANN developed and issued an Applicant Guidebook (“Guidebook” or “AGB”) setting forth procedures for applying for and the processing and approval of gTLD names. There have been several iterations of the Guidebook. The version applicable to the Amazon applications at issue was adopted in 2012. (Id.; *see* ICANN, gTLD Applicant Guidebook (June 4, 2012) (designated as Ex. C-20) [hereinafter Guidebook].)
19. The Guidebook sets forth procedures for applying for and objecting to top level domain names. As for geographic names, the Guidebook adopts the ISO geographic names registry that includes prohibited geographic names and restricted geographic names, the latter which cannot be used over the objection of a nation that has an interest in such names. (*See* Guidebook, §§ 2.2.1.4.1, 2.2.1.4.2.) There is an initial review process for all applications for gTLDs. (Id., at § 1.1.2.5.) The objection process includes both an Independent Objector (“IO”) process and the potentiality of an objection by one or more governments that make up ICANN’s Government Advisory Committee (“GAC”). (Id., at §§ 1.1.2.4, 1.1.2.6., 3.2.5.) An IO can lodge an objection which ordinarily results in one or more independent experts being appointed by the International Chamber of Commerce to determine the merits of the objection, against criteria set forth in the Guidebook. (Id., at § 3.2.5.) Short of an objection, a GAC member government is permitted to lodge an “Early Warning Notice” expressing its public policy “concerns” regarding an application for a gTLD or string. (Id., at § 1.1.2.4.) The Guidebook also contemplates situations where the member governments of the GAC

provide “consensus advice” objecting to a string, in which case such “advice” is to be given a strong presumption against allowing an application to proceed. (*See generally* Guidebook, Module 3.)

20. There have been over 1,900 applications for gTLDs. Only a small fraction of them, less than 20, have been the subject of GAC advice. (Atallah Tr., 214.)

21. Amazon’s applications passed ICANN’s initial review process with flying colors, receiving the highest possible score in ICANN’s initial review report (“IER”). (Hayden Statement, ¶¶ 25-30.) Indeed, on July 13, 2013, ICANN issued an IER for the .amazon application that received a maximum score of 41 out of a possible 41 points. (Id.) The IER stated that .amazon did “not fall within the criteria for a geographic name contained in the Applicant Guidebook § 2.2.1.4.” (Id.) In other words, at this early stage, ICANN had determined that .amazon is not a listed geographic name in the AGB. This means that .amazon was not a prohibited nor restricted geographic name requiring governmental support. (Id., at ¶ 31.)

22. Nonetheless, on November 20, 2012, Amazon’s applications were the subject of an Early Warning Notice filed by the governments of Brazil and Peru. (*See* Ex. C-22.) By its own terms, an Early Warning Notice is not an objection; however, it puts an applicant on notice that a government has a public policy concern about the applied for string that could be a subject of GAC advice at some later point in time. (*See* Guidebook, § 1.1.2.4.) The Early Warning Notice process is set forth in ICANN’s Applicant Guidebook. (Id.)

23. The Early Warning Notice began with the recital that “The Amazon region constitutes an important part of the territory of . . . [eight nations, including six others besides Brazil and Peru] due to the extensive biodiversity and incalculable natural resources.” (Ex. C-22, at 1.) Brazil and Peru then stated three reasons for their concerns about a private company, Amazon, being granted the gTLD “Amazon.” (Id., at 1-2.) The reasons were that:

- (1) It would prevent the use of this domain for purposes of public interest related to the protection, promotion and awareness raising an issue related to the Amazon biome. It would also hinder the possibility of use of this domain name to congregate web pages related to the population inhabiting that geographical region;
- (2) The string “matched” part of the name, in English, of the “Amazon Cooperation Treaty Organization,” an international organization formed under the Amazon Cooperation Treaty signed in 1978; and
- (3) The string had not received support from governments of countries where the geographic Amazon region is located.<sup>1</sup>

(See Id.)

24. In a note to the Early Warning Notice, Brazil stated:

The principle of protection of geographic names that refer to regions that encompass peoples, communities, historic heritages and traditional social networks whose public interest could be affected by the assignment, to

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<sup>1</sup> As noted elsewhere, under the Guidebook, a non-listed “geographic” name does not require government support.

private entities, of gTLDs that directly refer to those spaces, is hereby registered with reference to the denomination in English of the Amazon region, but should not be limited to it.

(Id., at 3.) Brazil went on to state that its concerns about the .amazon string extended to the English word “amazon” in “other languages, including Amazon’s IDN [internationalized domain name] applications” using Chinese and Japanese characters. (Id.)

25. The parties stipulated that none of the strings applied for by Amazon are listed geographic names as defined in ICANN’s Applicant Guidebook. (Ex. C-102, ¶ 1; Expert Report of Dr. Heater Forrest, 18-28 [hereinafter Forrest Report].)

26. Part of Guidebook procedures provide for an Independent Objector (“IO”) to challenge applications for domain names. (Guidebook, § 3.5.4.) Regarding Amazon’s applications, on March 12, 2013, an IO, Alain Pellet, initiated community objections to Amazon’s applications before the International Centre for Expertise of the International Chamber of Commerce (“Centre”). (Ex. C-102, ¶ 2.) The objections interposed by the IO were virtually identical to the concerns raised by Brazil and Peru in their Early Warning Notice. (Hayden Statement, ¶ 32.) Amazon responded to the IO’s community objections in May 2013. Thereafter, on June 24, 2013, the Centre selected Professor Luca G. Radicati di Brozoli as an independent expert to evaluate the IO’s objections. (Ex. C-47, at 4.) At the request of the IO, the independent expert, Professor Radicati, allowed both sides to file additional written statements. (Id., at 5.) The IO provided an augmented written statement on August 16, 2013, and Amazon replied to it on August 22, 2013. (Id., at 5.) Although, following an extension of time, his draft expert report

was due October 5, 2013, Dr. Radicati did not submit his final expert report until January 27, 2014. (Id., at 5, 25.)

27. On January 27, 2014, Professor Radicati issued a detailed Expert Determination rejecting the IO community objections. (See Ex. C-47.) He methodically considered the four factors laid out in Section 3.5.4 of the Guidebook as to whether the IO's objection on behalf of the community, i.e., the people and area of the Amazon region, had merit. (Id., at 13-14.) Regarding the first factor, he found that there was a strong association between the "community" invoked by the IO and the strings applied for. (Id., at 15.) As to the second factor, i.e., whether there as a "clear delineation of the community" invoked by the IO, Dr. Radicati indicated that: "The record is mixed and doubts could be entertained as to whether the clear delineation criterion is satisfied." (Id., at 16-18.) In light of his conclusion that there was not material detriment to the community being represented by the IO, (*see* discussion *infra*), Dr. Radicati stated that there was no need to reach a "conclusive finding" on the second factor. (Id., at 18.)

28. One of the four factors was "[w]hether the Applications create a likelihood of material detriment to a significant portion of the Amazon community." (Id., at 21). Professor Radicati determined that the applied for string .amazon would not pose a material detriment to the region or the people who inhabit the geographic region proximate to the Amazon River. (Id., at 21-24)

29. Among other things, Professor Radicati found that neither the Amazon community nor any entity purporting to represent that community had applied for the string .amazon. (Id., at 23.) This failure alone, he found, "can be regarded as an indication that the

inability to use the Strings in *not crucial* to the protection of the Amazon Community’s interests.” (Id. (emphasis added).) Regarding his finding of an absence of material harm, Professor Radicati concluded that the fact that an objector is deprived of future use of a specific gTLD is not a material detriment under ICANN’s Guidebook:

[T]he Amazon Community’s inability to use the Strings [.amazon and the two IDNs] is not an indication of detriment, and even less of material detriment. The Objection Procedures are clear in specifying that “[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a filing of material detriment” (Section 3.5.4).

(Id., at 23 (Emphasis in the original).)

30. Further, supporting his finding of no material detriment to the Amazon community and region, Professor Radicati noted that the applicant, Amazon, has used the name “Amazon”

as a brand, trademark and domain name for nearly two decades also in the States [including Brazil and Peru] arguably forming part of the Amazon Community. . . . There is no evidence, or even allegation, that this has caused any harm to the Amazon Community’s interests, or has led to a loss of reputation linked to the name of the region or community or to any other form of damage.

. . . [I]t is unlikely that the loss of the ‘.com’ after ‘Amazon’ will change matters.

(Id., at 23).

31. Regarding the absence of material detriment factor, Professor Radicati concluded:

More generally, there is no evidence either that internet users will be incapable of appreciating the difference between the Amazon group and its activities and the Amazon River and the Amazon Community, or that Amazonia and its specificities and importance for the world will be removed from the public consciousness, with the dire consequences emphasized by the IO. Were a dedicated gTLD considered essential for the interests of the Amazon Community, other equally evocative strings would presumably be available. “.Amazonia” springs to mind.

(Id., at 23.)

32. Another factor considered by independent expert Radicati was: “Whether there is substantial opposition to the Strings within the community.” (Id., at 19.) In rejecting the IO objections, Professor Radicati, while aware of the Early Warning Notice of Brazil and Peru, was evidently unaware that they continued to object to the applied for strings, nor was he aware of the GAC advice. (Id., at 20-21.) Indeed, he stated:

As evidence of substantial opposition to the Applications the IO relies essentially on the position expressed by the Governments of Brazil and Peru in the Early Warning Procedure. The two Governments undoubtedly have significant stature and weight within the Amazon Community. However, as noted by the Applicant, beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms. As a matter of fact, they engaged in discussions with the Applicant.

This is not without significance. Indeed, had the two Governments seriously intended to oppose the Application, they would presumably have done so directly. There is no reason to believe that they could have been deterred from doing so by the fear of negative consequences or by the costs of filing an objection. The Applicant is persuasive in arguing that the Brazilian and Peruvian Governments’ attitude is an indication of their belief that their interests can be protected even if the Objection does not succeed. Indeed, in assessing the substantial nature of the opposition to an objection regard must be had not only to the weight and authority of those expressing it, but also to the forcefulness of their opposition.

(Id.) These considerations led Dr. Radicati to find that the IO has failed to make a showing of substantial opposition to the Applications within the purported Amazon Community. (*See id.*)

33. Professor Radicati was mistaken about the continued lack of opposition to the string, especially from Brazil and Peru. Had he been informed of their opposition and the GAC advice objecting to the strings, it would no doubt have changed his finding regarding

whether there was substantial opposition to the strings. Nevertheless, even though, in addition to factors negating detriment, he considered lack of serious opposition as “indirect confirmation” of lack of detriment, it does not appear that Professor Radicati’s lack of knowledge regarding the GAC advice would have significantly impacted the reasons for his finding that there was no material detriment to the interest of the people and region proximate to the Amazon River by awarding the string to Amazon. (*Id.*, at 23-24.)

34. The NGPC, rejected Amazon’s applications on May 14, 2014. While the NGPC had Professor Radicati’s expert rulings and determinations before it, it did not discuss nor rely upon his expert determinations, *inter alia*, regarding the lack of material detriment, in making its decision to reject Amazon’s applications. (Ex. C-102, ¶ 2.)

35. In order to assist it in carrying out its functions, ICANN has various supporting organizations and advisory committees. One such committee is the GAC which is comprised of representatives of governments from around the world and several multi-lateral governmental organizations. (Atallah Tr., 98-99.)

36. Amazon’s applications were discussed at meetings of the GAC in Beijing in April, 2013<sup>2</sup> and, later, in Durban, South Africa on July 16, 2013.

37. At its plenary session in Durban on July 16, 2013, the GAC discussed the applications for the .amazon strings. The session was transcribed. (*See* Ex. C-40.) At this meeting, representatives of various nations spoke. (*Id.*) Brazil and Peru led the opposition to

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<sup>2</sup> The Beijing GAC meeting was closed and there is no publicly available transcript of what was discussed respecting the application for .amazon and the related IDN strings in Japanese and Chinese characters.

Amazon’s strings, and approximately 18 delegates of GAC member nations expressed general support for Brazil and Peru’s position opposing the applied for strings. (Id.)

With one or two exceptions of no significance, only the governments of Brazil and Peru expressed any actual reasons for opposing the applications, but if anything, Brazil and Peru’s reasons at the GAC meeting were either less specific than the three they gave in their Early Warning Notice or they were not well-founded grounds for objecting to the applied for strings. The representative of Peru, for example, stated that the applications should be rejected because “Amazon” was an ISO “listed” geographic name in the Guidebook; a statement which the parties now agree was erroneous, but not corrected during the Durban meeting.<sup>3</sup> (Id., at 14-15.)

38. At the Durban GAC meeting, Brazil essentially pointed out that Brazil and other nations in the Amazon region of South America have a “concern” with the application to register the gTLD .amazon. (Id., at 11-13.) The reason for their concern, much less an articulated public policy concern, is not apparent. (Id.) For example, Brazil asked that the GAC reject the registration of “dot amazon by a private company in the name of the public interest.” (Id., at 13.) Brazil does not define what the “public interest” for such a rejection would be. Moreover, how assigning .amazon to the applicant would harm the “public interest” was not explained. Brazil asserted that an undefined “community[,]” quite possibly, the people residing in the Amazon region, will “clearly be impacted[,]” but neither Brazil nor any other nation explained what this “impact”

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<sup>3</sup> We note that the word “amazon” can be traced back to ancient Greece as meaning large, powerful female warriors. (See *Amazon*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/amazon> (last visited June 12, 2017).) This meaning of the word is found in Virgil’s Aeneid. Indeed, it is one of the word’s defined meanings in the English language. (Id.)

would be or how it would harm the population living in the Amazon region or be detrimental to its “bio systems.” (Id., at 11-13). Brazil stated that it cannot accept the registration of .amazon to the applicant as “a matter of principle,” but nowhere does it make clear what that “principle” is. (Id., at 13.) A Brazilian vice minister added that dot amazon affected “communities” in eight countries, and it is important to protect “geographical and cultural names.” (Id., at 13-14.) Again, he did not articulate how such “names” would be harmed. (Id.)

39. At the Durban meeting, the representative of Peru set forth three “points that we think are crucial to understanding our request [to reject the applied for strings].” (Id., at 14.) According to the Peruvian representative, they were:

- (1) “[L]egal grounds” found in the ICANN’s Bylaws, in prior GAC advice and in the Guidebook, (Id., at 14.);<sup>4</sup>
- (2) The string is a geographic name listed in the Guidebook and therefore requiring governmental consent (Id., at 14-15.);<sup>5</sup> and
- (3) The national and local governments of the countries through which the Amazon River flows “have expressed, in writing, their rejection to dot amazon.” (Id., at 14-15, 24.).<sup>6</sup>

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<sup>4</sup> Based on our review, no “legal” grounds for rejecting the applications is apparent in those documents or elsewhere. (See Ex. C-48, at 7, 14.)

<sup>5</sup> As noted elsewhere, the word “Amazon” is not a listed geographic name in the Guidebook. Therefore, government consent is not required.

<sup>6</sup> See discussion *supra*, at 10 n. 1 (Individual governmental consent is not required by the Guidebook).

40. At the conclusion of the plenary session at Durban, after the representative of one nation acknowledged that “there are different viewpoints,”<sup>7</sup> the GAC Chair, Heather Dryden, asked:

So I am now asking you in the [GAC] committee whether there are any objections to a GAC consensus objection to the applications for dot Amazon, which would include their IDN equivalents? I see none. . . . So it is decided.

(Id., at 30.)

41. In a communique at the conclusion of its Durban meeting, the GAC issued consensus<sup>8</sup> advice to the Board of ICANN recommending to the Board that it not proceed with Amazon’s applications, stating:

The GAC Advises the ICANN Board that:

- i. The GAC has reached consensus [that the following application should not proceed] on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:
  1. The application for .amazon (application number 1-1315-58056) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591).

(Ex. R-22, at 3-4 (footnote omitted).)

42. In substance, the GAC “advice” or recommendation was that the Board should reject the applications for all three gTLDs applied for by Amazon. (Id.) No reasons were given by the GAC for its advice, nor did it provide a rationale for the same.<sup>9</sup> (*See Id.*)

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<sup>7</sup> *See Ex. C-40*, at 29.

<sup>8</sup> “Consensus” advice means, in essence, no nation objected to the position taken in the advice. It does not mean, however, that there was unanimous approval of the advice.

<sup>9</sup> The Panel requested that the parties attempt to secure a written statement from Heather Dryden, who was the Chair of the GAC at the time of the Durban meeting, regarding the reasons for the

43. During the course of the GAC’s meetings in Durban, Amazon Vice President and Associate General Counsel Scott Hayden stated that Amazon “asked the GAC to grant us the opportunity to distribute to the GAC background materials about the .AMAZON Applications and the proposals we had made but the GAC Chair rejected our request.” (Hayden Statement, ¶ 37.)
44. At all times pertinent herein, ICANN’s Board delegated its authority to decide all issues relating to new gTLD program that would otherwise require a Board decision, including decisions regarding whether an application for a gTLD should proceed or be rejected, to the NGPC.<sup>10</sup> (Ex. C-54, at 6.)
45. Procedures set forth in the Applicant Guidebook, Module 3.1 provide for an opportunity for an applicant to provide a written response to GAC advice. Amazon submitted a response taking issue with the GAC advice. (*See* Ex. C-43.) Thereafter, regarding one of the issues raised by Amazon, that is, whether Brazil or Peru had a right under international law to the name indicating the geographic region or river called “Amazon,” the NGPC commissioned an independent legal expert, Dr. Jerome Passa, a law professor at the Université Panthéon-Assas in Paris, France, to opine. (*See* Ex. C-48.)
46. In his March 31, 2014 report, Dr. Passa concluded that neither Brazil nor Peru had a legally cognizable right to the geographic name “Amazon” under international law, or for that matter under their own national laws. (Ex. C-48, at 7, 14; *accord* Forrest

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GAC advice. (Order No. 2, at 4.) No longer the GAC Chair, Ms. Dryden declined to provide a statement. (Atallah Tr., 95.)

<sup>10</sup> This delegation was made on April 10, 2012.

Report, 5, 9-12). In sum, he concluded that there was no legal principle supporting Brazil and Peru's objections. In other words, the legal objection of Brazil and Peru was without merit and did not provide a basis for the rejection of Amazon's gTLD applications.<sup>11</sup> (Ex. C-48, at 14.)

47. Moreover, Dr. Passa found that there was no prejudice to Brazil or Peru if the applied for strings were assigned to Amazon:

Beyond the law of geographical indications [which do not support Brazil and Peru's legal claims], the assignment of '.amazon' to Amazon would not in any event be prejudicial to the objecting states [Brazil and Peru] who, since they have no reason for linguistic reasons to reserve '.amazon', could always if they so wished reserve a new gTLD such as '.amazonia' or '.amazonas' which would create no risk of confusion with '.amazon'.

(Id., at 10; *see also* Ex. C-47, at 23.)

48. Both Amazon and the governments of Brazil and Peru were afforded an opportunity to respond to Dr. Passa's report. All three did so. (Ex. C-54, at 9-10.)

49. The NGPC considered Amazon's applications at several meetings. Following receipt of Dr. Passa's report and several letters responding thereto, the NGPC met on April 29, 2014 to consider the applications for the .amazon string and its Chinese and Japanese IDN equivalents. (*See* Ex. R-31, at 2-4.) The applications were discussed and the GAC advice referenced, but no decision was reached whether to allow the applications to proceed or to deny them. (Id.) Nor was any discussion or speculation by the NPGC

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<sup>11</sup> Regarding whether Amazon had a legal right to be assigned the strings, Dr. Passa opined "no one can claim a TLD simply because the name it consists of is not included on the ISO list" and that Amazon did not have a legal right to the gTLD .amazon based on its registered trademarks for that name in Brazil, Peru and other nations. (Ex. C-48, at 10.) Amazon makes the point that it was not making a legal claim of right based on its trademarks. (Ex. C-51, at 2.)

regarding the rationale for the GAC advice, or any public policy reasons that supported it, reflected in the minutes of this meeting. (Id.)

50. At its May 14, 2014 meeting, the NGPC adopted a resolution<sup>12</sup> in which it rejected Amazon’s applications. Under the heading “GAC Advice on .AMAZON (and related IDNs),” the NGPC resolved that: “[T]he NGPC accepts the GAC advice . . . and directs the [ICANN] President and CEO . . . that the applications . . . filed by Amazon EU S.à.r.l. should not proceed.” (Ex. C-54, at 6-7.)

51. The resolution goes on to state:

The action being approved today is to accept the GAC’s advice to the ICANN Board contained in the GAC’s Durban Communiqué stating that it is the consensus of the GAC that the applications . . . should not proceed. The New gTLD Applicant Guidebook (AGB) provides that if “GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed, this will create a strong presumption for the ICANN Board that the application should not be approved.” (AGB, § 3.1). To implement this advice, the NGPC is directing the ICANN President and CEO . . . that the applications . . . should not proceed.

(Id., at 7.)

52. After referencing the fact of Amazon’s position opposing the GAC advice and stating that it considered the report of Dr. Passa “as part of the NGPC’s deliberations in adopting the resolution,” the resolution states: “The NGPC considered several significant factors during its deliberations about how to address the GAC advice . . . .” (Id., at 8-10.) The resolution noted that the NGPC “had to balance the competing interest of each factor to arrive at a decision.” (Id., at 10.) Then, after noting that it

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<sup>12</sup> The minutes of the NGPC meeting on May 14, 2014 (Ex. R-83) are substantially the same and recite verbatim the NGPC resolution. (Ex. C-54).

lacked the benefit of any rationale from the GAC for its advice, it listed factors it relied upon, which were:

- (1) The Early Warning Notice submitted by Brazil and Peru that state as reasons for their concern, namely:
  - (a) The granting of the string to Amazon would deprive the string for use by some future party for purposes of protecting the Amazon biome and/or its use related to the populations inhabiting the Amazon region; and
  - (b) Part of the string matches the name in English of the Amazon Cooperation Treaty Organization. (*Id.*, at 10.)<sup>13</sup>
- (2) Curiously, the NGPC considered correspondence reflecting that Amazon sought to amicably resolve Brazil and Peru’s objections. We assume that Amazon’s effort to informally resolve concerns of Brazil and Peru was not a factor that *supported* the NGPC’s decision denying Amazon’s applications. (*Id.*, at 10-11.)<sup>14</sup>
- (3) The resolution correctly noted that, as it stood in the position of the ICANN Board, under the Guidebook the NGPC was called upon to “individually

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<sup>13</sup> On its face, it is difficult to see how this partial, one-word match in English to a treaty organization’s name is a valid reason that supports the GAC advice and hence the NGPC’s decision. Indeed, it was undisputed that this organization is commonly referred to as “OTCA,” an acronym for its name in Spanish. (Hayden Statement, ¶ 16; Forrest Report, 27.) There appears to be no reason to believe that internet users would be misled or confused.

<sup>14</sup> If so, this would be unwise policy for the same reason that evidence of settlement discussions is not to be considered against a party attempting to settle a matter. (*See, e.g.*, Fed. R. Ev. 408 (and international legal equivalents).)

consider an application for a new gTLD to determine whether approval would be in the best interests of the Internet community.” (Id., at 11.)<sup>15</sup>

(4) The resolution goes on to list eighteen documents, including, for example, the Early Warning Notice, that the NGPC reviewed before deciding to reject Amazon’s applications. (Id., at 11-13.) Aside from referring to the Early Warning Notice, there is no discussion in the resolution how any of these other documents impacted the NGPC’s decision.

53. Thus, the only *reasons* articulated by the NGPC for its decision rejecting Amazon’s applications were the strong presumption arising from the GAC consensus advice and, albeit without explanation, two reasons advanced by Brazil and Peru in their Early Warning Notice. Assuming that those reasons animated the GAC advice—and this is by no means clear<sup>16</sup>—there is no explanation by the NGPC in its resolution regarding why the reasons reflect well-founded and credible public policy interests.

54. The only live witness at the hearing was Akram Atallah, ICANN’s Deputy Chief Executive Officer and President of its Global Domains Division. Mr. Atallah has held executive positions at ICANN since he joined in 2010, and, significantly, he attended all seven meetings of the NGPC at which Amazon’s applications were agendaized and discussed, and in particular the last two meetings on April 29 and May 14, 2014. (Atallah Tr., 86:14-24.)

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<sup>15</sup> This factor neither supports the grant or the denial of the application, but merely reinforces that NGPC’s duty to make an independent and balanced determination in the best interests of the Internet community.

<sup>16</sup> In her testimony before the *DCA Trust* IRP, GAC Chair Heather Dryden stated that Early Warning Notices, and the rationale of nations that issued them, do not reflect GAC’s rationale for its advice. (Ex. CLA-5, 314:16-19; *see also* Atallah Tr., 306:12-24.)

55. In substance, Mr. Atallah testified that Amazon's applications would have been allowed to proceed, but for the GAC consensus advice opposing them. (Id., at 88-89).
56. Mr. Atallah testified that the NGPC did not consider the .ipiranga string, named for a famed waterway in Brazil, because neither Brazil nor the GAC opposed that string. Nor did Brazil submit an Early Warning Notice with respect to .ipiranga. (Id., at 90).
57. Regarding the impact of GAC consensus advice on the NGPC's decision, Mr. Atallah testified that ICANN is not controlled by governments, but ICANN procedures permit governments, through the GAC, to provide input, both as to ICANN policy matters and individual applications to ICANN. (Id., at 94-95.) The NPGC resolution (Ex. C-54) provides the entire rationale for the Board's (here, the NGPC's) decision to reject Amazon's applications. (Id., 93.) Because it lacks expertise, the NGPC, acting for the Board, did not and "will not substitute its decision" for the GAC's, especially on public interest issues. (Id., at 99-101, 128.)
58. Once the GAC provides the NGPC with consensus advice, Mr. Atallah explained, not only is there a strong presumption that it should be accepted, but it also sets a bar too "high for the Board to ignore." (Id.) Put differently, the bar is "too high for the Board to say no." (Id.) The Board, he said, defers to the consensus GAC advice as a determination that there is, in fact, a well-founded public policy reason supporting it. (Id., at 102). He added: "the board does not substitute its opinion to the opinion of the countries of that region when it comes to the public interest." (Id., at 128:16-18).
59. Mr. Atallah acknowledged that if GAC consensus advice was based upon the GAC's (or governments' advocating for a GAC consensus objection) mistaken view of

international law, it would outweigh the strong presumption and the advice would be rejected by the Board. (Id., at 127:11-128:4.) But the Board would not consider GAC consensus advice based on an anti-U.S. bias or “fear of foreign exploitation,” whether rational or not, as grounds for rejecting such advice. (Id., at 129:21-130:9.)

60. Although the NGPC considered the reasons given in the Early Warning Notice, Mr. Atallah made clear that the NGPC made no independent inquiry regarding whether there was a well-founded public policy rationale for the GAC advice, (Id., 102:17-20), nor did the NGPC explain why the reasons given in the Early Warning Notice stated well-founded public policy concerns for rejecting the applications. Moreover, the NGPC in its resolution did not discuss, much less evaluate Brazil and Peru’s reasons for their objection to the strings, (*see* Ex. C-54).

61. On August 22, 2014, ICANN’s Board Governance Committee denied Amazon’s request for reconsideration of the NGPC’s decision. (Ex. C-67.)

62. On March 1, 2016, Amazon filed its Notice and Request for an Independent Review of the NGPC decision denying its applications.

### **III. PROVISIONS OF THE ICANN’S ARTICLES OF INCORPORATION, BY-LAWS AND APPLICANT GUIDEBOOK**

63. The task of this Panel is to determine whether the NGPC acted in a manner consistent with ICANN’s Articles of Incorporation, Bylaws and Applicant Guidebook.<sup>17</sup> The most

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<sup>17</sup> While the Bylaws refer only to the Articles of Incorporation and Bylaws as subjects for the IRP process, the Panel is also permitted to determine whether the procedures of the Guidebook were followed. (*See Booking.com B.V. v. ICANN*, Case No. 50-20-1400-0247, Final Declaration,

salient provisions of these governance documents are listed below.

**64. Article IV, Section 3(4) of the Bylaws and Rule 8 of ICANN Supplementary**

**Procedures for Independent Review Process provide:**

The IRP Panel must apply a defined standard of review to the IRP request, focusing on: a. did the Board act without conflict of interest in taking its decision?; b. did the ICANN Board exercise due diligence and care in having sufficient facts in front of them?; and c. Did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interest of the company [i.e., the internet community as a whole]?

(See Bylaws, Art. IV, § 3(4).) Here, only compliance with requirements (ii) and (iii) is in issue.

**65. Art. 4 of the Articles of Incorporation:**

“[ICANN] shall operate for the benefit of the Internet community as a whole . . . .”

**66. Art. I, Sec. 2 of the Bylaws: CORE VALUES<sup>18</sup>**

In performing its mission, the following core values should guide the decisions and actions of ICANN:

. . .

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

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

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

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at ¶ 106 (Int’l Centre for Dispute Resolution, March 3, 2015), <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>; Resp’t Prehearing Br., 6.)

<sup>18</sup> All references to the Bylaws are to those in effect at the time of the NGPC’s decision, that is, the Bylaws, as amended July 2014. (See Ex. C-64.)

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

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness [such as the process of independent review].

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

. . . Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

**67. Art. II, Sec. 3 of the Bylaws: NON-DISCRIMINATORY TREATMENT**

“ICANN shall not . . . single out any particular party for disparate treatment unless justified by substantial and reasonable cause . . . .”

**68. Art. III (TRANSPARENCY), Sec. 1 of the Bylaws: PURPOSE**

“ICANN and its constituent bodies shall operate to the maximum extent feasible in a[] . . . transparent manner and consistent with procedures designed to ensure fairness.”

**69. Art. IV (ACCOUNTABILITY AND REVIEW), Sec. 1 of the Bylaws: PURPOSE**

“. . . 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.”

**70. Art. IV (ACCOUNTABILITY AND REVIEW), Sec. 3 of the Bylaws:**

**INDEPENDENT REVIEW OF BOARD ACTIONS**

The Board, or in this case, the NGPC final decision is subject to an “independent review” by this independent review panel to determine whether the Board/NGPC made

its decision in a manner consistent with ICANN’s articles of incorporation, applicable Bylaws and the applicant guidebook, i.e., its governance documents.

**71. Art. XI (ADVISORY COMMITTEES), Sec. 1 of the Bylaws: GENERAL**

“Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.”

**72. Art. XI, Sec. 2(1)(a) of the Bylaws**

“The [GAC] should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly . . . where they may affect public policy issues.”

**73. Art. XI, Sec. 2(1)(j) of the Bylaws**

“The advice of the [GAC] on public policy matters shall be duly taken into account, both in the formulation and adoption of policies.”

**74. Module 2 of the Applicant Guidebook<sup>19</sup>**

Module 2 of the Guidebook sets forth the evaluation procedures for gTLD strings, including string similarity, string confusion, DNS stability, reserved names and geographic names.

**75. Sec. 2.2.1.4 of the Applicant Guidebook**

“Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments . . . in geographic names. The requirements and procedure

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<sup>19</sup> The applicable version of the Guidebook for purposes of this IRP is Version 10 published on June 4, 2012. (*See* Ex. C-20; Resp’t Prehearing Br., 10 n. 29.)

ICANN will follow in the evaluation process are described in the following paragraphs.”

**76. Sec. 2.2.1.4.2 of the Applicant Guidebook**

“The following types of applied-for strings are considered geographic names and [require] . . . non-objection from the relevant governments . . . .” This is followed by a list of four specific categories, including, *inter alia*, cities, sub-national place names, etc.

**77. Sec. 2.2.1.4.4 of the Applicant Guidebook**

“A Geographic Names Panel (GNP) will determine whether each applied-for gTLD string represents a geographic name . . . . For any application where the GNP determines that the applied-for string is not a geographic name requiring government support (as described in this module), the application will pass the Geographic Names review with no additional steps required.”

**78. Attachment to Module 2 of the Applicant Guidebook, at A-1**

“It is ICANN’s goal to make the criteria and evaluation as objective as possible.”

**79. Module 3 of the Applicant Guidebook**

Module 3 relates to Objection Procedures.

**80. Sec. 3.1, GAC Advice on New gTLDs of the Applicant Guidebook**

The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities [i.e., may affect public policy issues].

. . .

. . . The GAC [may] advise[] ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN that the application should not be approved.

#### **IV. PARTIES' POSITIONS AND REQUEST FOR RELIEF**

81. Having set forth the procedural history, the relevant facts and the applicable provisions of ICANN's governing documents, the Panel now sets forth the issues raised by the parties and then provides the reasons for its Declaration.

82. Amazon seeks a declaration that the NGPC, acting for the Board, acted in a manner inconsistent with certain provisions, discussed below, of ICANN's Articles of Incorporation, Bylaws and/or Guidebook in connection with its rejection of the Amazon applications. Distilled to their essence, Amazon makes the following contentions:

- a. The GAC was required to state a reason(s) or rationale for its consensus advice, i.e., reason(s) for recommending that Amazon's applications be denied.
- b. As a constituent body of ICANN, the GAC was required to adhere to the Bylaws' duties of procedural fairness under Article III, Section 1. To comply with this Bylaw, the GAC was either required to permit Amazon, as the potentially adversely affected party in interest, to appear before the GAC or, at a minimum, submit information to the GAC in writing before it issued consensus advice.
- c. To warrant a strong presumption, GAC advice must be based upon a valid and legitimate public policy interest(s).
- d. By failing to make an independent evaluation of whether or not there was a valid public policy rationale for the GAC advice, the NGPC abdicated its independent decision making function to the GAC, converted the strong presumption to be given to GAC consensus advice into a conclusive presumption or veto, and otherwise abandoned its obligation to make a sufficient due diligence

investigation of the facts needed to support its decision and/or failed to make an independent, merits-based decision in the best overall interest of the Internet community.

- e. To comply with ICANN's transparency obligations, the NGPC must give reasons for its decisions. The NGPC's resolution of May 14, 2014 is not a sufficient statement of reasons for its decision rejecting Amazon's applications in that the NGPC failed to state any public policy rationale for its decision and/or balance the interests of Amazon favoring the granting of the applications with public policy interests militating against granting same.
- f. The ICANN Board, acting through the NGPC, violated its obligation not to engage in disparate treatment of the applicant under Article II, Section 3 of the Bylaws by denying its application, whereas under similar circumstances a private Brazilian corporation was granted the gTLD of .ipiranga, a string based on the name of another celebrated waterway in Brazil.<sup>20</sup>

83. As for relief, in addition to a declaration by this Panel that the NGPC acted inconsistently with ICANN governance documents, Amazon seeks affirmative relief in the form of a direction to ICANN to grant Amazon's applications. Alternatively, Amazon asks the Panel to recommend to the ICANN Board that its applications be granted and to set timelines for implementation of the Panel's recommendation, including a timeline for ICANN's "meet and confer" obligation with the GAC.<sup>21</sup>

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<sup>20</sup> The Ipiranga is mentioned in the Brazilian national anthem.

<sup>21</sup> In these circumstances, Amazon urges the Panel to retain jurisdiction until final resolution of this matter by the Board.

84. ICANN disputes each of Amazon’s contentions and asserts that the NPGC did not violate the Articles of Incorporation, the Bylaws or the Guidebook. Fairly synthesized, it argues:

- a. There is nothing in the Articles of Incorporation, applicable Bylaws<sup>22</sup> or Guidebook that requires the GAC to state any reason for its consensus advice.
- b. The procedural fairness obligation applicable to the GAC, as a constituent body of ICANN, did not require the Board to assure that a representative of a private company be able to appear before the GAC, nor did it require the Board to allow a potentially adversely affected party to be able to submit written statements to the GAC.<sup>23</sup>
- c. Although the GAC advice must be based on legitimate public policy considerations, even in the absence of a rationale for the GAC advice, there was sufficient support in the record before the NGPC for the NGPC to discern a well-founded public policy interest, and it was proper for the NGPC to consider reasons given in the Early Warning Notice as providing a public policy reason supporting the NGPC decision.
- d. Given the strong presumption arising from GAC consensus advice, the NGPC appropriately decided to reject Amazon’s applications.

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<sup>22</sup> Although not applicable to this IRP, Section 12.3 of the new version of the Bylaws adopted in 2016 requires all advisory committees of ICANN, including the GAC, to include “the rationale for such advice.” (See Ex. R-81; ICANN Bylaws, § 12.3 (eff. Oct. 1, 2016).) The new Bylaws indicate that they are not intended to be retroactive. (See ICANN Bylaws, § 27.4 (eff. Oct. 1, 2016).)

<sup>23</sup> ICANN also noted that Amazon had an opportunity to “lobby” governments in between the GAC meetings at which Amazon’s applications were discussed and it, in fact, did so. ICANN argued that this overcomes any lack of procedural fairness regarding the GAC.

- e. The NGPC gave reasons for its decision, and the reasons given by the NGPC for denying Amazon's applications are sufficient.
  - f. The NGPC did not engage in disparate treatment of Amazon. The anti-disparate treatment provision contained in the Article II, Section 3 of the Bylaws should be read, not as applying to ICANN as a whole, but as a limitation on actions of the ICANN Board. As there was no objection to .ipiranga, neither the NGPC nor the Board was ever called on to decide whether .ipiranga should be granted to a private company.<sup>24</sup> Accordingly, there could be no disparate treatment by the Board, or the NGPC acting for the Board, regarding the strings at issue in this proceeding.
  - g. Amazon's challenge to a 2011 change in the Applicant Guidebook relieving the GAC of any requirement to provide reasons for its advice is untimely.
85. Further, ICANN takes issue with the relief requested by Amazon. It argues that the Panel's powers are limited under the Bylaws to declaring whether or not the Board, or in this case the NGPC, complied with its obligations under ICANN's governance documents. It acknowledges, however, that if the Panel finds that the NGPC acted in a manner inconsistent with the governance documents, the Panel may properly make remedial recommendations to the Board.

## **V. ANALYSIS OF ISSUES AND REASONS FOR DECISION**

86. The majority of the Panel discusses *seriatim* each of the pertinent issues fairly raised by parties as part of the Independent Review Process.

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<sup>24</sup> ICANN also argued that the Ipiranga, a small waterway running through Sao Paulo, paled by comparison to the Amazon River, both in length and importance.

**A. Was the GAC required to state a reason(s) or provide a rationale for its advice?**

87. There is little question that a statement of reasons by the GAC, when providing consensus advice regarding an application for an internet name, is desirable. Having a reason or rationale would no doubt be helpful to the ICANN Board in evaluating the GAC's advice and assuring that there is a well-founded public policy interest behind it. Nonetheless, there is no specific requirement that the GAC provide a reason or rationale for its advice, and therefore, we conclude that a rationale or statement of reasons by the GAC was not required at the time of its action in this matter.<sup>25</sup>
88. Amazon argues the decision in the *DCA Trust* IRP, particularly paragraph 74, is precedent for proposition that the GAC must provide a reason for its advice. In that IRP, the Panel held: "As previously decided by this Panel, such accountability requires an organization to *explain or give reasons* for its activities, accept responsibility for them and to disclose the results in a transparent manner." (See *DotConnectAfrica Trust v. ICANN*, Case No. 50-2013-001083, Final Declaration, at ¶ 74 (Int'l Centre for Dispute Resolution, July 31, 2015), <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf> (Emphasis added) [hereinafter *DCA Trust*].)
89. While prior IRP decisions are indeed precedential, although not binding on this Panel,<sup>26</sup> we believe that read in context, *DCA Trust* stands for the proposition that the Board, to meet its accountability and transparency obligations, must give reasons for its actions. We do not read this language as requiring the GAC to do so.
90. It is true that ICANN changed its Bylaws in 2016 and now the GAC is required to provide a rationale for its advice, but this change is not retroactive, and, contrary to

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<sup>25</sup> See discussion *supra*, at 32 n. 22 (discussing a change in the Bylaws effective 2016).

<sup>26</sup> See Bylaws, Article IV, Section 3(21).

Amazon's argument, cannot be viewed as merely codifying the holding in *DCA Trust*.  
(See discussion *supra*, at 32 n. 22.)

**B. Was Article III, Section 1's procedural fairness requirement violated?**

91. This issue is evidently one of first impression. We have been unable to find any prior IRP matter that has considered this issue with respect to the GAC, and none was cited to us by the parties.
92. Article III, Section 1 of the Bylaws provides: "ICANN *and its constituent bodies* shall operate . . . with procedures designed to ensure fairness." (Emphasis added.)
93. The GAC is a constituent body of ICANN within the meaning of this Article. Indeed, ICANN does not argue otherwise. Nor is there any doubt, under the facts presented, that Amazon attempted to offer a written statement or materials regarding why the GAC should not adopt consensus advice opposing Amazon's applications. (Hayden Statement, ¶ 37.) It was not permitted to do so. (Id.) Nor is there any doubt that, as the applicant, Amazon stood to be materially adversely affected if the GAC issued consensus advice against its application, if for no other reason than there would be a strong presumption that, if the GAC did so, Amazon's application should be rejected by the ICANN Board.
94. Basic principles of procedural fairness entitle an applicant who request to have the opportunity to be heard in some manner before the GAC, as a constituent body of the ICANN. There is, however, a question of how much procedural fairness is required to satisfy Article III, Section 1. We need not decide whether such procedural fairness necessarily rises to the level normally required by administrative and quasi-judicial bodies. (See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313

(1950).) However, in matters relating to individual applications being considered by the ICANN Board itself, it is noteworthy that while individual applicants are not permitted to appear in person and make a presentation to the Board, ICANN's procedures permit an applicant, whose interests may be adversely affected by a decision of the Board regarding its application, to submit a written statement to the Board as to why its application should be permitted to proceed. The Panel is of the view that the same type of procedural fairness afforded by the Board required the GAC, as a constituent body of ICANN, to provide a comparable opportunity. Thus, under the facts of this IRP, the procedural fairness obligation applicable to the GAC, at a minimum, required that the GAC allow a written statement or comment from a potentially adversely affected party, before it decided whether to issue consensus advice objecting to an application. The Board's obligation was to see that the GAC, as a constituent body of ICANN, had such a procedure and that it followed it.

95. In this case, Amazon attempted to distribute written materials explaining its position to the GAC, but the GAC Chair denied its request. (Hayden Statement, ¶ 37.) Allowing a written submission would have given Amazon an opportunity, among other things, to correct the erroneous assertion by representatives of the Peruvian government that "Amazon" was a *listed* geographic name under the Guidebook. Amazon might have been able to submit information that neither Brazil nor Peru had a legal or sovereign right to the name "Amazon" under international or domestic law and that Amazon had registered the trademark or trade name of "Amazon" in many nations of the world, including Brazil and Peru. In any event, the failure to provide Amazon with an opportunity to submit a written statement - - despite its request that it be allowed to do

so - - to the very body of ICANN that was considering recommending against its application violated Article III, Section 1.

96. In the view of the majority of the Panel, while the GAC had the ability to establish its own method of proceeding, its failure to afford Amazon the opportunity to submit a written statement to the GAC governments at their meeting in Durban undermines the strength of the presumption that would otherwise be accorded GAC consensus advice. While our holding is limited to the facts presented in this matter, it draws support from the principle that a party has the right to present its views where a judicial or arbitral body is deciding its case. Indeed, this fundamental principle of procedural fairness is widely recognized in international law. Moreover, international law also supports the view that the failure to afford a party the opportunity to be present its position affects the value of the decision-making body's proclamations. For example, in the realm of international arbitration, the awards of arbitrators are given substantial, nearly irrefutable, deference. (*See generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. III, V, July 6, 1988, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention").) However, the New York Convention allows a court to refuse to enforce an arbitration award—that is, refuse to show the arbitrators deference—if "[t]he party against whom the award is invoked was not given proper notice . . . or was otherwise unable to present his case." (*Id.*, at art. V(1)(b).) Identical provisions allowing a party to either set aside an arbitration award or resist its enforcement appear in the Model Law on International Commercial Arbitration published by United Nations Commission on International Trade Law. (*See* United Nations Commission on International Trade Law, UNCITRAL Model Law on

International Commercial Arbitration 1985, with Amendments as Adopted in 2008, arts. 34(2)(a)(ii), 36(1)(a)(ii) (Vienna: United Nations, 2008).)

97. We find that this principle, enshrined in international arbitration law by convention, is instructive here. While the GAC is indisputably a political body - - not a judicial or arbitral body - - its consideration of specific gTLD applications takes place within the framework of the ICANN Board's application review process where the GAC's consensus advice is given a strong presumption by the Board, which itself is functioning as a quasi-judicial body. Thus, under the facts before us, the GAC's decision not to provide a affected party with the opportunity to be present a written statement of its position, notwithstanding its specific request to do so, not only constitutes a violation of procedural fairness obligations under Article III, Section 1 of the ICANN Bylaws, it diminishes the strength of the strong presumption that would otherwise be warranted based upon GAC consensus advice.
98. It is true, as ICANN established at the hearing, that because Amazon's applications were considered at two GAC meetings, Amazon had an opportunity between those meetings to lobby one or more governments to object to consensus advice, and it attempted to do so. Whatever this opportunity was, however, it was not a procedure that the GAC made available when requested by an applicant. Moreover, attempting to influence governments, who have their own political agendas and trade-offs that could be extraneous to the merits of an application for an internet name, is not the same as procedural fairness provided by the GAC itself. That duty is independently mandated under the Bylaws and is not supplanted by an opportunity to lobby governments apart from or in-between GAC meetings.

99. Our decision regarding minimum procedural fairness required by Article III, Section 1 of the Bylaws finds support in the *DCA Trust* IRP. In that matter, the Panel noted that DCA Trust was not given “an opportunity in Beijing or elsewhere to make its position known or defend its own interests before the GAC reached consensus on the GAC Objection Advice[.]” (*See DCA Trust*, at ¶ 109.) The *DCA Trust* Panel went on to hold that this lack of procedural opportunity was “not [a] procedure[] designed to insure the fairness required by Article III, sec. 1.” (*Id.*)

**C. Must GAC advice be based upon public policy considerations?**

100. The reasons for GAC Advice, even if not expressed, as is the case before us, must nonetheless be grounded in public policy. This proposition is fairly gleaned from several provisions of ICANN’s governance documents. Thus, the Bylaws recognize that the GAC’s purpose is to advise the Board regarding its activities “where they may affect public policy issues.” (Bylaws, art. XI, § 2(1)(a).) So, not only does the GAC have an important role in providing recommendations and advice regarding policy development by ICANN, but it also can intervene regarding a specific application to ICANN provided that the application raises legitimate public policy concerns. The GAC Operating Principles reinforce the need for a nexus between GAC advice and legitimate public policy concerns. (*See ICANN Governmental Advisory Comm. Operating Principles*, art. I, principles 2, 4.) Although not a decision-making body, as reflected in its Operating Principles, the GAC views itself as providing advice and recommendations to the ICANN Board and operating as a forum to discuss “government and other public policy issues and concerns.” (*Id.*) The Applicant

Guidebook indicates that the GAC may object when an application “violates national laws or raises sensitivities.”<sup>27</sup> (Guidebook, module 3.1.)

101. Moreover, the public policy concerns underlying GAC advice must be well-founded.

Mr. Atallah acknowledged that if GAC consensus advice was based upon a mistaken view of international law, the Board would reject such advice. (Atallah Tr., 127:14-128:4.) Thus, we conclude that if, for example, in the unlikely event that GAC consensus advice was animated by purely private interests, or corruptly procured, the ICANN Board would properly reject it. Put differently, such advice, even if consensus advice, would not be well-founded and would not warrant a strong presumption, or any presumption at all. Similarly, if the only reason for the GAC advice was that the applied for string is a listed geographic name under the Guidebook, whereas in truth and in fact it is not a listed geographic name, that reason, although based on public policy concerns, would be not be well-founded and, therefore, would be rejected by the Board. Put differently, the objection based on such grounds would not warrant a presumption that it should be sustained. Similarly, if the reason for objecting to the string is that assigning it would violate international or national laws, consensus advice might warrant a presumption if well-founded, but that presumption would be overcome by expert reports that make clear that neither international law, nor national law of the

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<sup>27</sup> As noted, based on the record before us, the granting of Amazon’s application would violate no country’s national laws. As for sensitivities, it is noteworthy that nowhere in the record is there a claim, much less any support for same, that the people who inhabit the Amazon region would find the use by the applicant of the English-language string, .amazon, derogatory or offensive. Brazil’s statement of concerns regarding the “risks” of granting the applications that relates to “a very important cultural, traditional, regional and geographical name related to the Brazilian culture” falls short of identifying what those “risks” are. (*See* Ex. C-40, at 11-13.) Nor did the delegates from Brazil or Peru articulate why the use of the string would be offensive to the sensibilities of people inhabiting the Amazon River basin. (*See id.*) There was no evidence in the record to support such an assertion, even had it been made.

objecting countries, prohibit the assignment of the string to the applicant. This is especially true where, as here, an independent expert report commissioned by the NGPC made clear that the legal objection of Brazil and Peru lacked merit. If the only reason for the consensus advice is that another entity, presumably a non-governmental organization (NGO), in the future would be denied the string, at a minimum the NGPC, acting for the Board, would need to explain why the Guidebook rule that deprivation of future use of a string, standing alone, is not a basis to deny a string is inapplicable. Further, if the public policy concern supporting the GAC advice is implausible or irrational, presumably the Board would find it not well-founded and would not be compelled to follow it, notwithstanding the strong presumption. (*Cf.* Atallah Tr., 128:24-129:20.)

102. The foregoing illustrates why it is highly desirable for the GAC to provide reasons or a rationale for its consensus advice to the Board. In this matter, the only arguably valid reason for the GAC advice is the assertion by Brazil and Peru that sometime in the future a NGO or other entity may wish to use the applied for English gTLD and equivalents in Chinese and Japanese characters to promote the environment and/or the culture of indigenous people of the Amazon region. This is no doubt a public policy concern. However, the evidence before the NGPC, in the form of expert reports of Dr. Passa and Dr. Radicati, indicates quite clearly that there is no prejudice or material harm to potential future users of the applied for strings. Ordinarily, the Board defers to expert reports, especially expert reports, such as Dr. Passa's, commissioned by the Board, or in this instance, by the NGPC functioning as the Board.

103. We conclude that GAC consensus advice, although no reasons or rationale need be given, nonetheless must be based on a well-founded public interest concern and this public interest basis must be ascertained or ascertainable from the entirety of the record before the NGPC. In other words, the reason(s) supporting the GAC consensus advice, and hence the NGPC decision, must be tethered to valid and legitimate public policy considerations. If the record fails to contain such reasons, or the reason given is not supported by the record, the Board, in this case acting through the NGPC, should not accept the advice.<sup>28</sup>

104. As we explain more fully below, the Board cannot simply accept GAC consensus advice as conclusive. The GAC has not been granted a veto under ICANN's governance documents. If the NGPC's *only* basis for rejecting the applications was the strong presumption flowing from GAC consensus advice, this would have the effect of converting the consensus advice into a conclusive presumption and, in reality, impermissibly shifting the Board's duty to make an independent and objective decision on the applications to the GAC.

105. In this matter, the NGPC relied upon the reasons set out in the Early Warning Notice of Brazil and Peru as providing a rationale supporting the GAC advice. Although there is no clear evidence that the rationale for objecting to the use of the applied-for strings advanced by Brazil and Peru in the Early Warning Notice formed the rationale for the

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<sup>28</sup> Under ICANN procedures, the Board would then engage the GAC in further discussions and give GAC a reason why it is doing so. (Atallah Tr., 121-128.) In this case, the reason might well be that there is no discernable valid and legitimate public policy reason for the GAC's recommendation. To the extent that reasons were given in the Early Warning Notice, the mere deprivation of the future use of the string does not appear to be a material reason, especially where there is no showing of harm or prejudice to the environment or inhabitants of the Amazon region.

GAC advice,<sup>29</sup> we believe it was appropriate for the NGPC to consider the reasons given by Brazil and Peru as support for the NGPC's decision, along with the presumption of valid public policy concerns arising from the consensus advice, as a basis for denying Amazon's application. Needless to say, however, the Early Warning Notice itself is not entitled to any presumption that it contains valid public policy reasons.

106. That said, as noted above, the reasons given by Brazil and Peru in their Early Warning Notice do not appear to be based on well-founded public policy concerns that justify the denial of the applications. Further, Brazil and Peru's objection to the applications based on deprivation of future use of the strings is not supported by the record, including the expert reports that are part of that record. In these circumstances, we are constrained to conclude that there is nothing to support the NGPC's decision other than the presumption arising from GAC consensus advice. There must be something more than just the presumption if the NGPC is to be said to have exercised its duty to make an independent decision regarding the applications, especially where, as in this matter, the GAC did not provide the ICANN Board with a rationale or reasons for its advice.

**D. Were the Early Warning Notice reasons relied on by the NGPC well-founded public policy reasons?**

107. Because the NGPC did not set forth its own reasons or analysis regarding the existence of a well-founded public policy concern justifying its rejection of the applications, the Panel must undertake to review the record before the NGPC. Having done so, we are

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<sup>29</sup> Indeed, the testimony of Heather Dryden, the former Chair of the GAC, in the *DCA Trust* IRP, part of the record in this IRP, indicates that there is no consensus GAC rationale for its advice. (Ex. CLA-5, 322:24-324:21.)

unable to discern from the record before the NGPC a well-founded public policy rationale for rejecting the applications.

108. Four reasons were asserted by Brazil and Peru in their Early Warning Notice and the discussion at the meeting of the GAC in Durban on July 16, 2013:

- a. Peru asserted that applications should be rejected because “Amazon” is a listed geographic name. ICANN, however, concedes that Peru’s assertion, made at GAC’s Durban meeting to rally support for GAC advice opposing Amazon’s application, was erroneous. “Amazon” is not a listed geographic name. (*See* Ex. C-40, at 14-15, 24; Ex. C-102, ¶ 1.)
- b. Brazil and Peru asserted legal rights to the name “.amazon” under international law, causing the NGPC to ask for an expert opinion on this issue. (Atallah Tr., 216:4-13.) Peru specifically claimed it had legal grounds to the name “Amazon,” as it denotes a river and a region in both Brazil and Peru, (*see, e.g.*, Ex. C-40, at 14), and it invoked the “rights of countries to intervene in claims that include words that represent a geographical location of their own,” (Ex. C-95, at 2). The legal claim of Brazil and Peru is without merit. Dr. Passa’s report, part of the record before the NGPC, makes plain that neither nation has a legal or sovereign right under international law, or even their own national laws, to the name. (Ex. C-48.) There appear to be no inherent governmental rights to geographic terms. (*See* Ex. C-34; Forrest Report, ¶ 5.2.1.)
- c. Brazil and Peru asserted in their Early Warning Notice that unidentified governmental or non-governmental organizations, who in the future may be interested in using the string to protect the environment (“biome”) of the Amazon

region or promote the culture of the people that live in this region, will be deprived of future use of the .amazon top level domain name if the applications are granted. (Ex. C-40, at 11-12.) We discuss this assertion below.

- d. Brazil and Peru also asserted that they objected to the applied-for string .amazon because it matched one of the words, in English, used by the Amazon Cooperation Treaty Organization. (*See* Ex. C-22, at 1.) A one word match is not likely to be misleading and is not a plausible public policy reason for an objection. (*See* discussion *supra*, at 22 n. 13.)
109. Only the third reason possibly presents a plausible public policy reason that could be considered to be well-founded. As discussed earlier, the record before the NGPC, however, undermines even this assertion as a well-founded reason for the GAC advice and, therefore, does not support the NGPC's decision denying the applications. First, it is noteworthy that under ICANN's own rules the mere fact that an entity will be deprived of the future use of a string is not a material reason for denying a domain name to an applicant. Indeed, the Guidebook prohibits ICANN from a finding of harm based solely on "[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector." (Guidebook, § 3.5.4.) Thus, even had a non-governmental organization filed an application for the .amazon gTLD in order to promote the environment of the Amazon River basin or its inhabitants and objected to that string be awarded to the applicant, this would not alone justify denial of Amazon's applications. While not dispositive, it does lead us to conclude that there must be some evidence of detriment to the public interest in order to justify the rejection of the applications for the strings.

110. Even if, *arguendo*, deprivation of future use could be considered a public policy reason, the uncontroverted record before the NGPC, found in two expert reports, the report of ICC independent expert Professor Radicati di Brozolo and the expert report by Dr. Passa commissioned by the NGPC, was that the use of the string by Amazon was not prejudicial and would not harm such potential future interest in the name, because (1) no entity other than Amazon has applied for the string, (2) Amazon has used this tradename and domain name for decades without any indication it has harmed the geographic region of the Amazon River or the people who live there, and (3) equally evocative strings exist, such as “Amazonia” and “Amazonas”<sup>30</sup> that could be used in the future to further the interests to which Brazil and Peru alluded in their Early Warning Notices. (See Ex. C-47, at 13-14, 21-23; Ex. C-48, at 10.) Although Professor Radicati was not informed of the GAC advice<sup>31</sup>, that alone does not undermine his determination that there was no material detriment to the interests of the people inhabiting the Amazon region by awarding the applicant the .amazon string. Moreover, his findings regarding the absence of prejudice or detriment are consistent with and are supported by those of Dr. Passa, the NGPC’s independent expert, who was well aware of the GAC objection to the string.

111. The NGPC did not analyze Professor Radicati’s or Dr. Passa’s reports in its resolution denying the applications. In absence of any statement of the reasons by the NGPC for denying the applications, beyond deference to the GAC advice, we conclude that the NGPC failed to act in a manner consistent with its obligation under the ICANN

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<sup>30</sup> It is noteworthy that Amazon agreed not to object to .amazonas and .amazonia, if they were to be applied for. (Hayden Statement, ¶ 21.)

<sup>31</sup> The Panel is surprised and troubled that neither the IO nor Amazon informed Professor Radicati of the GAC advice objecting to the strings before he made his determinations.

governance documents to make an independent, objective decision on the applications at issue. (See Bylaws, art. IV, § 3(4); Supplementary Procedures, Rule 8(iii).)

Moreover, without such an explication of a reason indicating a well-founded public policy interest, the Panel is unable to discharge meaningfully its independent review function to determine whether the NGPC made an independent, objective and merits-based decision in this matter.

**E. Was the NGPC required to state its reasons for its decision denying the applications?**

112. Although the GAC was not required to state reasons for its action (*see* discussion *supra* at 34-35), under the circumstances presented in this matter we hold that, in order to comply with its governance documents, the Board, in this case the NGPC, *was* required to state reasons for its decision in order to satisfy the community that it rendered an independent and objective decision in this matter. “[A]ccountability requires an organization *to explain or give reasons* for its activities.” (*See DCA Trust*, at ¶ 74; *accord Vistaprint Ltd. v. ICANN*, Case No. 01-14-0000-6505, Final Declaration, at ¶ 190 (Int’l Centre for Dispute Resolution, Oct. 9, 2015), <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf> [hereinafter *Vistaprint*] (stating that the Board’s decisions should be “supported by a reasoned analysis.”) (quoting *Gulf Cooperation Council v. ICANN*, Case No. 01-14-0002-1065, Interim Declaration on Emergency Request, at ¶ 76 (Int’l Centre for Dispute Resolution, Feb. 12, 2015) <https://www.icann.org/en/system/files/files/interim-declaration-emergency-protection-redacted-12feb15-en.pdf>)). Similar to *GCC* Final, para. 142, the NGPC resolution in this matter does not discuss the factors or reasons that led to its decision denying the applications, beyond the presumption flowing from

GAC consensus advice. Suffice it to say, the minutes of the NGPC's May 14, 2014 meeting and its resolution adopted that date are bereft of a reasoned analysis.

113. To be clear, our limited holding is that under the facts of this IRP, where the NGPC is relying on GAC Advice and the GAC has provided no rationale or reason for its advice, the NGPC must state reasons why the GAC advice is supported by well-founded public interests. Otherwise, the NGPC is not acting in a transparent manner consistent with its Bylaws as there would be scant possibility of holding it accountable for its decision. (*See* Bylaws, art. I, § 2(8), art. III, § 1.) Here, the limited explanation of the NGPC is deficient. Certainly, there is no way that an independent review process would be able to assess whether an independent and objective decision was made, beyond reliance on the presumption, in denying the applications. The NGPC failed to articulate a well-founded public policy reason supporting its decision. In the event the NGPC was unable to ascertain and state a valid public policy interest for its decision, it had a due diligence duty to further investigate before rejecting Amazon's applications.

(Supplementary Procedures, Rule 8(ii); *see also DCA Trust*, at ¶ 74.)

**F. Absent a well-founded public policy reason, did the NGPC impermissibly give the GAC consensus advice a conclusive presumption?**

114. Implicit in the NGPC resolution is that the GAC advice was based on concerns stated by Brazil and Peru in their Early Warning Notice and that the reasons given in the Early Warning Notice by Brazil and Peru for objecting were based on valid, legitimate and credible public policy concerns. An Early Warning Notice, in and of itself, is not reason for rejecting an application. At a minimum, it would require that the Board independently find that the reason(s) for the objections stated therein reflect a well-

founded public policy interest. As there is no explanation in the NGPC resolution why any of the reasons given by Brazil and Peru supported its decision to reject the applications, we have concluded above that there was not a sufficient statement of the reasons by the NGPC to satisfy the requirement of the Bylaws that the Board give reasons for its decisions.

115. In his testimony, Mr. Atallah acknowledged that ICANN is not controlled by governments, even when governments, through the GAC, provide consensus advice. (Atallah Tr., 94-95.) Consensus advice from the GAC is entitled to a strong presumption that it is based on valid public policy interests, but not a conclusive presumption. In its governance documents, ICANN could have given consensus GAC advice a conclusive presumption or a veto, but it chose not to do so.

116. Yet in this matter, Mr. Atallah candidly admitted that when the GAC issued consensus advice against Amazon's applications, the bar was too high for the Board (NGPC) to say "no." (Atallah Tr., 100-101, 128.) Clearly, the NGPC deferred to the consensus GAC advice regarding the existence of a valid public policy concern and by so doing, it abandoned its obligation under ICANN governance documents to make an independent, merits-based and objective decision whether or not to allow the applications to proceed. By failing to independently evaluate and articulate the existence of a well-founded public policy reason for the GAC advice, the NGPC, in effect, created a conclusive or irrebuttable presumption for the GAC consensus advice. In essence, it conferred on the GAC a veto over the applications; something that went beyond and was inconsistent with ICANN's own rules.

117. Moreover, as observed above, we are unable to discern from the Early Warning Notice a well-founded public policy reason for the NGPC's action. There being none evident, and none stated by the NGPC, much less the GAC, the only rationale supporting the NGPC's decision appears to be the strong presumption of a public policy interest to be accorded to GAC consensus advice. But as that is the only basis in the record supporting the NGPC's decision, to let the NGPC decision stand would be tantamount to converting the strong presumption into a conclusive one and, in effect, give the GAC a veto over the gTLD applications. This would impermissibly change the rules developed and adopted in the Guidebook. And it would also run afoul of two important governance principles of ICANN:

- That the Board state reasons for its decisions; and
- That the Board make independent and objective decisions on the merits.

118. It is noteworthy that, while the NGPC's resolution listed many documents that it considered, the NGPC did not explain how those documents may or may not have affected its own reasons or rationale for denying Amazon's applications, other than its reference to the GAC consensus advice and its presumption. Moreover, nowhere does the NGPC explain why rejecting Amazon's application is in the best interest of the Internet community, especially where a well-founded public policy interest for the GAC advice is not evident.

119. Under these circumstances, the NGPC's decision rejecting the Amazon application is inconsistent with its governance documents and, therefore, cannot stand.

**G. Did the NGPC violate ICANN’s prohibition against disparate treatment when it denied the applications?**

120. Amazon argues that the NGPC discriminated against it by denying its application for .amazon, yet an application by a private Brazilian oil company for the string .ipiranga, another famous waterway in Brazil, was approved. Amazon contends that by approving .ipiranga and denying .amazon, the ICANN Board, here the NGPC, engaged in disparate treatment in violation of Article II, Section 3 of the Bylaws.

121. It is accurate that ICANN’s Bylaws prohibit discriminatory treatment by the Board in applying its policies and practices regarding a particular party “unless justified by substantial and reasonable cause.” (Bylaws, art. II, § 3.) As pointed out by ICANN’s counsel, in this instance neither the Board nor NGPC, acting on its behalf, considered, much less granted, the application for .ipiranga and, therefore, did not engage in discriminatory action against Amazon. We agree. In the context of this matter, the Bylaws’ proscription against disparate treatment applies to Board action, and this threshold requirement is missing. Thus, we do not find the NGPC impermissibly treated these applications differently in a manner that violated Article II, Section 3 of the Bylaws regarding disparate treatment.

**H. Was Amazon’s objection to changes to the applicant guidebook untimely?**

122. In essence, Amazon argued that the GAC was required to state reasons for its advice under earlier iterations of the Guidebook. To the extent that earlier versions of the Guidebook supported Amazon’s contention, the Guidebook was changed in 2012 and earlier requirements that the GAC state reasons for its advice or provide specific

information were deleted. ICANN's launch documents, ICANN argued, are even more explicit regarding this change.

123. We agree with ICANN that to the extent that Amazon is challenging Guidebook changes made in 2011 in this proceeding, its attempt to do so is untimely. (*See Booking.com B.V. v. ICANN*, Case No. 50-20-1400-0247, Final Declaration, at ¶ 106 (Int'l Centre for Dispute Resolution, March 3, 2015), <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>; *Vistaprint*, at ¶ 172.) Any disagreement with proposed changes to the Guidebook must be made within 30 days of the notice of proposed amendments to the Guidebook. (*See* Bylaws, Art. IV, § 3.3.)

### CONCLUSION

124. Based upon the foregoing, we declare that Amazon has established that ICANN's Board, acting through the NGPC, acted in a manner inconsistent with ICANN's Bylaws, as more fully described above. Further, the GAC, as a constituent body of ICANN, failed to allow the applicant to submit any information to the GAC and thus deprived the applicant of the minimal degree of procedural fairness before issuance of its advice, as required by the Bylaws. The failure by the GAC to accord procedural fairness diminishes the presumption that would otherwise attach to its consensus advice.

125. The Panel recommends that the Board of ICANN promptly re-evaluate Amazon's applications in light of the Panel's declarations above. In its re-evaluation of the applications, the Board should make an objective and independent judgment regarding whether there are, in fact, well-founded, merits-based public policy reasons for denying Amazon's applications. Further, if the Board determines that the applications should

not proceed, the Board should explain its reasons supporting that decision. The GAC consensus advice, standing alone, cannot supplant the Board's independent and objective decision with a reasoned analysis. If the Board determines that the applications should proceed, we understand that ICANN's Bylaws, in effect, require the Board to "meet and confer" with the GAC. (*See* Bylaws, Article XI, § 2.1(j).) In light of our declaration, we recommend that ICANN do so within sixty (60) days of the issuance of this Final Declaration. As the Board is required to state reasons why it is not following the GAC consensus advice, we recommend the Board cite this Final Declaration and the reasons set forth herein.

126. We conclude that Amazon is the prevailing party in this matter. Accordingly, pursuant to Article IV, Section 3(18) of the Bylaws, Rule 11 of ICANN's Supplementary Procedures and Article 31 of the ICDR Rules, ICANN shall bear the costs of this IRP as well as the cost of the IRP provider. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US\$5,750 shall be borne by ICANN and the compensation and expenses of the Panelists totaling US\$314,590.96 shall be borne by ICANN. Therefore, ICANN shall reimburse Amazon the sum of US\$163,045.51, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Amazon.

127. Each side will bear its own expenses and attorneys' fees.

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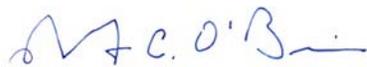
Our learned co-panelist, Judge A. Howard Matz, concurs in the result. Attached hereto is Judge Matz's separate concurring and partially dissenting opinion.

SO ORDERED this 10th day of July, 2017



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Robert C. Bonner  
Chair



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Robert C. O'Brien

## CONCURRING AND PARTIALLY DISSENTING OPINION

### OF A. HOWARD MATZ

128. I greatly admire my colleagues on this Panel and respect their diligent and thoughtful work in providing the foregoing Declaration. Moreover, for the reasons I will summarize at the end of this opinion, I concur in the outcome that they reach. But I do not believe that our authority, or that of any IRP Panel, permits us to invalidate a decision of ICANN based in substantial part on a finding that the GAC violated “basic principles of procedural fairness. . . widely recognized in international law. . .” To the extent that the Majority Declaration overturns ICANN’s decision because the NGPC failed to remedy that supposed GAC violation, it extends the scope of an IRP beyond its permissible bounds. And in any event I also reject the factual basis for the Majority’s conclusions about due process and fundamental fairness.

#### **AUTHORITY OF AN IRP PANEL**

129. The majority correctly states that “the task of this Panel is to determine whether the NGPC acted in a manner consistent with ICANN’s Articles of Incorporation, Bylaws and Applicant guidebook.” Majority Declaration, ¶ 63. The majority goes on to cite Article IV, § 3(4) of the Bylaws as follows:

The IRP Panel must apply a defined standard of review to the IRP request, focusing on: a. did the Board act without conflict of interest in taking its decision?; b. did the ICANN Board exercise due diligence and care in having sufficient facts in front of them?; and c. Did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interest of the company [*i.e.*, the internet community as a whole]?

*Id.* ¶ 64.

130. What is troublesome about the Majority Declaration is that it does not comply with the clearly limited scope of review that we are duty-bound to follow. Article IV, § 3(4) specifically mandates that the IRP Panel “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 [those] provisions. . . .” (Emphasis added.) Instead of focusing on whether the *Board* acted consistently with its own responsibilities, the Majority Declaration devotes a considerable portion of the ruling to criticizing the *GAC*. Indeed, it does not merely criticize the *GAC*, but also finds that because the *GAC* supposedly violated a “fundamental principle of procedural fairness [that is] widely recognized in international law” [Majority Declaration ¶ 96] it thereby violated Art. III, § 1 of ICANN’s Bylaws. *See, e.g.*, Majority Declaration, ¶¶ 2(e); 94-99; 124. Nowhere does the majority provide support for the proposition that this IRP Panel is entitled to opine on whether general principles of international law require that “fundamental notions of due process” be imported onto *GAC* proceedings, especially when the parties did not even meaningfully brief those “general principles.”
131. As stated in the Final Declaration in *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247 (Mar. 3, 2015),

The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. ¶ 108. . . . Nor . . . does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. ¶ 110 . . . [I]t is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with the applicable rules found in the Articles, Bylaws, and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and

procedures themselves), but merely to apply them to the facts. ¶  
115.

132. The majority finds that the Board (NGPC) violated Article IV, § 3(4) of the Bylaws because it effectively and improperly granted the GAC advice a conclusive presumption, despite that advice having been undermined by the GAC's supposed unfairness. (See below.) In this respect and to this extent, then, although the holding in the Majority Declaration is explicitly based on the conduct of the Board (Majority Declaration ¶ 113), the result must be seen as a reflection of the majority's view about what the GAC did (or failed to do). If the conclusion that "the NGPC failed to exercise the requisite degree of independent judgment" (Majority Declaration, ¶ 2(a)) is dubious, as I think it is, then the Majority Declaration may have exceeded its proper scope.

**WAS THERE REALLY A "DUE PROCESS" VIOLATION?**

133. The claimed violation by the GAC of due process is based on the written testimony of Mr. Scott Hayden, who is Amazon's Associate General Counsel for Intellectual Property. He wrote, "We had asked the GAC to grant us the opportunity to distribute to the GAC background materials about the Amazon Applications and the proposals we had made but the GAC Chair rejected our request." Hayden Statement, ¶ 37.

134. It is noteworthy that Mr. Hayden did not disclose just who at Amazon asked just which GAC representative for leave to submit just which written disclosure, or when such request was made (although it was evidently before the Durban meeting). Even more noteworthy is the indisputable fact that *the GAC already knew* about those Amazon applications and proposals. Indeed, governments objecting to those applications could not have issued an Early Warning until and unless at least the Amazon application had

come to their attention, and Brazil and Peru did not in fact issue the Early Warning until after they received Amazon's application.

135. Notwithstanding my view that it is not appropriate for this Panel to rest its decision, at least in large part, on whether the GAC was fair, I recognize that it is tempting to invoke Bylaws Article III, § 1 ("ICANN and its constituent bodies shall . . . ensure fairness") as the basis for doing so. "Fair is fair," after all, and it is not uncommon in an IRP for the disputing parties to challenge the fairness of their opponent's conduct. But even assuming the GAC was legally obligated to allow Amazon to make a direct written presentation in Durban, what was the impact of its failure to do so? The record shows that there was no impact at all; the claimed violation or error was utterly harmless.

136. The only supposed harm mentioned by the majority is that "allowing a written submission by Amazon would have given Amazon an opportunity, among other things, to correct the erroneous assertion by representatives of the Peruvian government that '.Amazon' was a *listed* geographic name under the Guidebook." *Id.* at ¶ 95. (Emphasis in original.) In fact, however, Mr. Atallah testified that if .Amazon had been on the list, the GAC would not even have been considering the issue in the first place. *Tr.*, p. 208.

As he put it,

So the only reason it's accepted as an application is because it was not on the list and everybody knew that. Otherwise, it wouldn't be an issue that required GAC Advice in the first place.

*Id.* at 209. This testimony was not rebutted.

137. Which leads to another concern that I have with the majority view: it is at odds with reality. It simply defies common sense to depict Amazon as having been effectively shut out of the process leading up to the GAC Advice or as the victim of one-sided,

heavy-handed maneuvering by Brazil, Peru, and the many other governments that joined in the Durban communique. Indeed, the facts show otherwise. At the hearing before this Panel, Amazon’s counsel himself conceded that people other than government representatives *were* allowed to attend the GAC meeting in Durban: “I now understand that observers were permitted in Durban. So the transparency issue . . . there were observers there. . . .” Tr., p. 270. Their attendance, counsel further acknowledged, was a form of “participation.” *Id.* at 269. In his written testimony, Mr. Atallah affirmed that at the Durban meeting on July 18, 2013 ICANN conducted a “Public Forum,” at which several speakers commented on the GAC’s advice regarding .Amazon. Amazon’s representative, Stacy King, actually stated, “We disagree with these recommendations and object . . . .” *Id.* at ¶ 36. Moreover, ICANN introduced ample and unrefuted evidence that in the spring and summer of 2013 – before the GAC Advice was issued – Amazon communicated its response to the Brazil/Peru opposition to several countries, including Germany (Ex. R-67), Australia (Ex. R-69), the United Kingdom (Ex. R-66) and Luxembourg (Ex. R-68). Nor is it surprising that a company as large and influential as Amazon directly waged such a sustained lobbying campaign with numerous members of the GAC. Amazon, of all possible gTLD applicants, was probably the best equipped to communicate its position to everyone involved in the determination of whether ICANN should grant it a new gTLD. Just as it may be understandable to take into account the notion that “fair is fair” in assessing the GAC’s conduct, so too should we recognize the reality that “Amazon is Amazon.”

138. For these reasons, then, in my respectful opinion there is little merit in the majority’s decision to “piggyback” the claimed due process violation by the GAC into a basis for

“undermin[ing] the strength of the presumption that would otherwise be accorded GAC consensus advice.” Majority Declaration, ¶ 96.

139. In addition to the foregoing factors, another reason why it is unfortunate that the Majority Declaration has declared that the GAC has a duty to adhere to international law-based principles of due process is that such declaration might well cause considerable confusion within ICANN. Article III, § 1 of the Bylaws, cited in ¶ 92 of the Majority Declaration, does indeed provide that both ICANN “and its constituent bodies shall operate. . . with procedures designed to ensure fairness.” But just what are those bodies? How do they participate within ICANN? Do they all function in the same manner? Do they rely on committees? Are they entitled to representation on Board committees? On the Board’s Executive Committee? If constituent bodies must permit direct presentations, would the Board and all its Committees also have to permit third parties to appear before them directly? These are legitimate questions to ask here, notwithstanding that the Majority Declaration states that it is limited to the facts of this case (¶ 113), because this IRP Declaration is entitled to be treated as precedent. (Bylaws Article IV, § 3(21).) But the questions are not even considered, much less answered.

140. Finally, given that it is the ICANN Board whose specific conduct we are reviewing, it must be stressed here that there is absolutely no evidence that it or the NGPC were unaware of both the GAC’s thinking and Amazon’s position. While I will return to the question of what the NGPC knew and what it did *infra*, at this point it is sufficient to note that as to the GAC’s thinking, Mr. Atallah swore under oath that for those NGPC and Board members who attended the seven meetings dealing with Amazon’s

application, it would not have been a benefit if GAC had provided a rationale with its advice. As he put it, “as an insider, you know exactly what is going on . . . .” Tr., p. 109. He went on to explain: “ICANN has three meetings a year, every year, where everybody gets together to actually develop policies and do the ICANN business. In every meeting the board actually meets with the GAC. And the issues that the GAC is facing are actually . . . told to the board, and so the board is aware of the issues that . . . the GAC members are bringing up . . . It’s open meetings. And in several of those meetings, the South American countries had voiced their issues with the Amazon applications.” Tr., p. 113. Mr. Atallah also testified that “when the GAC Advice came about, the board provided notice to Amazon to actually provide it with information, present their view, their side of the topic and they presented a large document to the NGPC which they reviewed and did their due diligence.” Tr., p. 184.

**DID THE NGPC INDEPENDENTLY INVESTIGATE THE APPROPRIATE FACTS AND FACTORS RELATING TO AMAZON’S APPLICATION?**

141. The majority has concluded that “The Board, acting through the NGPC . . . failed in its duty to independently evaluate and determine whether valid and merits-based public policy interests existed supporting the GAC’s consensus advice . . . [and thus] failed to exercise the requisite degree of independent judgment . . . .” Majority Declaration, ¶ 2(a). In my respectful opinion, the Majority Declaration either conflates or misapprehends the important difference between what ICANN initially *did* in looking into the GAC Advice re .Amazon and what it concluded after doing so.

142. The Majority Declaration acknowledges that under the then-applicable Bylaws, the GAC was not required to give reasons for its actions. Majority Declaration, ¶¶ 87-90. The Majority Declaration notes that even the decision in the *Dot Connect Africa Trust v. ICANN IRP* (ICDR Case No. 50-2013-001083) does not require the GAC to provide such reasons.<sup>32</sup> But then the Majority Declaration essentially goes on to hold the Board responsible for GAC’s supposed failure “to explain or give reasons for its activities. Majority Declaration, ¶ 112 (emphasis in original). It does so by construing the Board to have relied solely on the “strong presumption” that the GAC’s advice is entitled to be implemented as if that presumption was conclusive. Majority Declaration, ¶¶ 104, 114. If that is what the Board did, such action would indeed fail to constitute “independence.” But I do not agree that that is what the Board did.

143. Brazil and Peru, as GAC members, issued their Early Warning on November 20, 2012 and the GAC issued its Advice on July 18, 2013. Thereafter, ICANN notified Amazon, and the NGPC proceeded to solicit and receive from Amazon and others numerous documents and submissions, which were read and considered over the course of seven different NGPC meetings. (Exs. R-26 through R-31.) Also reviewed were Professor Radicati’s Jan. 27, 2014 analysis (Ex. C-47); Dr. Passa’s March 31, 2014 “expert”

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<sup>32</sup> Regrettably, however, the Majority Declaration does not sufficiently make clear that before the Applicant Guidebook was completed, quite a saga had unfolded over how applications for top level domains in names containing geographic meaning would be treated. Various grounds for objection were considered. The GAC is comprised of sovereign governments that by their very nature function through a political lens, but the GAC is vital to the very essence of the internet and ICANN. There could be no worldwide web without the support and cooperation of governments around the globe. The GAC pushed for the right to raise concerns and objections separate and apart from the otherwise generally available grounds. Recognizing this, the full ICANN community granted GAC the very powers that have been challenged here. The outcome was that the entire ICANN community agreed to allow the GAC to use the Early Warning and GAC Advice (without accompanying rationales) procedures. The written testimony of Mr. Atallah explained this in great detail. (¶¶ 11-23.)

opinion (Ex. C-48); the Early Warning (C-22); several letters from Peru (C-45; C-50; C-51); at least four letters from Amazon (C-35; C-36; C-44; C-46) and other items.

(See Ex. R-83.) Mr. Atallah testified at length about what the NGPC did. He summarized it this way:

But the information that the NGPC went through was comprehensive. They looked at every opinion that the counterparties have [sic] and everything that was available to them, and they made their decision based on the process and as well as the issues at hand . . . and actually reviewed so much information, so much data, that the thing took ten month[s] . . .”

Tr., pp. 184-185.

144. I thus conclude that the NGPC did not in fact accept the GAC advice as conclusive. It displayed both due diligence and independent initiative in its effort to carry out its responsibilities.<sup>33</sup> However, whether it actually succeeded in discharging its responsibilities requires us to ascertain whether that independent inquiry led to a conclusion consistent with what the mission or core values of ICANN require. To that analysis I now turn.

145. Paragraph 113 of the Majority Declaration states very clearly,

To be clear, our limited holding is that under the facts of this IRP, where the NGPC is relying on GAC advice and the GAC has provided no rationale or reason for its advice, the NGPC must state reasons why the GAC advice is supported by *well-founded* public interest [sic] concerns. Otherwise, the NGPC is not acting in a transparent manner consistent with its Bylaws, Article I, § 2(8), Article III, § 1.

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<sup>33</sup> In reaching this conclusion, I choose not to apply literally and indiscriminately Mr. Atallah’s testimony to the effect that the NGPC made no independent inquiry as to whether there was a valid public interest rationale for the GAC advice. (Tr., p. 238.) For Amazon to rely so heavily on that off-the cuff statement, made at the very end of a full day’s testimony and in response to a question from the Panel chair, is to take it out of fair context. Indeed Mr. Atallah followed that response with “But there was no reasons for us to believe that the public interests of the Brazilian people is [sic] misrepresented by their governments.” *Id.*

(Emphasis added.)

146. I agree, at least as to Article III, § 1. For me, the key requirement is that there be a “well-founded” basis for the NGPC’s conclusion, regardless of how procedurally adequate its inquiry otherwise was under the Bylaws. Amazon having at least rebutted the strong presumption supporting advice of the GAC, the burden of making that showing became ICANN’s to bear. It failed to do so.

147. The GAC had every right to assert “cultural sensitivities” as the primary basis for its opposition to Amazon’s application. See Paragraph 2.1(b) of the GAC Principles Regarding New gTLDs: “New gTLDs should respect . . . the sensitivities regarding terms with national, cultural, geographic and religious significance.” But Brazil and Peru needed to do more than raise those concerns in the conclusory manner that they did. Professor Radicati had sound reason to conclude that awarding the string “.Amazon” to Amazon would not in fact create a material detriment to the people who inhabit the wide region in South America that is part of the Amazon River and rain forest. As he put it, “. . . [T]here were many other parties defending interests potentially affected by the Applications (environmental groups, representatives of the indigenous populations and so on) that could have voiced some form of opposition to the Applications, had they been seriously concerned about the consequences. Particularly given the standing of at least some of those organizations, it is implausible that none of them would have been aware of the Applications.” Ex. C-47, ¶ 93. Radicati went on to add, “[T]here is no evidence either that internet users will be incapable of appreciating the difference between the Amazon group and its activities and the Amazon River and the Amazon Community and its specificities [sic] and

importance for the world will be removed from the public consciousness, with the dire consequences emphasized by the IO.” Ex. C-47, ¶ 103. (Emphasis added.)

148. What the objectors, the GAC and the NGPC failed to demonstrate here stands in contrast with what the applicants for the “.persiangulf” gTLD pointed to in the “Partial Final Declaration” in the IRP in *Gulf Cooperation Council (GCC) v. ICANN* (ICDR Case No. 01-14-0002-1065). There, in fact, *both* the applicant (Asia Green) and its opponents presented greater support for their respective positions. For example, Asia Green noted,

There are in excess of a hundred billion of Persians worldwide. They are a disparate group, yet they are united through their core beliefs. They are a group whose origins are found several millennia in the past, their ethnicity often inextricably linked with their heritage. Hitherto, however, there has been no way to easily unify them and their common cultural, linguistic and historical heritage. The .persiangulf gTLD will help change this. (¶ 14)

For its part, the GCC established that “the relevant community was substantially opposed to the “.persiangulf” application, and (c) the relevant community was closely associated with and implicitly targeted by the gTLD string.” (¶ 38)

149. So what, then, could Brazil and Peru have presented to the GAC that the NGPC should have looked for or relied on in order to reach a conclusion consistent with Art. 1, § 2 of the Bylaws, including such ICANN core values as “seeking . . . broad, informed participation reflecting . . . geographic and cultural diversity” (Core Value 4), “open and transparent policy development mechanisms” (Core Value 7) and “recognizing that governments. . . are responsible for public policy” (Core Value 11)? They could have presented: public opinion surveys; expressions of concern by existing native communities; resolutions by existing NGOs; and submissions by historians and

scientists in the Amazon region about the importance of cultural patrimony and ecological preservation. Had Brazil and Peru made at least some such information available to the GAC and had the GAC at least acknowledged that it had received such material, the NGPC's decision to uphold the GAC advice even in the absence of an explicit GAC rationale would have been sufficient, in my opinion.

150. In addition to the foregoing reasons for concurring in the result, there are other considerations that persuade me to join in the outcome of the majority's ruling. For example, as already indicated, I agree with several observations that are central to the majority's conclusion, including the following.

- a. GAC advice must be based upon public policy considerations, even if not incorporated into a written "rationale." Majority Declaration ¶ 100.
- b. The public policy considerations must be "well-founded," *Id.*, ¶ 101, and "ascertainable from the entirety of the record before the NGPC." *Id.*, ¶ 103.
- c. It "is highly desirable for the GAC to provide reasons or a rationale for its consensus advice to the Board." *Id.*, ¶ 102.<sup>34</sup>
- d. The Board "cannot accept GAC consensus advice as conclusive." *Id.*, ¶ 104. (Put another way, a "strong" presumption is not the same as an "irrebutable" presumption.)

151. Also, for the most part, Amazon's conduct in pursuing its application was commendably reasonable. For example, it explicitly agreed not to apply for gTLDs with the names (or words) "Amazonas," "Amazonia" and close variants thereof. Such a concrete effort at compromise should not be ignored or taken for granted.

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<sup>34</sup> So basic and compelling is this "desirable" factor that it now has become required in the 2016 Bylaws.

152. Moreover, given that the 2016 changes in the Bylaws now impose requirements on the GAC to provide reasons for GAC advice, to the extent that because the GAC did not explicitly do so in this case ICANN's decision has been found to be deficient, the outcome of this IRP will cause little or no detriment to ICANN going forward.

153. In the *Booking* Final Declaration, *supra*, the Panel recognized the value of an IRP “contribut[ing] to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here.” ¶ 4. Here, too, there is a demonstrable benefit to the ICANN community that can result from further guidance about the minimum requirements that ICANN must meet in order to have its decisions about GAC advice upheld in the face of challenge. That benefit is especially applicable where, as here, the practical effect of the Panel's ruling is that the dispute is remanded for further proceedings. In other words, Brazil, Peru, the GAC and ICANN, as well as Amazon, may now supplement and strengthen their positions. The Applicant Guidebook states that the objective for ICANN is to “determine whether approval would be in the best interest of the internet community.” § 5.1. Here, all the interested parties, including Brazil, Peru and the GAC, are members of that community. *See* Bylaws, Art. I, § 2(11). They all share a common objective and potentially a common benefit in promoting their respective interests anew in light of this Declaration.

Dated: July 10, 2017

  
A. Howard Matz

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)**

**Independent Review Panel**

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS**  
**Pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the *International Arbitration Rules of the ICDR*, and the *ICDR Supplementary Procedures for ICANN Independent Review Process***

_____	)	
<b>Gulf Cooperation Council (GCC)</b>	)	
	)	
Claimant	)	
	)	
and	)	<b>ICDR Case</b>
	)	<b>No. 01-14-0002-1065</b>
<b>Internet Corporation for Assigned Names and Numbers (ICANN)</b>	)	
	)	
Respondent	)	
_____	)	

**PARTIAL FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS  
PANEL**

Independent Review Panel

Lucy Reed, Chair  
Anibal Sabater  
Albert Jan van den Berg

## I. INTRODUCTION

1. This case concerns the dispute between the Gulf Cooperation Council (“GCC”), and the Internet Corporation for Assigned Names and Numbers (“ICANN”) over the generic Top-Level-Domain name (“gTLD”) “.persiangulf”.
2. The underlying dispute is a broader one, concerning the name for the body of water separating the Arabian Peninsula from the Islamic Republic of Iran (“Iran”), which is a non-Arab nation historically called Persia. The Arab states, including members of the GCC, use the name “Arabian Gulf”, while Iran uses the name “Persian Gulf”. The sensitivity of this geographical name dispute, which has gone on for over 50 years, is well-known. It is representative of deeper disputes between GCC members and Iran over matters of religion, culture and sovereignty, prompting sanctions such as the banning of maps and censorship of publications that use either “Arabian Gulf” or “Persian Gulf”. (For purposes of neutrality, we will use the simple term “Gulf” in this Declaration.)
3. The particular dispute has its origins in the July 2012 application by a Turkish company founded by Iranian nationals, Asia Green IT System Bilgisayar San. Ve Tic. Ltd Sti (“Asia Green”), for registration of the “.persiangulf” gTLD as an international forum for people of Persian descent and heritage. The GCC has contested this application at every step of the ICANN gTLD review process, primarily on grounds that “.persiangulf” targets the Arabian Gulf Arab community, which was not consulted and opposes this use of the disputed geographical name.
4. The GCC initiated this Independent Review Process (“IRP”) in December 2015 to challenge the ICANN Board’s taking any further steps to approve registration of “.persiangulf” gTLD to Asia Green, alleged to violate the ICANN Articles and Bylaws.
5. Based on the IRP Panel’s review and assessment of the Parties’ submissions and evidence, our Partial Declaration is in the GCC’s favor. At the Parties’ joint request, the IRP Panel will allocate costs in a Final Declaration at a later stage.

## II. THE PARTIES AND COUNSEL

6. The Claimant GCC is a political and economic alliance established in 1981 among six countries: the United Arab Emirates (“UAE”), Saudi Arabia, Kuwait, Qatar, Bahrain and Oman. The GCC is based in Saudi Arabia. Its address is Contact Information Redacted
7. The GCC is represented by Natasha Kohne and Kamran Salour of Akin Gump Strauss Hauer & Feld LLP, Sawwah Square, Al Sila Tower, 21<sup>st</sup> Floor, P.O. Box 55069, Abu Dhabi, UAE.
8. The Respondent ICANN is a non-profit public benefit corporation established under the laws of the State of California, USA. ICANN’s mission is “*to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems*”, including the domain name system.<sup>1</sup> ICANN’s address is 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536, USA.
9. ICANN is represented by Jeffrey A. LeVee, Eric P. Enson, Charlotte Wasserstein and Rachel Zernik of Jones Day, 555 South Flower Street, 50<sup>th</sup> Floor, Los Angeles, CA 90071, USA.

## III. BACKGROUND FACTS

10. We set out below the basic background facts, which are undisputed except where otherwise noted. More detailed background facts are included in the separate sections below on the jurisdiction and merits issues in dispute.

### A. ICANN’s New gTLD Program

11. As set out in Article 3 of its Articles of Incorporation, ICANN is mandated to develop procedures to expand the number of top level domains and increase the number of companies approved to act as registry operators and sell domain name registrations. In

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<sup>1</sup> ICANN’s Response to Gulf Cooperation Council’s Request for Emergency Relief (“**Response to Emergency Request**”), ¶ 6.

June 2011, ICANN launched a significant expansion with the “New gTLD Program”. According to ICANN, this Program is its “most ambitious expansion of the Internet’s naming system”. To illustrate, ICANN approved only seven gTLDs in 2000 and another small number in 2004-2005<sup>2</sup> and then received almost 2000 applications in response to the New gTLD Program.<sup>3</sup>

12. ICANN developed an Applicant Guidebook through several iterations, with Version 4 of the New gTLD Application Guidebook dated 4 June 2012 (“**Guidebook**”) being relevant here.<sup>4</sup> The Guidebook, running to almost 350 pages, sets out comprehensive procedures for the gTLD application and review process. It includes instructions for applicants, procedures for ICANN’s evaluation of applications, and procedures for objections to applications. In line with ICANN’s policies of transparency and accountability, applications for new gTLDs are posted on the ICANN website for community review and comment. ICANN may take such community comments into account in deciding whether an application meets the criteria for approval of a new gTLD registry operator.
13. Decisions on applications for new gTLDs are made by the New gTLD Program Committee of the ICANN Board (“**NGPC**”).

#### **B. The “.persiangulf” New gTLD Application**

14. On 8 July 2012, Asia Green applied for the “.persiangulf” gTLD. In its application form, Asia Green identified the mission/purpose of the proposed gTLD in relevant part as follows:

*There are in excess of a hundred million of Persians worldwide. They are a disparate group, yet they are united through their core beliefs. They are a group whose origins are found several millennia in the past, their ethnicity often inextricably linked with their heritage. Hitherto, however, there has been no way to easily unify them and their common cultural, linguistic and historical heritage. The .PERSIANGULF gTLD will help change this.<sup>5</sup>*

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<sup>2</sup> Response to Emergency Request, ¶¶ 12-13.

<sup>3</sup> <https://newgtlds.icann.org/en/about/program>.

<sup>4</sup> Response to Emergency Request, Exh. R-ER-3/R-2 (“**Guidebook**”).

<sup>5</sup> Request for Independent Review Process (“**Request for IRP**”), ¶¶ 31 and 66.

15. Asia Green has also applied for a number of other gTLDs. Its application for “.pars” (referring to the ancient Persian homeland of Pars), which was based on essentially the same mission/purpose as “.persiangulf” to unite the Persian community, was successful and led to a registry agreement in 2014.<sup>6</sup> Its applications for “.islam” and “.halal”, however, were not accepted by ICANN.<sup>7</sup>

### C. The GCC’s Objections to Asia Green’s “.persiangulf” gTLD Application

16. The GCC objected to Asia Green’s application within the mechanisms provided by ICANN.

#### 1. Concerns Raised with the Governmental Advisory Committee to ICANN

17. ICANN, which is a complex global organization, relies on committees to provide advice from different constituencies. As relevant here, the Governmental Advisory Committee to ICANN (“GAC”) consists of members appointed by and representing governments. The GAC was created to:

*consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements, or where they may affect public policy issues.*<sup>8</sup>

18. Module 3.1 of the Guidebook, which is entitled “GAC Advice on New gTLDs”, allows GAC members to raise governmental concerns about a gTLD application. Such concerns are considered by the GAC as a whole, which may agree on advice to forward to the ICANN Board. Such GAC advice to the ICANN Board is one of two methods of governmental recourse against an application for a gTLD. (The second method, an “Early Warning Notice”, is discussed below.)
19. As set out in Module 3.1 of the Guidebook, the advice from the GAC to the ICANN Board may take one of the following three forms:
  - a. A “Consensus GAC Advice”, in which the GAC, on consensus, provides public policy advice to the ICANN Board that an application **should not** proceed, creating a strong

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<sup>6</sup> Request for IRP, ¶ 65.

<sup>7</sup> Ibid., ¶ 61.

<sup>8</sup> Guidebook, Module 3.1, p. 1.

- presumption of non-approval of the application by the ICANN Board; there is no equivalent form of consensus GAC advice that an application **should** proceed;
- b. The expression of **concerns** in the GAC about an application, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those concerns, and to give reasons for its ultimate decision; or
  - c. Advice that the application should not proceed unless remediated, creating a strong presumption that the ICANN Board should not allow the application to proceed unless the applicant implements a remediation method available in the Guidebook.
20. On 14 October 2012, the UAE wrote to the GAC and ICANN expressing its disapproval and non-endorsement of Asia Green’s “.persiangulf” application.<sup>9</sup> Similar letters from Oman, Qatar and Bahrain followed.<sup>10</sup> As members of the GCC and GAC, these governments objected to registration of “.persiangulf” as a new gTLD on grounds that the proposed domain refers to a geographical place subject to a long historical naming dispute and targets countries bordering the Gulf that were not consulted and did not support the domain, confirming that there was not community consensus in favor of the new gTLD. (The subsequent GAC consideration of these concerns is described below.)

## 2. Early Warning Process

21. During the public comment period for gTLD applications, the Guidebook (Module 1.1.2.4) also allows the GAC to issue an “Early Warning Notice” to the ICANN Board flagging that one or more governments consider the application to be sensitive or problematic. The Board in turn notifies the applicant for the gTLD. As the Early Warning is merely a notice, and not a formal objection, it alone cannot lead to ICANN’s rejection of the application.
22. On 20 November 2012, the governments of Bahrain, Oman, Qatar and the UAE raised their concerns about Asia Green’s “.persiangulf” application through the GAC Early Warning process. The reasons mirrored those of their GAC objections: “*The applied for*

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<sup>9</sup> Request for IRP, Annex 6.

<sup>10</sup> Ibid., Annexes 7-9.

*new gTLD is problematic and refers to a geographical place with disputed name”; and “Lack of community involvement and support”.*<sup>11</sup>

### 3. Independent Objector Review

23. The Guidebook (Module 3, Articles 3.2.1–3.2.5) also provides an “Independent Objector” process, when there has been negative public comment before any formal objection. ICANN appoints an Independent Objector whose role, as the name indicates, is to exercise independent judgement in the public interest to determine whether to file and pursue a “Limited Public Interest Objection” or a “Community Objection” to the application.
24. In December 2012, the Independent Objector for the “.persiangulf” gTLD application, Professor Alain Pellet, issued his comments aimed at “*informing the public of the reasons why the [Independent Objector] does not consider filing an objection*” in relation to the “.persiangulf” application.<sup>12</sup> Professor Pellet concluded that a Limited Public Interest Objection was not warranted, because there were no binding international legal norms to settle the naming dispute. Likewise, he found a Community Objection to be “*unadvisable*”.<sup>13</sup> Although Professor Pellet found that there was a clearly delineated Gulf community at least implicitly targeted by Asia Green’s application and that a significant portion of that community opposed delegation of “.persiangulf”, he considered it “*most debateable*” that the gTLD would “*create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the targeted community*” (meaning the Arab portion), which is a necessary criterion in the Guidebook for a Community Objection.<sup>14</sup> He stated in this regard that:

*it is a matter of fact that there is a long-term dispute over the name of the Gulf and that both designation[s] [i.e. Persian Gulf and Arabian Gulf] are in use. It is indeed not the mission of the gTLD strings to solve nor to exacerbate such a dispute; but they probably should adapt to the status quo and the [Independent Objector] deems it unsuitable to take any position on the question. He notes that it is open to the Arabian Gulf community to file an objection as well as the same community could have applied for a “.Arabiangulf” gTLD.*<sup>15</sup>

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<sup>11</sup> Ibid., Annex 10.

<sup>12</sup> Independent Objector’s Comments on Controversial Applications, Response to Emergency Request, Exh. R-ER-5.

<sup>13</sup> Ibid., p. 6.

<sup>14</sup> Ibid., p. 5.

<sup>15</sup> Ibid., pp. 5-6.

#### 4. Formal Community Objection by the GCC

25. Module 3 of the Guidebook also provides for formal objection by third parties to challenge a gTLD application. There are four types of formal objections, of which a “Community Objection” is one.
26. A Community Objection is made on the basis that “[t]here is *substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted*” (Module 3.2). Pursuant to Paragraph 3.2.3 of the Guidebook, the International Centre of Expertise of the International Chamber of Commerce (“ICC”) administers disputes brought by Community Objection. One expert hears a Community Objection (Paragraph 3.4.4).
27. On 13 March 2013, the GCC filed a Community Objection to the “.persiangulf” application. The ICC appointed Judge Stephen M. Schwebel as the Expert Panelist to hear the Objection (Case No. EXP/423/ICANN/40). (Judge Schwebel’s determination, which he issued on 30 October 2013, is discussed below.)

#### D. GAC Advice to the ICANN Board

28. Concurrent with the various opposition avenues described above, the GAC was considering the GCC’s concerns in the course of its regular meetings.
29. In its 11 April 2013 meeting in Beijing, China, the GAC issued advice to the ICANN Board concerning a number of gTLD applications, using the typical format of a post-meeting Communiqué. Certain of the advice in the Beijing Communiqué was Consensus GAC Advice against gTLD applications, creating a presumption that the ICANN Board should **not** approve the relevant applications. In the case of certain geographically-based strings, including “.persiangulf”, the Beijing Communiqué reflected that the GAC required time for further consideration. On that basis, the GAC advised the ICANN Board not to proceed beyond initial evaluation of Asia Green’s application.<sup>16</sup>

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<sup>16</sup> Request for IRP, Annex 23, p. 3.

30. The NGPC of the ICANN Board accepted this advice. The NGPC documented its decision in a Resolution with an annexed “Scorecard” setting out its response to each item in the GAC’s Beijing Communiqué.<sup>17</sup>
31. In its 13-18 July 2013 meeting in Durban, South Africa, the GAC gave further consideration to the Asia Green application for “.persiangulf”: Mr Abdulrahman Al Marzouqi, who represented the UAE and the GCC at the Beijing and Durban GAC meetings, testified that no consensus was reached to oppose or support the application. In his words:

*5. I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC’s opposition to the .PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because “Persian Gulf” is a disputed name. A substantial amount of GAC members in attendance shared these concerns.*

*6. Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the “Persian Gulf” name, and Iran’s GAC representative obviously does not share the other GAC members’ concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson... pulled me to the side to express her frustration that GAC could not reach a consensus.<sup>18</sup>*

32. The Minutes of the Durban meeting (“**Durban Minutes**”), on which the GCC relies in these IRP proceedings, reported:

*The GAC finalized its consideration of .persiangulf after hearing opposing views, the GAC determined that it was **clear that there would not be consensus of an objection regarding this string** and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name.<sup>19</sup> (Emphasis added.)*

33. The 18 July 2013 Durban Communiqué, on which ICANN relies as the document formally providing GAC advice to the ICANN Board, reported:

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<sup>17</sup> Response to Emergency Request, Exhs. R-ER-6 and R-ER-7.

<sup>18</sup> Claimant’s Request for Emergency Arbitrator and Interim Measures of Protection, Witness Statement of Abdulrahman Al Marzouqi (22 December 2014) (“**Al Marzouqi Statement**”), paras. 5-6.

<sup>19</sup> Request for IRP, Annex 34.

*The GAC has finalised its consideration of the following strings, and does not object to them proceeding:*

...

ii. *.persiangulf* (application number 1-2128-55439).<sup>20</sup> (Emphasis added.)

34. On 10 September 2013, relying on the Durban Communiqué, the NGPC of the ICANN Board passed a resolution to continue to process the “.persiangulf” gTLD application, with a notation that there was a Community Objection:

*ICANN will continue to process the application in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF.*<sup>21</sup> (Emphasis added.)

35. The NGPC resolution and related Scorecard were posted on the ICANN website on 12 September 2013. The Board Minutes and related materials were posted more than two weeks later, on 30 September 2013.
36. It is the ICANN Board’s decision on 10 September 2013 to continue to process Asia Green’s “.persiangulf” gTLD application that the Claimant GCC challenges in these IRP proceedings.

#### **E. Expert Determination of the Community Objection**

37. On 30 October 2013, one month after ICANN’s posting of the Durban Minutes, Judge Schwebel issued his Expert Determination dismissing the GCC’s Community Objection.<sup>22</sup>
38. Judge Schwebel first found that the GCC had standing to object to the “.persiangulf” application, as an institution created by treaty and having an ongoing relationship with a clearly delineated community, namely the Arab inhabitants of the six GCC states on the Gulf. He then proceeded to find in the GCC’s favor on the first three of the four elements required by the Guidebook for a successful Community Objection (which, it bears noting, are not the same as the elements applicable to these IRP proceedings). Judge Schwebel found that: (a) the community invoked is a clearly delineated community; (b) the relevant

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<sup>20</sup> Ibid., Annex 24.

<sup>21</sup> Response to Emergency Request, Exhs. R-ER-9 and R-ER-10.

<sup>22</sup> Case No. EXP/423/ICANN/40, Expert Determination of Judge Stephen M. Schwebel, Request for IRP, Annex 2.

community was substantially opposed to the “.persiangulf” application, and (c) the relevant community was closely associated with and implicitly targeted by the gTLD string.

39. Judge Schwebel, however, then found against the GCC on the fourth element, on grounds that the GCC had failed to prove that the targeted community would “*suffer the likelihood of material detriment to their rights or legitimate interests*”. In his assessment, even though geographical name disputes such as the Arabian Gulf-Persian Gulf dispute can have significant impacts on international relations, “*it was far from clear that the registration would resolve or exacerbate or significantly affect the dispute*”.<sup>23</sup> Like the Independent Objector before him, Judge Schwebel noted that the GCC could apply for its own “.arabiangulf” string.
40. This Independent Review Process followed.

#### IV. THE INDEPENDENT REVIEW PROCESS: THE ARCHITECTURE

41. Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), of the ICANN Bylaws sets out the procedure for independent review of actions taken by the ICANN Board.
42. Paragraph 2 of Article IV, Section 3, provides:

*Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board’s alleged violation of the Bylaws of the Articles of Incorporation, and not as a result of third parties acting in line with the Board’s action.*

43. Paragraph 7 of Article IV, Section 3, provides that “[a]ll IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN”. As stated in the Supplementary Procedures for ICANN Independent Review Process (“**Supplementary Procedures**”), the ICANN Board has designated and approved

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<sup>23</sup> Ibid., p. 11.

the International Centre for Dispute Resolution (“ICDR”) as the Independent Review Panel Provider.<sup>24</sup>

44. The Supplementary Procedures apply to these proceedings, in addition to the ICDR International Arbitration Rules (“ICDR Rules”). Pursuant to Article 2 of the Supplementary Procedures, in the event of any inconsistency between the Supplementary Procedures and the ICDR Rules, the former prevail.
45. The Parties dispute whether the ICANN Bylaws are also applicable to this procedure, in particular in relation to the determination of costs. (This is discussed in Section IX below.)
46. The ICANN Bylaws provide a three-question standard of review for the Independent Review Process. As set out in Paragraph 4 of Article IV, Section 3:

*Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

47. Article 8 of the Supplementary Procedures replicates this standard of review in similar terms.

## V. THE INDEPENDENT REVIEW PROCESS: PROCEDURAL HISTORY

48. On 5 December 2014, the GCC filed its Request for Independent Review Process with the ICDR (“**Request for IRP**”). The Claimant attached a number of Annexes, and the Expert Report of Mr. Steven Tepp.

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<sup>24</sup> The standing panel of reviewers contemplated in Article, IV, Section 3, Paragraph 6, of the ICANN Bylaws has not been established. Claimant’s Supplementary Request for Independent Review Process (“**Supplementary IRP Request**”), Annex S-8.

49. The Request for IRP invokes ICANN's accountability mechanisms for the independent review of ICANN Board action, as set out in Article IV, Section 3, of the ICANN Bylaws.
50. Also on 5 December 2014, the Claimant filed a Request for Emergency Arbitrator and Interim Measures of Protection ("**Emergency Request**"). In the Emergency Request, the GCC sought:
  - a. Timely appointment of an Emergency Arbitrator to hear its request for emergency relief to preserve its right to a meaningful independent review; and
  - b. An order enjoining ICANN from executing the ".persiangulf" registry agreement with Asia Green while the Request for IRP was pending.
51. On 9 December 2014, ICANN consented to the appointment of an Emergency Panelist. Mr. John A.M. Judge was appointed on the same day to fulfil that role.
52. On 17 December 2014, the Respondent submitted its Response to Gulf Cooperation Council's Request for Emergency Relief, asking that the Emergency Request be denied.
53. On 22 December 2014, the Claimant filed its Reply in Support of its Request for Emergency Arbitrator and Interim Measures of Protection. This submission included the Witness Statement of Mr. Al Marzouqi ("**Al Marzouqi Statement**").
54. On 23 December 2014, the Emergency Panelist conducted a hearing by telephone conference call.
55. On 20 January 2015, ICANN submitted its Response to Claimant's Request for Independent Review Process.
56. On 12 February 2015, Mr. Judge issued his Interim Declaration on Emergency Request for Interim Measures of Protection ("**Emergency Declaration**"). The Conclusion of the Emergency Declaration provided as follows:

*96. Based on the foregoing analysis, this Emergency Panel makes the following order by way of an interim declaration and recommendation to the ICANN Board that:*

- a. *ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted;*
- b. *This order is without prejudice to the IRP panel reconsidering, modifying or vacating this order and interim declaration upon a further request;*
- c. *This order is without prejudice to any later request to the IRP panel to make an order for the provision of appropriate security by the Claimant; and*
- d. *The costs of this Request for Interim Measures shall be reserved to the IRP panel.*<sup>25</sup>

57. Following the Emergency Declaration, the present IRP Panel was constituted. The chair was appointed on 4 December 2015.
58. On 6 January 2016, the IRP Panel held a preparatory conference call with the Parties. The Panel issued Procedural Order No. 1 on 8 January 2016 (corrected 13 January 2016), establishing the submissions and setting the timetable for the proceedings. The merits hearing by telephone conference call was scheduled for 17 May 2016.
59. Pursuant to Procedural Order No. 1, the GCC filed its Supplementary Request for Independent Review Process ("**Supplementary IRP Request**") on 12 February 2016. This submission included the Supplementary Witness Statement of Mr. Al Marzouqi ("**Supplementary Marzouqi Statement**"), which described the GCC's unsuccessful attempts to conduct a conciliation process with both ICANN and Asia Green after the GCC filed its Request for IRP.
60. On 14 March 2016, ICANN filed its Response to Claimant's Supplementary IRP Request ("**Response to Supplementary IRP Request**"). As was the case in the emergency proceedings, ICANN did not file any witness statements.
61. On 29 March 2016, the GCC submitted its Reply in Support of its Supplementary Request for IRP, with no additional witness statements. ICANN's Response followed on 12 April 2016, ("**Rejoinder to IRP Request**"), again with no witness statements.

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<sup>25</sup> Interim Declaration on Emergency Request for Interim Measures of Protection ("**Emergency Declaration**"), ¶ 96.

62. On 7 May 2016, the Claimant requested that the hearing be postponed until July 2016. ICANN did not oppose. The IRP Panel rescheduled the hearing for 7 July 2016.
63. The hearing took place by telephone conference call on 7 July 2016, lasting approximately two hours. The IRP Panel heard submissions from counsel for both Parties. As agreed by the Parties, there was no fact or expert witness testimony.
64. Having determined that there was no need for further submissions, the Panel declared the hearing officially closed on 19 October 2016, except as to costs.

## **VI. THE RELIEF SOUGHT**

65. The Claimant GCC seeks a Declaration:
  - a. stating that the ICANN Board violated ICANN's Articles, Bylaws and the New gTLD Application Guidebook of 4 June 2012;
  - b. recommending to the Board that ICANN take no further action on the ".persiangulf" gTLD, including by enjoining ICANN from signing the registry agreement with Asia Green, or any other entity;
  - c. awarding the GCC its costs in this proceeding; and
  - d. awarding such other relief as the Panel may find appropriate or that the GCC may request.<sup>26</sup>
66. The Respondent ICANN seeks a Declaration:
  - a. denying the GCC's IRP Request;
  - b. awarding ICANN its reasonable fees and costs incurred, including legal fees, if it is the prevailing party.<sup>27</sup>

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<sup>26</sup> Supplementary IRP Request, ¶ 63.

<sup>27</sup> Response to Supplementary IRP Request, ¶¶ 30 and 32.

## VII. JURISDICTION: TIMELINESS OF THE REQUEST FOR IRP

### A. The Issue and Legal Framework

67. A preliminary jurisdictional issue for decision is whether the GCC's Request for IRP is time-barred. ICANN argues that the Request is time-barred; the GCC disagrees.
68. As a starting point, the 30-day deadline for challenging an ICANN Board action appears in Article IV, Section 3, Paragraph 3 of the ICANN Bylaws ("**IRP Deadline**"), which provides in relevant part:

*A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.*

69. Article IV, Section 3, of the ICANN Bylaws, together with the ICANN document entitled "Cooperative Engagement Process – Requests for Independent Review" dated 11 April 2013 ("**CEP-IRP Document**"),<sup>28</sup> codify two exceptions to the IRP Deadline.
- a. The IRP Deadline is tolled if the parties are engaged in a Cooperative Engagement Process ("**CEP**"), referred to in Paragraph 14 of Article IV, Section 3, of the ICANN Bylaws:

*Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.*

Pursuant to the CEP-IRP Document (pp. 1-2):

*If ICANN and the requestor have not agreed to a resolution of issues upon the conclusion of the cooperative engagement process, or if issues remain for a request for independent review, the requestor's time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.*

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<sup>28</sup> Response to Claimant's Request for Independent Review Process ("**Response to IRP Request**"), Exh. R-5; Supplementary IRP Request, Exh. S-10.

b. Pursuant to the CEP-IRP Document (para. 6), ICANN and an IRP requestor may agree, in writing, to extend the IRP Deadline.

70. To recall, certain relevant facts are undisputed. Following the Durban GAC meeting and Communiqué, ICANN posted the Durban Minutes and related materials on 30 September 2013. The GCC filed its Request for IRP on 5 December 2014. Obviously, 5 December 2014 is more than 30 days after the 30 September 2013 posting of the Durban Minutes and related materials.
71. It is also undisputed that the Parties neither initiated a formal CEP nor agreed in writing to extend the IRP Deadline.
72. Accordingly, the issue before the IRP Panel is whether the 30-day IRP Deadline was tolled or otherwise extended despite the absence of a CEP or written extension of the IRP Deadline.

#### **B. The Respondent's Position**

73. ICANN takes the firm legal position, as advocated in both its written submissions and during the 7 July 2016 hearing, that the IRP Deadline is mandatory and cannot be tolled or extended for non-codified reasons. To allow equitable tolling in general would be to create unacceptable uncertainty for gTLD applicants and IRP applicants. To allow tolling in the instant circumstances for the GCC, which waited over a year to file its IRP Request, would be to provide impermissible special treatment.
74. As for the specific circumstances alleged by the GCC (described below), ICANN denies that any dealings and communications between its officials and GCC representatives effectively substituted for the CEP process or excused the GCC's failure to initiate the CEP process. To recall, as in the Emergency Request proceedings, ICANN presented no witness statements from named or unnamed representatives or any other factual evidence.

#### **C. The Claimant's Position**

75. The GCC presents an equitable reliance defense to its delayed initiation of the IRP process. The GCC argues, as a general matter, that ICANN should acknowledge non-written tolling

circumstances and, in the specific circumstances here, that the IRP Deadline must be deemed tolled by reason of the explicit and/or implicit representations made by ICANN officials to Mr. Al Marzouqi between October 2013 and November 2014.

76. The GCC asserts that *“following the Board’s September 2013 Board Action, ICANN represented repeatedly – through its words and actions – to the GCC that the deadline to file the IRP had not yet passed”*.<sup>29</sup>
77. The GCC relies primarily on the Al Marzouqi Statement, and a 9 July 2014 letter from Mr. Mohammed Al Ghanim, Director General of the UAE Telecommunications Regulatory Authority, to ICANN CEO Mr. Fadi Chehade, to support this assertion. According to Mr. Al Marzouqi:
  - a. He and other GAC members expected that ICANN would treat the “.persiangulf” gTLD application in the same way it had treated the “.islam” and “.halal” applications, because all three applications *“lack community support, and the .PERSIANGULF gTLD application, unlike the .ISLAM and .HALAL gTLD applications, also is strongly opposed by the Arab community because ‘Persian Gulf’ is a disputed name”*.<sup>30</sup>
  - b. After the posting of the ICANN Board decision to proceed with the “.persiangulf” application on 30 September 2013, he *“reached out to [his] ICANN counterparts to initiate an attempt at resolution”* and they *“instructed [him] to wait until the Independent Expert issued a declaration on the GCC’s Community Objection”*, which he did.<sup>31</sup>
  - c. After Judge Schwebel dismissed the Community Objection on 30 October 2013, Mr. Al Marzouqi again reached out and his *“ICANN counterparts advised they would get back to [him]”*.<sup>32</sup>

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<sup>29</sup> Supplementary IRP Request, ¶ 35.

<sup>30</sup> Al Marzouqi Statement, ¶ 7.

<sup>31</sup> Ibid., ¶¶ 8-10.

<sup>32</sup> Ibid., ¶ 11.

- d. “After several months of dialogue with [his] ICANN counterparts proved unsuccessful”, he arranged for “high-level” meetings “in hopes of facilitating a resolution”, which arrangements took substantial time due to schedules.<sup>33</sup>
- e. In June 2014, Mr. Al Marzouqi and other GCC representatives met with the ICANN CEO, Mr. Chehade, during the GCC Telecom Council Ministers Meeting in Kuwait City.<sup>34</sup> According to Mr. Al Marzouqi, GCC representatives reiterated their objections to the “.persiangulf” application in that meeting.
- f. Mr. Al Marzouqi’s testimony about the meeting is corroborated by a 9 July 2014 letter from Mr. Al Ghanim to Mr. Chehade.<sup>35</sup> Mr. Al Ghanim reiterated the GCC’s concerns about lack of community involvement and support for the gTLD, which is “problematic and refers to a geographical place with disputed name”, and added:

*While the GAC did not issue an advice objecting against the Application (due to lack of consensus because one particular country did not agree to the objection), this does not mean those countries which are part [sic] of the community targeted by the Application are agreeing to the Application to proceed and this certainly does not mean that ICANN should ignore this fact and continue to allow the Application to proceed.*

*.... The security, functionality and stability of Internet rely greatly on a successful operation of the DNS system. It is worrying to see how a TLD being opposed by majority of the community targeted would be able to operate and sustain. We believe the motive behind this Application has nothing to do with Internet community interest, nor commercial interest. We request ICANN to analyze the Application from financial and sustainability angle given that the community continues to oppose the Application.<sup>36</sup>*

- g. Thereafter, Mr. Al Marzouqi’s “ICANN counterparts again advised [him] that they had taken the GCC’s position under advisement and would get back to the GCC with an answer”.<sup>37</sup> That answer, testified Mr Al Marzouqi, came in September 2014, when Mr. Al Marzouqi’s “ICANN counterparts ... suggested to

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<sup>33</sup> Ibid., ¶¶ 12-13.

<sup>34</sup> Ibid., ¶ 14.

<sup>35</sup> Ibid., attached Letter from Mr. Mohammed Al Ghanim to Mr. Fadi Chehade, 9 July 2014 (“Al Ghanim Letter”).

<sup>36</sup> Al Ghanim Letter, p. 2.

<sup>37</sup> Al Marzouqi Statement, ¶ 15.

[him] *that the GCC's only recourse toward resolution may be to file a request for independent review of ICANN's Board action*" (emphasis in original).<sup>38</sup>

- h. Mr. Al Marzouqi spoke again with his "*ICANN counterparts*" in October 2014 at ICANN meetings in Los Angeles. As "*ICANN's handling of geographic gTLD applications was a topic of discussion at those meetings*", he "*remained hopeful that the GCC and ICANN could finally resolve the dispute*".<sup>39</sup>
- i. In November 2014, there having been no resolution at the October meetings, Mr. Al Marzouqi advised the GCC to proceed with the IRP process.<sup>40</sup> He learned only in December 2014 that ICANN intended to sign the registry agreement for ".persiangulf", after which he advised the GCC to file the Emergency Request "*to ensure that the independent review process would not be rendered meaningless*".<sup>41</sup>
- j. According to Mr. Al Marzouqi: "*At no time from September 2013 to November 2014 did ICANN state, let alone suggest, that if the GCC engaged in resolution efforts it would be time-barred from seeking an independent review of the September 2013 Board action*".<sup>42</sup>

78. Mr. Marzouqi, in his Supplementary Witness Statement, describes further attempts at conciliation with both ICANN and Asia Green after the GCC filed its IRP Request.<sup>43</sup> These attempts proved unsuccessful.

79. The GCC also relies, in support of its equitable reliance defense, on an email dated 19 December 2014 from Mr. Eric Enson, outside counsel to ICANN, to Mr. Kamran Salour, outside counsel to the GCC ("**ICANN Counsel Email**").<sup>44</sup> The relevant language is as follows:

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<sup>38</sup> Ibid., ¶16.

<sup>39</sup> Ibid., ¶ 17.

<sup>40</sup> Ibid., ¶ 18.

<sup>41</sup> Ibid., ¶ 22.

<sup>42</sup> Ibid., ¶ 19.

<sup>43</sup> Supplementary Marzouqi Statement, Exh. S-9, ¶¶ 2-16.

<sup>44</sup> Supplementary Request for IRP, Exh. S-11.

*Fourth, during the call yesterday, you mentioned the possibility of entering a Cooperative Engagement Process (“CEP”), as set forth in ICANN’s Bylaws. A CEP is supposed to take place before the filing of an IRP in the hope of avoiding, or at least minimizing, the costs associated with an IRP. That, obviously, did not happen in this matter. In addition, a CEP is supposed to be a dialogue between the parties, rather than counsel for the parties. ICANN is always willing to discuss amicable resolutions of issues, but I think we need additional information from the GCC before agreeing to engage in a CEP, at this point. First, ICANN would like to know whether the GCC believes that there is a realistic possibility that the GCC would dismiss its IRP based on CEP discussions. The reason this is important to ICANN is because ICANN representatives informed GCC representative[s], on several occasions, that the CEP was available to the GCC and should be invoked before the filing of an IRP.*

80. The GCC considers this email to evidence ICANN’s earlier tolling of the 30-day IRP Deadline, because ICANN expressed willingness to enter into a CEP despite the GCC’s initiation of the IRP process on 5 December 2014.<sup>45</sup>

#### **D. The IRP Panel’s Analysis and Decision**

81. Turning first to the Parties’ general arguments on whether and how the IRP Deadline can be tolled or extended other than by the two codified exceptions, we do not consider it our role as an IRP Panel to issue general directives. It suffices to record that, under an equitable reliance theory, a requesting party should be allowed to request an IRP after expiry of the 30-day IRP Deadline if that party can show reliance on a representation or representations by ICANN inviting or allowing extension of the IRP Deadline. Otherwise, ICANN would be allowed “to blow hot and cold” and ultimately undermine its own mandate. Such contradictory actions would be inconsistent with, for example, the core value set out in Article 1, Section 2, of the ICANN Bylaws, of ICANN’s “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness”.
82. Beyond that general proposition, our Declaration must be focused on the facts and circumstances of the case before us. The issue is whether ICANN did make such a representation or representations here, either explicitly or implicitly by conduct.

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<sup>45</sup> Claimant’s Reply in Support of its Supplementary Request for IRP, ¶ 26.

83. We have carefully examined the GCC's evidence of contacts and communications between GCC and ICANN representatives between September 2013 and November 2014. Although the Marzouqi Statement was conclusory and short on detail, for example, in not providing names for his "*ICANN counterparts*" who participated in discussions after September 2013, he did provide a credible account of a series of communications with ICANN, commensurate with the credible level of serious GCC concerns about registry of ".persiangulf" as a new gTLD.
84. We have not been helped by any contradictory or confirming witness statements, or other evidence, from ICANN, about that alleged series of contacts and communications. It is striking that ICANN does not dispute the fact that the meeting with its most senior representative, CEO Chehade, occurred in June 2014. ICANN does dispute other points of Mr. Al Marzouqi's testimony, for example, his description of the instruction by unnamed ICANN officials that the GCC wait until after the Expert Panelist's decision on the Community Objection to commence an IRP process, and his testimony that unnamed ICANN officials suggested an IRP process in September 2014 and participated actively in negotiations thereafter. However, ICANN provided no witness statements from ICANN representatives who did participate in the June 2014 meeting, no copy of any written response from ICANN to the Al Ghanim letter about the content of the discussions in that meeting, or any other factual evidence whatsoever countering Mr. Al Marzouqi's account.
85. Having weighed such evidence as there is in the record, we find as follows, on the balance of probabilities:
  - a. In October 2013, ICANN requested the GCC, through Mr. Al Marzouqi, not to commence dispute resolution proceedings – which by definition encompass an IRP process – until the Expert Panelist had resolved the GCC's Community Objection to the ".persiangulf" gTLD application. This request was in effect a representation that the IRP Deadline was tolled until Judge Schwebel issued his expert decision, regardless of when that might be.
  - b. The GCC relied on that representation from ICANN, to the effect that the 30-day IRP Deadline was not yet running, in not filing an IRP request within 30 days

after the posting of the GAC's Durban Minutes and related materials on 30 September 2013.

- c. After Expert Panelist Schwebel dismissed the GCC's Community Objection on 30 October 2013, which happened to be the expiry of the IRP Deadline, ICANN continued to welcome – if not actively encourage – a series of communications and meetings to discuss the GCC's objections to registration of “.persiangulf”. Having previously tolled the IRP Deadline, if ICANN at that point believed that the 30-day deadline was running or had expired, it is reasonable to assume that ICANN would have told the GCC. It is thus reasonable – indeed, necessary – to conclude that, while those communications and meetings were taking place, the IRP Deadline remained tolled.
- d. By far the most compelling evidence is that the ICANN CEO himself, Mr. Chehade, met with Mr. Al Marzouqi and other GCC representatives in June 2014 to discuss the GCC's objections to the “.persiangulf” gTLD application, a meeting testified to by Mr. Al Marzouqi and corroborated by the 9 July 2014 Al Ghanim Letter. Regardless of whether ICANN officials thereafter expressly advised the GCC that ICANN had taken the GCC's objections under advisement, as Mr. Al Marzouqi testified, CEO Chehade's personal involvement made it reasonable for the GCC to consider that their opposition to “.persiangulf” remained under active consideration by the ICANN Board through July 2014.
- e. Not long thereafter, in September 2014, an ICANN representative or representatives suggested to Mr. Al Marzouqi that an IRP request might be the GCC's only recourse toward resolution. Considering that the 30-day IRP Deadline had passed over a year before, and assuming good faith on the part of ICANN throughout, it is reasonable that the GCC considered the IRP Deadline to remain tolled at this time.
- f. The GCC pursued a further settlement attempt with ICANN at meetings in Los Angeles in October 2014, which reflects that the GCC continued to rely on ICANN's holding the IRP Deadline open in hopes of settlement. Those hopes

dissipated by November 2014 when the GCC received nothing positive from the Los Angeles meetings.

- g. At this point, absent any further representations from ICANN about further negotiations, the limitations period reasonably ceased to be tolled and the IRP Deadline started to run.
  - h. On 5 December 2014, within the 30-day IRP Deadline, the GCC filed its Request for IRP.
86. Exchanges thereafter – in specific, the ICANN Counsel Email confirming that ICANN had entertained a CEP process – support the conclusion that ICANN itself considered the deadline for the submission of an IRP to have been tolled. Those exchanges show that ICANN could and did continue discussions with the GCC aimed at resolving the “.persiangulf” gTLD dispute by way of a formal or informal CEP process even after the 30-day IRP Deadline had passed and before the GCC filed a Request for IRP. As confirmed in the ICANN Counsel Email, the CEP is a dispute resolution mechanism that typically precedes, and is aimed at avoiding, an IRP filing. We need not interpret Mr. Enson’s email as confirmation that a CEP took place before the IRP was filed, to find that ICANN reasonably appeared to the GCC to remain open to a CEP, with certain conditions, well after 30 October 2013.
87. While there was no formal CEP, we conclude from the evidentiary record overall that ICANN explicitly and implicitly cooperated in a shadow conciliation process with the GCC. It was reasonable for the GCC to continue to participate in that process, without concern that ICANN would retroactively impose a strict 30 October 2013 time-bar for an IRP request should the shadow conciliation process fail.
88. In coming to this conclusion, we have not been swayed by the GCC’s umbrella argument that ICANN should have formally notified the GCC, at very least in the December 2014 ICANN Counsel Email, that the IRP Deadline was mandatory and had expired by 30 October 2014. Nor have we been swayed by ICANN’s mirror argument that the GCC should have formally reserved and documented its position that the IRP Deadline was tolled by ICANN’s conduct. It is because neither Party took such formal action that this

dispute comes before this Panel, and we are tasked with evaluating the legal import of the actions the Parties did take.

89. Nor have we been swayed by the political context. While the well-known sensitivities around the disputed names “Persian Gulf” and “Arabian Gulf” cannot **excuse** ICANN’s ignoring its own IRP Deadline for over a year, which implicitly encouraged the GCC to postpone filing its IRP Request, those sensitivities perhaps **explain** ICANN’s reluctance to apply the IRP Deadline strictly in this case. It would seem that both Parties hoped that such a political dispute would somehow resolve itself.
90. Although neither Party asked the IRP Panel to take any formal action in relation to the status of the Emergency Declaration, it should be clear from our conclusion that we agree with the assessment of Mr. Judge that “*the evidence of the ongoing contact between representatives of ICANN and the GCC from October 2013 to November 2014 supports a reasonable possibility that the time period for the filing of the IRP has been extended by the conduct of ICANN representatives and that the delay, as explained, is reasonable*”.<sup>46</sup> The Emergency Panelist cautioned that “*the evidentiary record is far from complete and additional evidence can be expected on this issue on the IRP itself*”,<sup>47</sup> but, as it transpired, ICANN did not provide any such additional evidence concerning the conduct of its officials.
91. To conclude, the Panel finds that: (a) at no point did the GCC cease its objections to ICANN’s registration of the “.persiangulf” gTLD; (b) through its conduct, ICANN made representations that the IRP Deadline, measured against the 30 September 2013 Board action, was tolled; (c) the GCC relied on those representations, in hopes of a resolution, in postponing a formal IRP process; and (d) the GCC timely submitted its IRP Request on 5 December 2014.

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<sup>46</sup> Emergency Declaration, ¶ 83.

<sup>47</sup> Ibid., ¶¶ 83 and 86.

## VIII. THE MERITS

### A. The Standard of Review

92. As a preliminary matter, the Panel considers the standard of review to be clear. Pursuant to Article IV, Section 3, Paragraph 4, of the ICANN Bylaws (echoed in Article 8 of the Supplementary Procedures), we are:

*charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. . . . [and] **must apply a defined standard of review to the IRP request, focusing on:***

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

93. The IRP Panel agrees with the GCC that this is a *de novo* standard of review, without a component of deference to the ICANN Board with regard to the consistency of the contested action with the Articles and Bylaws.<sup>48</sup> This is consistent with the very name of the IRP process – an **independent** review of the contested Board action. Other IRP Panels have recognized and applied this *de novo* standard of review.<sup>49</sup>
94. We also agree with ICANN that an IRP Panel cannot abuse this independence to substitute its own view of the underlying merits of the contested action for the view of the Board, which has substantive discretion.<sup>50</sup> This proposition is reflected in the language of Article IV, Section 3, Paragraph 4, of the Bylaws: an IRP Panel is not entrusted with second-

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<sup>48</sup> Supplementary IRP Request, ¶¶ 9-11.

<sup>49</sup> Relying upon Annex S-3, 19 February 2010, Final Declaration in *ICM Registry LLC v. ICANN*; Annex S-4, 3 March 2015, Final Declaration in *Booking.com v. ICANN*; Annex S-5, 9 July 2015 Final Declaration in *DotConnectAfrica Trust v. ICANN*.

<sup>50</sup> Response to Claimant's Supplementary IRP Request ("Response to Supplementary IRP Request"), ¶ 5; Annex S-2, 9 October 2015, Final Declaration in *Vistaprint v. ICANN*, ¶ 124; Exh. R-24, Final Declaration in *Merck v. ICANN*, ¶ 21; Annex S-4, Final Declaration in *Booking.com v. ICANN*, ¶ 108.

guessing the Board, but rather “*with declaring whether the Board has acted consistently with the provisions of [the ICANN] Articles of Incorporation and Bylaws*”.

95. To recall, the contested ICANN Board action here is the Board’s decision on 10 September 2013 to proceed with the “.persiangulf” gTLD application. It is irrelevant whether the IRP Panel considers this decision to be right or wrong on the merits, much less to be politically wise or unwise. Our role is to examine the **process** of the Board’s decision-making, in specific to answer the questions in Article IV, Section 3, Paragraph 4, of the Bylaws: (a) did the Board act without conflict of interest? (b) did the Board exercise due diligence and care in having a reasonable amount of facts? and (c) did the Board members exercise independent judgment, believed to be in the best interests of ICANN?
96. If the answer to any of those questions is “no”, the GCC will prevail in this Request.

#### **B. The Claimant’s Standing to Pursue the IRP**

97. A second preliminary question goes, as we find below, to the GCC’s standing to pursue this IRP proceeding.
98. The Parties devoted substantial attention in their written and oral submissions to the question of the type and level of harm that the GCC must establish it has suffered or will suffer as a result of the contested ICANN Board action. This question arises from the IRP-related test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws:

*Any person **materially affected** by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws **may submit a request for independent review** of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action. (Emphasis added.)*

99. The Parties agree that the term “*materially affected*” must be distinguished from the term “*material detriment*”, which is relevant in assessing the merits of a Community Objection to a gTLD application. One of the four elements to be proven for a successful Community Objection is that the application “*creates a likelihood of **material detriment** to the rights or legitimate interests of a significant portion of the community to which the string may be*

*explicitly or implicitly targeted*” (emphasis added). Factors evidencing material detriment go to actual operation of the gTLD by the applicant, including the likelihood that operation will cause reputational, security, and/or economic harm to the community represented.

100. ICANN, however, effectively equates the two terms “*materially affected*” and “*material detriment*” by using them interchangeably. The basic inquiry for both tests, according to ICANN, is whether an IRP requestor will be materially injured or harmed by the actual operation of the relevant string.<sup>51</sup> In ICANN’s view, the GCC, however, has failed to identify any legally recognizable harm it will suffer if “.persiangulf is registered; the contention that a “.persiangulf” gTLD will create the false impression that the Gulf Arab nations accept the disputed name “Persian Gulf” is not a cognisable harm.<sup>52</sup> To support its position, ICANN puts substantial weight on the findings of the Independent Objector and the Expert Panelist that the GCC fell short of proving that it would suffer harm reaching the level of “*material detriment*”.<sup>53</sup>
101. In comparison, the GCC in its Supplementary IRP Request argues that the only relevant inquiry is whether it suffered injury or harm connected to ICANN’s alleged action inconsistent with the ICANN Articles or Bylaws.<sup>54</sup> The IRP Panel, according to the GCC, is to examine only whether that action – here, the Board’s 10 September 2013 decision to allow processing of the “.persiangulf” application – did cause harm “*materially affect[ing]*” the GCC and its members.<sup>55</sup> The GCC identifies that harm to be the denial of its due process rights to an ICANN decision on the contested “.persiangulf” gTLD application in which its objections were fully considered by the Board, and apparent discrimination against its Arab members in favor of Iran.<sup>56</sup>
102. The IRP Panel agrees with ICANN that the question of whether the GCC was “*materially affected*” for purposes of Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is one

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<sup>51</sup> Rejoinder to ICANN’s Response to Gulf Cooperation Council’s Reply in Support of Supplementary Request for Independent Panel Review (“**Rejoinder to IRP Request**”, ¶ 15.

<sup>52</sup> Ibid., ¶¶ 13-15; Response to Supplementary IRP Request, ¶ 25.

<sup>53</sup> Rejoinder to IRP, ¶ 14.

<sup>54</sup> Supplementary IRP Request, ¶ 41. The GCC took a position closer to ICANN’s in this respect in its original Request for IRP; see, e.g., ¶¶ 70-74.

<sup>55</sup> Supplementary IRP Request, ¶ 49.

<sup>56</sup> Ibid., ¶ 42.

of standing.<sup>57</sup> This is the logical meaning of the language in Paragraph 2 that a “*person materially affected*” by an ICANN Board action perceived to be inconsistent with the Bylaws or Articles “*may submit a request for independent review*”; this cannot and does not presuppose a successful request for IRP. As a standing question, this question precedes the core IRP question of whether the ICANN Board acted inconsistently with its Articles or Bylaws.<sup>58</sup>

103. However, we cannot agree with ICANN’s effective conflation of the two tests of “*materially affected*” and “*material detriment*”. Only the former test appears in, and is relevant to, the IRP-related standing test in Article VI, Section 3, Paragraph 2, of the ICANN Bylaws. To apply the “*material detriment*” test, which is a critical component of the Community Objection evaluation process under the Guidebook, would be to put the IRP Panel into a role it does not have – to examine and offer its views on the merits of the “.persiangulf” gTLD application under the relevant ICANN criteria. The determinations of the Independent Objector and the Expert Panelist, which were made in the Community Objection context and hence necessarily focused on the likelihood of “*material detriment*” to the interests of the Gulf community, are therefore irrelevant.<sup>59</sup>
104. In this connection, we do not need to address the submissions of the Parties as to whether the GCC could have minimized or avoided injury or harm by applying for an “.arabiangulf” gTLD, and whether such an application is or is not foreclosed in the future. This may have been a factor for the Independent Objector and the Expert Panelist to consider in the Community Objection context, but it is not a proper issue of standing in an IRP case.
105. We recognize that the “*materially affected*” test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is defined in relation to “*injury or harm that is directly or causally connected to the Board’s alleged violation of the Bylaws or the Articles*”. As Paragraph 2 goes to standing, however, it cannot reasonably be interpreted as requiring an IRP panel to find proof of concrete and measurable injury or harm at the time an IRP request is filed. It

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<sup>57</sup> Rejoinder to IRP Request, ¶ 16.

<sup>58</sup> *Ibid.*, ¶ 16.

<sup>59</sup> Supplementary IRP Request, ¶¶ 43-49; The Gulf Cooperation Council’s Reply in Support of its Supplementary Request for Independent Review Process (“**Reply to IRP Request**”), ¶ 21.

must suffice for the IRP requestor, to meet the standing test, to allege reasonably credible injury or harm connected to the contested ICANN Board action. We are satisfied that the GCC has done so here by describing the harm caused to its Gulf members' due process rights, by definition, if the processing of the ".persiangulf" gTLD application were to continue on the basis of a Board decision made without regard to the GCC's objections. We now turn to the core merits question of whether the GCC has proven such inconsistent action by ICANN.

### C. The Claimant's Position

106. The GCC's main submission is that ICANN failed to follow the GAC's advice from the Durban meeting, as well as the Guidebook procedures, in deciding in September 2013 to allow further processing of the ".persiangulf" gTLD.
107. The GCC relies on Module 3.1 of the Guidebook, which sets out three possible forms for GAC advice to the ICANN Board. These are set out at paragraph 19 above. Given that the GAC did not issue Consensus GAC Advice that the ".persiangulf" gTLD application should **not** proceed or advice that the application should not proceed unless remediated, by elimination the only available form of advice was an "*expression of concerns in the GAC*" about Asia Green's application, meant to prompt a dialogue between the GAC and the Board.<sup>60</sup> The GAC did identify such concerns, in the Durban Minutes, which explicitly: (i) referred to the opinions of GAC members from the UAE, Oman, Bahrain and Qatar that the application should not proceed; (ii) noted that the GAC had heard "*opposing views*" on the application; and (iii) concluded that "*it was clear that there would not be consensus on an objection*".<sup>61</sup> In the GCC's view, these vigorous comments were a fully recognizable expression of its members' concerns.
108. The GCC disagrees with ICANN that only the Durban Communiqué constituted recognizable GAC advice to the ICANN Board. The GCC relies on Principle 51 of GAC's Operating Principles, which does not limit the GAC's advice to a communiqué.<sup>62</sup> Further, ICANN's failure to review the Durban Minutes before passing its resolution on the

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<sup>60</sup> Supplementary IRP Request, ¶ 20.

<sup>61</sup> Ibid., ¶ 18; Reply to IRP Request, ¶ 6.

<sup>62</sup> Reply to IRP, ¶ 8.

“.persiangulf” application was, in itself, a failure to exercise due diligence in making the decision, in violation of Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws.<sup>63</sup>

109. In light of the foregoing, the ICANN Board was obligated to enter into a dialogue with the GAC to understand its members’ concerns, and to give reasons for its ultimate decision to allow Asia Green’s application to move forward – which ICANN failed to do.
110. The GCC argues in the alternative that, even if ICANN was somehow correct in following the GAC’s non-compliant advice to allow the “.persiangulf” application to proceed, ICANN violated several other Articles and Bylaws. Among others, the GCC identifies:

a. Bylaws, Article I, Section 2:

*In performing its mission, the following core values should guide the decisions and actions of ICANN:*

....

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

....

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

....

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

b. Bylaws, Article II, Section 3:

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

c. Bylaws, Article III, Section 1:

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<sup>63</sup> Reply to IRP Request, ¶ 10.

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

d. Articles of Incorporation, Article 4:

*The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.*

111. The GCC puts special emphasis on Paragraph 2.1(b) of the GAC Principles Regarding New gTLDs, which directs that “*New gTLDs should respect: ... the sensitivities regarding terms with national, cultural, geographic and religious significance*”.
112. Against this backdrop of ICANN constituent documents, the GCC argues that the ICANN Board failed to collect and independently assess all relevant facts before resolving to allow the “.persiangulf” gTLD application to proceed. The Board failed to review the GAC’s Durban Minutes, which flagged that there were serious objections to the application and hence no consensus in favor of its proceeding. Nor did the Board explain, or even give any indication of, the reasons for its decision to allow the vigorously contested application to proceed. The bare Board resolution of 10 September 2013 gives no hint that the Board fulfilled its obligation to assess and balance the competing core values of ICANN. Neither that resolution nor any other document contains any reference to the ICANN core values guiding the Board in its 10 September 2013 decision on the “.persiangulf” application or any statement as to how the Board balanced core values that it found to be competing.
113. The Board also discriminated against the GCC by giving credence only to the Iranian position at the GAC and by ignoring the GCC’s Community Objection and strong government opposition. If registered with Asia Green, the “.persiangulf” string will be discriminatory because “it will falsely create the perception that the GCC accepts the disputed ‘Persian Gulf’ name”.<sup>64</sup> This is particularly egregious because the Persian

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<sup>64</sup> Request for IRP, ¶ 58.

community already has the benefit of the “.pars” string, already registered with Asia Green for purposes overlapping with the “.persiangulf” application.

114. Further, according to the GCC, the Board handled Asia Green’s “.persiangulf” application inconsistently with Asia Green’s “.halal” and “.islam” applications. In those cases, although the Independent Expert dismissed the Community Objections because he did not find substantial community opposition, the Board intervened to stop the processing of both strings. Here, where the Community Objection and the Durban Minutes documented substantial community opposition, the Board nonetheless decided to allow continued processing of the “.persiangulf” application.
115. Overall, says the GCC, the Board’s NGPC acted unfairly in a non-transparent and discriminatory manner, without sensitivity to the national, cultural and geographic issues in the Gulf.<sup>65</sup> In reviewing the Board’s decision to allow Asia Green’s “.persiangulf” application to go forward, the Panel should follow the path of the IRP Panel in the *DotConnectAfrica Trust v ICANN* case. There, the IRP Panel held that the Board had breached its transparency obligations by simply adopting the GAC’s consensus advice not to proceed with the application for the “.africa” gTLD, stating that it “*would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting [DotConnectAfrica] Trust’s application*”.<sup>66</sup>

#### **D. The Respondent’s Position**

116. ICANN’s defense to the GCC’s argument that the Board failed to follow the GAC’s advice is straightforward: the ICANN Board followed the GAC’s advice to the letter. According to ICANN, the GAC did **not** advise of any member concerns regarding the “.persiangulf” gTLD application, and so the proper course was for the Board’s NGPC to allow Asia Green’s application to progress. The Durban Communiqué expressly stated that the GAC had “*finalised its consideration ... and does not object to [the “.persiangulf” application] proceeding*”, without advising of any concerns whatsoever. ICANN emphasizes that the Board did not make a decision to approve the “.persiangulf application” based on the

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<sup>65</sup> Supplementary IRP Request, ¶ 23-26; Reply to IRP Request, ¶¶ 16-18.

<sup>66</sup> *Ibid.*, Exh. S-5; Final Declaration, *DotConnectAfrica Trust v ICANN*, 9 July 2015, ¶ 113.

GAC's advice, but simply resolved to allow the ICANN staff to continue to process the application.<sup>67</sup>

117. ICANN relies on GAC Operating Principles 51 to argue that the Durban Minutes, to the extent those Minutes say anything more than the Durban Communiqué, are not an official statement of GAC advice to the ICANN Board.<sup>68</sup> Nor were the Durban Minutes approved or posted until November 2013, and so they were not even before the Board for consideration at its meeting on 10 September 2013 to review and pass resolutions on the Durban Communiqué and Scorecard items. Further, in ICANN's view, the Durban Minutes are consistent with the Dublin Communiqué in reporting that there was no advice against the “.persiangulf” application proceeding. Comments made by individual GAC members at the Durban meeting, recorded in the Minutes, do not constitute GAC advice triggering Board duties under Module 3 of the *Guidebook*.<sup>69</sup>
118. As for the GCC's alternative argument based on ICANN's failure to meet its mission and core value standards, ICANN denies both the theory and the facts. In ICANN's view, the Board independently evaluated the “.persiangulf” gTLD application, in an open and transparent fashion, as evidenced by: the posting of the Durban Communiqué and subsequent public comment period; the Board meetings to determine actions based on the GAC's advice in the Durban Communiqué, with a public record of the discussion on each item in the Durban Scorecard responding to the GAC's advice; and a unanimous vote adopting resolutions based on the Scorecard, again publicly posted. Nor can it be inferred that the Board failed to consider ICANN's core values simply because the Board did not explicitly state how it did so; it would be impossible for the Board to spell this out for the hundreds of resolutions it must manage each year.<sup>70</sup> Further, the Bylaws do not oblige the Board to accept any and all advice from the GAC; Article XI, 2.1.j of the Bylaws only requires the Board to take GAC advice into account and, if the advice is not followed, to provide reasons for not doing so.

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<sup>67</sup> Response to IRP Request, ¶ 21.

<sup>68</sup> Ibid., ¶ 10, Exh. R-25.

<sup>69</sup> Reply to IRP Request, ¶ 9.

<sup>70</sup> Response to IRP Request, ¶¶ 13-20.

119. ICANN argues that the IRP Panel’s Declaration in the *DotConnectAfrica* case is inapposite, because the GAC provided Consensus Advice against the string proceeding. Similarly, as for the alleged inconsistent treatment of Asia Green’s applications for “.halal” and “.islam”, ICANN points out that in those cases, unlike the instant case, the GAC did in fact express concerns to the Board base on community concerns about the obvious religious sensitivities.
120. In sum, the ICANN Board’s NGPC considered and followed the GAC’s advice exactly as it was supposed to, fully consistently with the ICANN Articles and Bylaws.
121. Should the Tribunal find in the GCC’s favor, ICANN contests the GCC’s request for a declaration ordering ICANN to refrain from signing the registry agreement with Asia Green or any other entity. ICANN argues that, pursuant to Article IV, Section 3, Paragraph 3.11, of the Bylaws, an IRP Panel is limited to stating its opinion by “*declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws*” and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel.

#### **E. The IRP Panel’s Analysis and Decision**

122. We turn first to the GCC’s main submission that the ICANN Board failed to follow the GAC’s advice from the Durban meeting, as well as the Guidebook, in deciding on 10 September 2013 to allow the “.persiangulf” gTLD to proceed in the application process.
123. This turns on whether the GAC did in fact properly provide post-Durban advice to the Board. We find this to be a difficult question, which overlaps with the GCC’s alternative submission concerning ICANN’s overall compliance with its mission and core values under the Bylaws and Articles.
124. To recall, Module 3.1 of the Guidebook envisions three forms of GAC advice to the Board: (a) Consensus GAC Advice that an application should **not** proceed, creating a strong presumption of non-approval; (b) the expression of **concerns** within the GAC, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those

concerns and then give reasons for its decision; or (c) advice that the application should not proceed unless **remediated**. It is undisputed, and we agree, that the GAC did not issue Consensus GAC Advice against the “.persiangulf” application or suggest remediation, leaving only the second form of advice – the expression of **concerns**, meant to prompt interaction with the Board.

125. If, as ICANN argues, only the Durban Communiqué could provide GAC advice to the Board, then the GAC clearly did **not** express concerns about the “.persiangulf” gTLD application. That Communiqué stated no more than this: “*The GAC has finalised its consideration of [the application] and does not object to [it] proceeding*”. This underlies ICANN’s main defense that the ICANN Board followed the GAC’s advice to the letter, by resolving to allow Asia Green’s application to proceed.
126. We find ICANN’s defense to be unduly formalistic and simplistic.
127. As we see it, the GAC sent a missive to the ICANN Board that fell outside all three permissible forms for its advice. The GAC’s statement in the Durban Communiqué that the GAC “*does not object*” to the application reads like consensus GAC advice that the application **should** proceed, or at very least non-consensus advice that the application should proceed. Neither form of advice is consistent with Module 3.1 of the Guidelines. Yet the ICANN Board proceeded to resolve to allow the application to proceed, as a routine matter, based on the Durban Communiqué.
128. Some of the fault for the outcome falls on the GAC, for not following its own principles. In particular, GAC Operating Principle 47 provides that the GAC is to work on the basis of consensus, and “[w]here consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board”.<sup>71</sup> The GAC chair clearly did not do so. Mr. Al Marzouqi testified to the views he expressed at the Durban meeting and that consensus proved impossible, which testimony stands unrebutted by ICANN here (quoted in paragraph 31 above):

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<sup>71</sup> ICANN Response to IRP Request, Exh. R-25.

5. *I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC's opposition to the .PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because "Persian Gulf" is a disputed name. A substantial number of GAC members in attendance shared these concerns.*

6. *Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the "Persian Gulf" name, and Iran's GAC representative obviously does not share the other GAC members' concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson pulled me to the side to express her frustration that GAC could not reach a consensus.*

129. If the GAC had properly relayed these serious concerns as formal advice to the ICANN Board under the second advice option in Module 3.1 of the Guidebook, there would necessarily have been further inquiry by and dialogue with the Board. The directive of Module 3.1, which is a **procedural** protection for opponents to gTLD applications, bears emphasis:

*The GAC advises ICANN that there are concerns about a particular application "dot.example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.*

130. It is difficult to accept that ICANN's core values of transparency and fairness are met, where one GAC member can not only block consensus but also the expression of serious concerns of other members in advice to the Board, and thereby cut off further Board inquiry and dialogue.

131. In any event, the IRP Panel is not convinced that just because the GAC failed to express the GCC's concerns (made in their role as GAC members) in the Durban Communiqué that the Board did not need to consider these concerns. The record reveals not only substantial sensitivity with respect to Asia Green's ".persiangulf" application, but also general discord around religious or culturally tinged geographic gTLD names. In addition to the Durban Minutes, the pending Community Objection, and public awareness of the sensitivities of the "Persian Gulf"- "Arabian Gulf" naming dispute, the Durban Communiqué itself – on which ICANN relies so heavily here – contained an express recommendation that "*ICANN collaborate with the GAC in refining, for future rounds, the Applicant Guidebook with*

*regard to the protection of terms with national, cultural, geographic and religious significance*".<sup>72</sup> These materials and this general knowledge could and should have come into play, if not as a matter of following GAC advice then as part of the Board's responsibility to fulfil ICANN's mission and core values.

132. Although it is not necessary to the outcome of this IRP, the Panel cannot accept ICANN's argument that the GAC may provide official advice to the Board only through a Communiqué. It is Principle 46 of the GAC's Operating Principles that provides that "[a]dvice from the GAC to the ICANN Board shall be communicated through the Chair", while Principle 51 speaks only of the Chair's authority to "issue a communiqué to the Media" following a meeting.
133. Even if, as a matter of practice, ICANN is correct that the Durban Minutes were not a form of official communication from the GAC, the Minutes do express serious GAC member concerns and confirm that there was, in fact, no consensus in Durban in favor of the ".persiangulf" gTLD application proceeding. As quoted in paragraph 32 above, those Minutes recorded as follows:

*The GAC finalized its consideration of .persiangulf after hearing opposing views, the GAC determined that it was clear that there would not be consensus of an objection regarding this string and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name. (Emphasis added.)*

Given this language, we cannot accept ICANN's argument that the Durban Minutes are consistent with the Durban Communiqué, which succinctly stated that the GCC "*does not object to [the application] proceeding*", thereby creating the impression that GAC members took the position – whether by consensus or not – that the application **should** proceed.

134. It is difficult to accept that the Board was not obliged to consider the concerns expressed in the Durban Minutes if it had access to the Minutes. If it was not given the Minutes, it is equally difficult to accept that the Board – as part of basic due diligence – would not have

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<sup>72</sup> Request for IRP, Annex 24, Durban Communiqué, para. 7.

asked for draft Minutes concerning GAC discussions of such a geo-politically charged application.

135. This failure of due diligence is compounded by the fact that, as noted by the NGPC itself in the Minutes of the critical 10 September 2013 meeting, the GCC's Community Objection was pending. The relevant Board resolution bears quoting again:

*ICANN will continue to process the application in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF. (Emphasis added.)*

136. Yet there is no evidence or indication in the record that the NGPC bothered to consider the content of the Community Objection, before allowing the processing of the obviously controversial string application to proceed. Certainly, that the Expert Panelist – some three weeks later – dismissed the Community Objection cannot support the procedural propriety of the Board's decision on 10 September 2013 to allow the “.persiangulf” application to proceed.

137. In sum, ICANN may be correct that the Board followed all the routine steps of posting information about the application, meeting to review the application, and acting strictly on the basis of the Durban Communiqué and Scorecard items. The Board did post the Durban Communiqué on 1 August 2013 for public comment – but it contained only the one-line conclusion that the GAC had “*finalised its consideration of the [“.persiangulf”] string, and does not object to its proceeding*”. The Board did meet on 13 August 2013 – but the only discussion was whether to respond to the Durban Communiqué advice by Scorecard. The Board did meet on 10 September 2013 to discuss each of the Durban Scorecard items, and did vote unanimously in favor of continuing to process the “.persiangulf” application – but the relevant entry on the Scorecard merely repeated the one-line Durban Communiqué reporting that the GAC “*does not object*” to the “.persiangulf” application proceeding. The Minutes of the Board meetings were publicly posted.

138. In the IRP Panel's assessment, these were empty steps. ICANN's insistence in its Response to the Supplementary IRP Request (at paragraph 2) and Rejoinder to IRP Request (at paragraph 10) is equally empty. At the end of the day, there is simply no

evidence – or even the slightest indication – that the Board collected facts and engaged with the GCC’s serious concerns before resolving to allow the “.persiangulf” application to proceed. ICANN’s willingness to meet GCC representatives after the 10 September 2013 decision to allow the application to proceed was belated and could not cure or validate its failure to conduct due diligence and engage with the GCC before that uninformed decision.

139. If the Board had undertaken a modicum of due diligence and independent investigation, it would readily have learned about the GCC’s serious concerns as raised in the GAC meetings in Durban and in Beijing, and how and why the GAC failed to reach consensus in Durban against the “.persiangulf” application. The GCC may be right or wrong in submitting that it was Iran’s solitary support for the application in Durban that motivated the message in the Durban Communiqué. The correctness of the GCC’s position on this point is irrelevant in this IRP. The relevant issue is whether the Board’s decision to allow the “.persiangulf” application to proceed was consistent with the Bylaws and Articles.

140. While not binding upon this Panel, the IRP precedent that we find most helpful is the decision concerning the application by DotConnectAfrica Trust for the “.africa” string, in which the IRP Panel found that the actions and inactions of the ICANN Board were inconsistent with its Articles and Bylaws. In particular, the IRP Panel held that the ICANN Board had breached its transparency obligations by rotely adopting the GAC’s Consensus Advice not to proceed with that application. The Panel stated that it “*would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting [DotConnectAfrica] Trust’s application*”.<sup>73</sup> Contrary to ICANN’s attempt to distinguish the DotConnectAfrica case, we find that ICANN’s transparency obligations arose here despite the absence of Consensus GAC Advice. Indeed, transparency and the related need for further due diligence were more compelling in this case, given the pending Community Objection concerning a sensitive application.

141. Overall, based on the submissions and evidence in the record, we are constrained to find that the Board passed a bare-bones resolution, based on a bare-bones GAC Communiqué

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<sup>73</sup> Note 66, *supra*.

and Scorecard, to allow Asia Green's ".persiangulf" application to proceed, to virtually certain registration and operation. We can only regard the Board's routine treatment of the non-routine ".persiangulf" gTLD application to have been non-transparent, unfair and essentially oblivious to the well-known geo-political sensitivities associated with the name "Persian Gulf". This treatment consequently fell far short of the mission and core values enshrined in ICANN's Articles of Incorporation and Bylaws, specifically Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.

142. In this connection, we are sympathetic to ICANN's argument that the Board cannot be expected to spell out considerations going to mission and core values in every resolution passed on every gTLD application. However, our finding is not based on inferences from the lack of discussion about mission and core values in the Board's 10 September 2013 decision to allow the ".persiangulf" application to proceed. As noted, there was **no** discussion of **any** factors whatsoever in that decision. This cannot be reconciled with the requirement in Article 1, Section 2, of the Bylaws that ICANN "*exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values*".
143. In related vein, we are not here second-guessing the Board's assessment of a difficult application against the backdrop of its mission and core values. That is because, if nothing else, we have no evidence or indication of what, if anything, the Board **did** assess in taking its decision. Our role is to review the **decision-making process** of the Board, which here was virtually non-existent. By definition, core ICANN values of transparency and fairness were ignored.
144. Having made findings on the Board's duties to make decisions fairly and transparently, we do not need to make an additional finding on the GCC's allegation that the Board discriminated against the GCC, or failed to provide the GCC with consistent treatment, in failing to intervene to stop the ".persiangulf" application as it did with Asia Green's application for the ".halal" and ".islam" gTLDs, to which the GCC had also objected. We do note that it would seem mechanistic indeed for ICANN to justify the different treatment

of “.halal” and “.islam” on the basis that the GAC expressed member concerns about those strings based on community objections and religious sensitivity, when the GAC failed to relay similar member concerns about “.persiangulf”. This is despite the glaring fact that the Independent Expert reviewing the GCC’s Community Objections against all three strings dismissed them all on the same grounds.

145. In conclusion, turning to the IRP standard of review in Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws, we conclude that the ICANN Board failed to “*exercise due diligence and care in having a reasonable amount of facts in front of them*” before deciding, on 10 September 2013, to allow the “.persiangulf” application to proceed. We find, on the balance of probabilities on the basis of the Parties’ submissions and evidence, that this decision effectively was an unreasoned vote on an unreasoned Scoreboard entry reciting the one-line Durban Communiqué statement that the GAC “*does not object*” to the application proceeding. Under the circumstances, and by definition, the Board members could not have “*exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company*”, as they did not have the benefit of proper due diligence and all the necessary facts. This reflects Board action inconsistent with the Articles and Bylaws, contrary to Article IV, Section 3, Paragraph 4(c), of the ICANN Bylaws.

146. As a final matter, we do not accept ICANN’s position that we lack authority to include affirmative declaratory relief. Like the IRP Panel in the *DotConnectAfrica Trust* case, we consider that Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws does give us “*the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act*” inconsistently with its Articles of Incorporation and Bylaws.<sup>74</sup> That Bylaw bears repeating:

*The IRP Panel shall have the authority to .... recommend that the Board stay any action or decision or that the Board take any interim action, until such time as the Board reviews and acts upon the **opinion** of the IRP. (Emphasis added.)*

147. Recalling that, under Article IV, Section 3, Paragraph 2, of the Bylaws, the IRP process is designed to provide a remedy for any person “*materially affected*” by suffering injury or harm causally connected to the relevant Board violation, we agree with the

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<sup>74</sup> Ibid, ¶ 126.

*DotConnectAfrica Trust* IRP Panel that the “*language and spirit*” of Paragraph 11(d) empowers us to recommend redress for such injury or harm.<sup>75</sup> The words “*shall*” and “*opinion*” reflect that, similar to any decision maker, the Panel may and should recommend affirmative steps to be taken by the Board to correct the consequences of actions it took inconsistent with the Bylaws and Articles of Incorporation. Here, given the harm caused to the GCC’s due process rights by the Board’s decision – taken without even basic due diligence despite known controversy – to allow Asia Green’s “.persiangulf” gTLD application to go forward, adequate redress for the GCC requires us to recommend not a stay of Asia Green’s application but the termination of any consideration of “.persiangulf” as a gTLD. The basic flaws underlying the Board’s decision cannot be undone with future dialogue. In recognition of ICANN’s core values of transparency and consistency, it would seem unfair, and could open the door to abuse, for ICANN to keep Asia Green’s application open despite the history. If the issues surrounding “.persiangulf” were not validly considered with the first application, the IRP Panel considers that any subsequent application process would subject all stakeholders to undue effort, time and expense.

## **IX. FIXING OF COSTS**

148. The Parties disagree on whether the procedural rules governing this IRP include the ICANN Bylaws. This is potentially relevant because of differences in language between the costs sections of the Bylaws and the Supplementary Procedures, connected to the good faith pursuit of the cooperative engagement and conciliation processes.

149. Article 9 of the ICANN Supplementary Procedures provides:

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

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<sup>75</sup> Ibid, ¶ 128.

150. Article IV, Section 3, of the ICANN Bylaws provides:

*16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.*

*18.... The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.*

151. The Parties agreed to postpone final submissions on costs, including on the question of whether Paragraphs 16 and 18 of Article IV, Section 3, of the ICANN Bylaws apply in this IRP.

152. As the IRP Panel has determined that the GCC is the prevailing party, no question arises as to the application of Paragraph 16 of Article IV, Section 3, of the ICANN Bylaws.

153. We will await further submissions from the Parties before allocating all or a percentage of the costs of the proceedings to the GCC.

## **X. DECLARATION**

For the foregoing reasons, the Independent Review Process Panel hereby Declares:

1. The action of the ICANN Board with respect to the application of Asia Green relating to the “.persiangulf” gTLD was inconsistent with the Articles of Incorporation and Bylaws of ICANN. These are, in specific: Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.
2. Pursuant to Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws, the IRP Panel recommends that the ICANN Board take no further action on the “.persiangulf” gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the “.persiangulf” gTLD.

3. The GCC is the prevailing Party in this IRP.
4. The Parties are to file submissions on costs by 18 November 2016. Following those submissions, all or a percentage of costs will be allocated against ICANN in favor of the GCC.

This Partial Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute the Partial Declaration of this IRP Panel

<u>19 OCTOBER 2016</u>	<u>Lucy Reed</u>
Date	Lucy Reed, Panelist - Chair
<u>19 October 2016</u>	<u>[Signature]</u>
Date	Anibal Sabater, Panelist
<u>19 OCTOBER 2016</u>	<u>[Signature]</u>
Date	Albert Jan van den Berg, Panelist

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)**

**Independent Review Panel**

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS**  
**Pursuant to the Bylaws of the Internet Corporation for Assigned Names and**  
**Numbers (ICANN), the *International Arbitration Rules of the ICDR*, and the**  
***Supplementary Procedures for ICANN Independent Review Process***

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<b>Gulf Cooperation Council (GCC)</b>	)	)
Claimant	)	
and	)	<b>ICDR Case</b>
<b>Internet Corporation for Assigned Names</b>	)	<b>No. 01-14-0002-1065</b>
<b>and Numbers (ICANN)</b>	)	
Respondent	)	

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**FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL AS TO  
COSTS**

Independent Review Panel

Lucy Reed, Chair  
Anibal Sabater  
Albert Jan van den Berg

## I. INTRODUCTION

1. The Independent Review Panel, in our Partial Final Declaration of 19 October 2016 (“**Partial Declaration**”), declared the Claimant Gulf Cooperation Council (“**GCC**”) to be the prevailing Party. We found that the action of the Respondent Internet Corporation for Assigned Names and Numbers (“**ICANN**”) with respect to the application by Asia Green for the generic Top-Level-Domain name (“**gTLD**”) “.persiangulf” was inconsistent with several Articles of Incorporation and Bylaws of ICANN. We further recommended, pursuant to Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws, that the ICANN Board take no further action on the “.persiangulf” gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the “.persiangulf” gTLD. At the Parties’ request, we postponed final submissions and the decision as to costs.
2. This Final Declaration awards all costs to the GCC as the prevailing Party, for the reasons set forth below.

## II. THE APPLICABLE STANDARD

3. Starting first with the applicable standard, it is undisputed that all costs of the Independent Review Process (“**IRP**”), which include the fees and expenses of the Panelists and the ICDR as the IRP Provider, are to be awarded to a prevailing claimant except in extraordinary circumstances, taking into account the reasonableness of the parties’ positions and their contribution to the public interest. This standard appears in both Article 11 of the ICANN Supplementary Procedures and Article IV, Section 3, paragraph 18 of the ICANN Bylaws.<sup>1</sup>

Article 11 of the ICANN Supplementary Procedures provides:

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<sup>1</sup> In extraordinary circumstances, Article 11 of the ICANN Supplementary Procedures envisions allocation of up to half of the total costs to the prevailing party while Article IV, Section 3, paragraph 18 of the ICANN Bylaws may limit that allocation to the IRP Provider administrative costs. Neither Party has argued for such a limitation here.

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

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

Article IV, Section 3, of the ICANN Bylaws provides, in relevant part:

*18.... The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.*

4. The issue for decision, therefore, is whether the circumstances here are extraordinary and hence warrant allocating up to half of the total IRP process costs to the GCC despite its status as prevailing Party.

### **III. THE PARTIES' POSITIONS**

#### **A. The Claimants' Position**

5. The GCC submits that no extraordinary circumstances exist. In short, the GCC argues that ICANN's position "*was anything but reasonable*" throughout its treatment of the ".persiangulf" application, citing the Panel's conclusion that ICANN's actions were "*unduly formalistic and simplistic*" (Partial Declaration, para. 126). Nor, argues the GCC, did ICANN's position contribute to the public interest, because the ICANN Board "*picked a side on a decades-long divisive Gulf naming dispute and its treatment of the .PERSIANGULF gTLD application was, as this Panel declared, 'essentially oblivious to the well-known geo-political sensitivities associated with that dispute'*" (Partial Declaration, para. 141).

## **B. The Respondent's Position**

6. ICANN submits that the GCC should bear its own costs because this IRP was extraordinary, for three main reasons. First, both sides presented “*reasonable and thorough positions on novel issues of geopolitical sensitivity*”. Second, the Parties’ briefing of these issues served the public interest. Third, the GCC failed to engage in ICANN’s Cooperative Engagement Process before initiating the IRP, and so failed to narrow the issues and reduce the costs.

## **IV. THE PANEL’S ANALYSIS AND DECISION**

7. Having considered the Parties’ submissions against the background of the overall record and the Partial Declaration, the Panel cannot find any extraordinary circumstance warranting deviation from the undisputed standard that all IRP process costs go to the GCC as the prevailing Party. As this conclusion is based on the unique circumstances of this case, we did not find the IRP precedents cited by the Parties – also based on unique circumstances – helpful. Our analysis can be brief.
8. First, we weigh the reasonableness criterion in the GCC’s favour. While ICANN is correct that both sides put forth thorough reasons for their positions, we state and explain in our Partial Declaration why the ICANN Board did not act reasonably in allowing the “.persiangulf” application to proceed without at least entering into a dialogue with the Government Advisory Council to discuss member concerns. We found “*simply no evidence – or even the slightest indication – that the Board collected facts and engaged with the GCC’s serious concerns*” (Partial Declaration, para. 138) and, absent any independent investigation, the only possible conclusion was that the ICANN Board’s position was “*simplistic and formalistic*” (Partial Declaration, para. 126) rather than reasonable.
9. Second, we do not consider that the public interest criteria favors either side’s position in relation to costs. The GCC is correct that we found ICANN to be “*essentially oblivious to the well-known geo-political sensitivities associated with the name ‘Persian Gulf’*”

(Partial Declaration, para. 141). However, it is important to recall that our mandate was to review the Board's process and not the merits of the “.persiangulf” application. The Parties' agreement that the geopolitical issues associated with “Persian Gulf” are themselves extraordinary does not make the ICANN Board process issues extraordinary. We do not see that the GCC contributed to the broader public interest by prevailing in this process review or that the ICANN Board failed to benefit the public in taking the stance it took. The public interest factor, to us, is neutral.

10. This is not the case with ICANN's third argument, which faults the GCC for not first invoking the Cooperative Engagement Process and thereby narrowing issues and reducing costs. In this situation where ICANN is not the prevailing Party as addressed in the second paragraph of Article 11 of the ICANN Supplementary Procedures, it is unclear whether this argument goes to the reasonableness or public interest factor, but the outcome would be the same. In our jurisdictional analysis in the Partial Declaration, we found that “*ICANN explicitly and implicitly cooperated in a shadow conciliation process*” (Partial Declaration, para. 87), which obviously proved unsuccessful. There is no reason to believe that a formal Cooperative Engagement Process would have been any more successful than this informal conciliation process proved to be, or that it would have reduced the GCC's ultimate costs.

11. In sum, in the absence of any extraordinary circumstances, the GCC is entitled to reimbursement of its full costs in relation to the IRP process. This includes the administrative expenses of the ICDR, the Independent Review Panel panelists' fees and expenses, and the emergency IRP panelist's fees and expenses. ICANN did not contest the GCC's claim for the fees and expenses of the emergency IRP panelist in addition to this Panel's fees and expenses and the ICDR administrative expenses.

12. As per the last sentence of Article IV, Section 3, paragraph 18 of the ICANN Bylaws, each Party shall bear its own expenses, including legal representation fees.

## **V. DECLARATION AS TO COSTS**

For the foregoing reasons, the Independent Review Process Panel hereby Declares:

1. There are no extraordinary circumstances to justify allocating less than full costs to the Claimant GCC as the prevailing Party, under Article 11 of the ICANN Supplementary Procedure and Article IV, Section 3, paragraph 18 of the ICANN Bylaws.
2. The Respondent ICANN is to bear the totality of the GCC's costs in relation to the IRP process, including: (a) the ICDR administrative expenses of \$7,500.00; (b) the Independent Review Panel panelists' fees and expenses of \$ 150,273.30; and (c) the emergency IRP panelist's fees and expenses of \$50,575.00. Accordingly, ICANN shall reimburse the GCC the sum of \$107,924.16 upon demonstration by GCC that these incurred costs have been paid.
3. This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute the Final Declaration of this IRP Panel.

15 December 2016

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Date



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Lucy Reed, Panelist – Chair

15 December 2016

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Date



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Anibal Sabater, Panelist

15 December 2016

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Date



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Albert Jan van den Berg, Panelist

## REFERENCE MATERIALS – BOARD SUBMISSION NO. 2017.09.23-0b

**TITLE:**                    **Further Consideration of *Gulf Cooperation Council vs. ICANN* Independent Review Process Final Declarations**

The following attachments are relevant to the Board’s further consideration of the Panel’s Final Declaration as to the merits and the Final Declaration As To Costs in the Gulf Cooperation Council (GCC) vs. ICANN Independent Review Process (IRP):

- Attachment A is the Panel’s [Final Declaration](#) on the merits issued on 19 October 2016.
- Attachment B is the Panel’s [Final Declaration As To Costs](#) issued on 15 December 2016.

### **Other Relevant Materials:**

The documents submitted during the course of the GCC IRP are available at:

<https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en>.

GAC Early Warning against the .PERSIANGULF application, issued on 20 November 2012, available at:

<https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197754/Persianguf-AE-55439.pdf>.

The IO’s decision to not file an objection against the .PERSIANGULF application is available at: <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/persianguf-general-comment/>.

GAC Beijing Communiqué is available at:

<https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>.

NGPC Resolution 2013.06.04.NG01 is available at: <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en>.

GAC Durban Communiqué is available at:

<http://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20Communiqu%C3%A9%20>

[%20Durban,%20South%20Africa.pdf](#).

GAC Durban Meeting Minutes are available at IRP Request Annex 34:

<https://www.icann.org/en/system/files/files/gcc-irp-request-annex-26-05dec14-en.pdf>.

NGPC Resolution 2013.09.10.NG03 is available at: <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c>.

ICC expert determination on 30 October 2013 that the GCC's Community Objection against the .PERSIANGULF application did not prevail is available at:

<https://newgtlds.icann.org/sites/default/files/drsp/12nov13/determination-1-1-2128-55439-en.pdf>.

Submitted by: Amy Stathos, Deputy General Counsel

Date Noted: 7 September 2017

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ccTLD Delegation/Transfer for Board Review  
Sensitive Delegation Information

ICANN Confidential

## **Report on the Transfer of the .CI (Cote d'Ivoire) top-level domain to Autorité de Régulation des Télécommunications/TIC de Côte d'Ivoire (ARTCI)**

7 September 2017

This report is a summary of the materials reviewed as part of the process for the transfer of the .CI (Cote d'Ivoire) top-level domain. It includes details regarding the proposed transfer, evaluation of the documentation pertinent to the request, and actions undertaken in connection with processing the transfer.

### **FACTUAL INFORMATION**

#### **Country**

The "CI" ISO 3166-1 code is designated for use to represent Cote d'Ivoire.

#### **Chronology of events**

Since 1994, the Institut National Polytechnique Felix Houphouet Boigny (INP-HB) has been the manager of the .CI top-level domain. In 1995, INP-HB established the Network Information Center - Cote d'Ivoire (NIC-CI), a non-profit organization to be responsible for administrative and technical operations of the .CI top-level domain under the authority of INP-HB.

Until 2012, the .CI top-level domain was recorded to only have 1800 domain registrations. The government compared .CI's registration to that of other comparable ccTLDs, and decided to further promote the .CI domain by changing how it is managed.

On 21 March 2012, the President of Cote d'Ivoire issued Decree number 2012-293 on *Telecommunication and Information and Communication Technologies*, assigning the management of .CI to Autorité de Régulation des Télécommunications/TIC de Côte d'Ivoire (ARTCI).

The organizational structure and functioning of ARTCI was established in Decree number 2012-934 on 19 September 2012. Under this decree, ARTCI is responsible for the technical, administrative and financial management of .CI.

On 31 December 2013, an agreement was signed between ARTCI and INP-HB on transferring the management duties of the .CI top-level domain. ARTCI then took

over the day-to-day management responsibilities of .CI in January 2014 whilst INP-HB continued to be the recognized manager of the domain.

In December 2015, ARTCI held a seminar on the adoption of management rules for the .CI top-level domain. Various participants representing significantly interested parties attended the seminar.

In March 2017, ARTCI conducted an online questionnaire asking the significantly interested parties for their opinion on the transfer of .CI top-level domain to ARTCI. Responses from the questionnaire were later submitted as evidence of local community support for the transfer.

On 2 June 2017, ARTCI commenced a request to PTI to transfer the management of the .CI top-level domain to Autorité de Régulation des Télécommunications/TIC de Côte d'Ivoire (ARTCI).

### **Proposed Manager and Contacts**

The proposed manager is the Autorité de Régulation des Télécommunications/TIC de Côte d'Ivoire (ARTCI). It is based in Côte d'Ivoire.

The proposed administrative contact is Houndji Mireille epse Bote, Head of the Department of Numbering and Domain Name .CI of ARTCI. The administrative contact is understood to be based in Côte d'Ivoire.

The proposed technical contact is Kouadio Assi Donald Landry, Head of the Specialized Center .CI.

### **EVALUATION OF THE REQUEST**

#### **String Eligibility**

The top-level domain is eligible for transfer as the string for Côte d'Ivoire is presently listed in the ISO 3166-1 standard.

#### **Public Interest**

The following letters from significantly interested parties were provided:

- Andre A. Apete, Cabinet Director of the Ministry of Digital Economy and Postal Service
- Alpha Omega Services, a local registrar
- Awebsi, a local registrar
- Akassoh, a local registrar
- Gotic CI, an association of IT operators
- Femmes et TIC, a non-government organization
- Web Entrepreneur Club Cote d'Ivoire

- Amazon du Web, a non-government organization
- ANSUT, National Agency for Universal Service of Telecom
- CICC, a government registrar

The application is consistent with known applicable laws in Côte d'Ivoire. The proposed manager undertakes responsibilities to operate the domain in a fair and equitable manner.

### **Based in country**

The proposed manager is constituted in Côte d'Ivoire. The proposed administrative contact is understood to be a resident of Côte d'Ivoire. The registry is to be operated in Côte d'Ivoire.

### **Stability**

At the time of request evaluation, the transfer of domain management had already taken place, therefore stability aspects relating to registry transfer have been evaluated with the view that the transfer has already taken place.

The application is not known to be contested.

### **Competency**

The application has provided information on the technical and operational infrastructures and expertise that will be used to operate the domain.

Proposed policies for management of the domain have also been tendered.

## **EVALUATION PROCEDURE**

PTI is tasked with coordinating the Domain Name System root zone as part of a set of functions governed by a contract with ICANN. This includes accepting and evaluating requests for delegation and transfer of top-level domains.

A subset of top-level domains are designated for the significantly interested parties in countries to operate in a way that best suits their local needs. These are known as country-code top-level domains (ccTLDs), and are assigned to responsible managers that meet a number of public-interest criteria for eligibility. These criteria largely relate to the level of support the manager has from its local Internet community, its capacity to ensure stable operation of the domain, and its applicability under any relevant local laws.

Through the IANA Services performed by PTI, requests are received for delegating new ccTLDs, and transferring or revoking existing ccTLDs. An investigation is performed on the circumstances pertinent to those requests, and, the requests are implemented where they are found to meet the criteria.

## **Purpose of evaluations**

The evaluation of eligibility for ccTLDs, and of evaluating responsible managers charged with operating them, is guided by a number of principles. The objective of the assessment is that the action enhances the secure and stable operation of the Internet's unique identifier systems.

In considering requests to delegate or transfer ccTLDs, input is sought regarding the proposed new manager, as well as from persons and organizations that may be significantly affected by the change, particularly those within the nation or territory to which the ccTLD is designated.

The assessment is focused on the capacity for the proposed manager to meet the following criteria:

- The domain should be operated within the country, including having its manager and administrative contact based in the country.
- The domain should be operated in a way that is fair and equitable to all groups in the local Internet community.
- Significantly interested parties in the domain should agree that the prospective manager is the appropriate party to be responsible for the domain, with the desires of the national government taken very seriously.
- The domain must be operated competently, both technically and operationally. Management of the domain should adhere to relevant technical standards and community best practices.
- Risks to the stability of the Internet addressing system must be adequately considered and addressed, particularly with regard to how existing identifiers will continue to function.

## **Method of evaluation**

To assess these criteria, information is requested from the applicant regarding the proposed manager and method of operation. In summary, a request template is sought specifying the exact details of the delegation being sought in the root zone. In addition, various documentation is sought describing: the views of the local internet community on the application; the competencies and skills of the manager to operate the domain; the legal authenticity, status and character of the proposed manager; and the nature of government support for the proposal.

After receiving this documentation and input, it is analyzed in relation to existing root zone management procedures, seeking input from parties both related to as well as independent of the proposed manager should the information provided in

the original application be deficient. The applicant is given the opportunity to cure any deficiencies before a final assessment is made.

Once all the documentation has been received, various technical checks are performed on the proposed manager's DNS infrastructure to ensure name servers are properly configured and are able to respond to queries correctly. Should any anomalies be detected, PTI will work with the applicant to address the issues.

Assuming all issues are resolved, an assessment is compiled providing all relevant details regarding the proposed manager and its suitability to operate the relevant top-level domain.

**GAC Advice – Johannesburg Communiqué: Actions and Updates (23 September 2017)**

*DRAFT Version 3.3*

*Updated 1 September*

GAC Advice Item	Advice Text	DRAFT Board Understanding Following Board-GAC Call	GNSO Review of Johannesburg Communiqué	DRAFT Board Response
<p>§1.a.I – §1.a.III, Intergovernmental Protections</p>	<p><b>1. Intergovernmental Organization (IGO) Protections</b></p> <p><b>a. The GAC reiterates its Advice that IGO access to curative dispute resolution mechanism should:</b></p> <p>I. be modeled on, but separate from, the existing Uniform Dispute Resolution Policy (UDRP)</p> <p>II. provide standing based on IGOs’ status as public intergovernmental institutions, and</p> <p>III. respect IGOs’ jurisdictional status by facilitating appeals exclusively through arbitration.</p> <p>The GAC expresses concern that a GNSO working group has indicated that it may deliver recommendations which</p>	<p>The Board understands that the GAC wishes that Intergovernmental Organization (IGO) protections:</p> <ol style="list-style-type: none"> <li>1. Be modeled on, but separate from, the existing Uniform Dispute Resolution Policy;</li> <li>2. Provide standing for IGOs within curative dispute resolution mechanisms based on their status as public intergovernmental institutions; and</li> <li>3. Facilitate appeals relating to the curative dispute resolution mechanisms exclusively through arbitration.</li> </ol> <p>The Board understands that the GAC is concerned that the GNSO PDP Working Group on IGO-INGO Curative Rights Protection Mechanisms may issue recommendations that differ from GAC Advice. The Board understands that the GAC wishes that the ICANN Board apply its oversight responsibilities to the work of the GNSO PDP Working Group so that</p>	<p>The GNSO Council notes that the GAC has reiterated its previous advice regarding access to curative dispute resolution mechanisms by IGOs. Similarly, we refer the Board to our earlier responses, noting that the work of the Policy Development Process (PDP) on this topic (IGO/INGO Access to Curative Rights) is ongoing, and this group anticipates publication of its Final Report and recommendations prior to ICANN60 in Abu Dhabi.</p> <p>The PDP recently conducted a Public Comment period on its Initial Report, and received multiple thoughtful submissions including many from IGOs. Each comment from the community containing new data or ideas was extensively considered and discussed by the PDP working group, and the PDP leadership reports that its Initial Report is likely to be materially amended as a result of taking these comments on board.</p>	<p>The Board acknowledges the GAC’s Advice and its concerns. The Board reiterates that as part of a PDP, the Working Group has an obligation to duly consider all inputs received*.</p> <p>The Board notes that the GNSO Council has informed the Board that all public comments and input received by the PDP Working Group, including from the GAC and IGOs, have been extensively discussed by the Working Group. The Board notes, further, that the GNSO Council considers the upcoming ICANN60 meeting to be an opportunity for further discussions among the community. The Board will continue to facilitate these discussions and encourages participation in them by all affected parties.</p>

GAC Advice Item	Advice Text	DRAFT Board Understanding Following Board-GAC Call	GNSO Review of Johannesburg Communiqué	DRAFT Board Response
	<p>substantially differ from GAC Advice, and calls on the ICANN Board to ensure that such recommendations adequately reflect input and expertise provided by IGOs.</p>	<p>recommendations and input from the entire community are acknowledged and considered in accordance with the GNSO’s operating procedures.</p>	<p>Previous GAC Advice on this topic included the “IGO Small Group Proposal” from October 2016, which outlined a separate dispute resolution process tailored exclusively for IGO/INGOs. In addition to comments posted to the ICANN Public Comments forum, the PDP also considered the “IGO Small Group Proposal”, and included it in their analysis. But as the PDP nears the conclusion of its work, it is clear to Council that their Final Recommendations will diverge from GAC Advice and the “IGO Small Group Proposal” in at least two respects.</p> <p>First, the PDP working group does not recommend the creation of a new, separate dispute process solely for the use of IGO, but instead outlines the means by which these organizations can better access existing processes like UDRP and URS. And secondly, the PDP does not conclude that it is within their (or the GNSO’s, or ICANN’s) remit to grant, extend, or restrict the jurisdictional immunity protections of IGOs, or to limit the legal rights of</p>	<p>* From the GNSO Operating Procedures: <i>“Public comments received as a result of a public comment forum held in relation to the activities of the WG should be carefully considered and analyzed. In addition, the WG is encouraged to explain their rationale for agreeing or disagreeing with the different comments received and, if appropriate, how these will be addressed in the report of the WG”.</i></p>

GAC Advice Item	Advice Text	DRAFT Board Understanding Following Board-GAC Call	GNSO Review of Johannesburg Communiqué	DRAFT Board Response
			<p>registrants who are party to a dispute with an IGO.</p> <p>The GNSO Council chartered this PDP with the objective of ensuring that IGOs and INGOs have access to low-cost and effective rights protection mechanisms, in order to mitigate abuse of their identities in the DNS and aid in their work serving the public needs of citizens across the globe, and the PDP working group believes that its Final report will meet that goal. We eagerly await publication of the PDP's recommendations, and further discussions among the Community at ICANN60.</p>	



**ICANN**

# The Business Case for the Information Transparency Initiative

May 2017

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## What problem does the Information Transparency Initiative solve?

Over its 19-year history, the ICANN organization has professionalized and improved its operations in key areas except one – the stewardship of its information. The problem ICANN faces is that we have no centralized system in place to preserve, organize, and secure the large volume of information we have produced and continue to produce each day. Preservation and organization happens in many ways. But our lack of centralized content governance has directly resulted in our inability to make this information transparent and searchable across the organization, and easily available for both internal and public use. And with content growth rates of 25-35% per year, our problem is only getting worse. The growth of our over 104,000 pieces of disorganized and unstructured content has reached a crisis point. Without swift and direct action, we risk financial and reputational consequences for our organization, the community, and the Board.

## Why do we need to solve this problem now?

Our information is ICANN's most valuable asset. It represents our history and our institutional memory, and supports our accountability and our policymaking dialogues. We need to take additional steps to safeguard that information and make it more readily accessible. **This duty to protect our information is not optional, but a critical component of our viability.** It is our collective responsibility to resolve this content crisis.

**We have made post-Transition commitments to and requirements for accountability and transparency. Current and easy-to-find public information in all six official U.N. languages is a vital part of achieving those commitments.** The level of scrutiny of our ability to meet and track those commitments through our system of record for information – and in particular, public-facing policies, contracts, and bylaws – will only increase.

There is some urgency to resolve this issue while reasonable options remain available. Each day that our content grows, the amount of effort and cost to fix the problem also grows. As such, reasonable options dwindle and our solutions to fix the problem become more expensive, resource-intensive, and constrained. **It is not only the fact that we will face serious financial consequences the longer we wait to resolve this issue, but we risk being unable to meet our post-Transition commitments in the future.** We need to change our thinking about the importance of information governance and apply the same strict and acknowledged standards to our information that we apply to operational, financial, and legal management.

## How do we solve this problem?

To solve our content crisis, mitigate risk, continue to meet our post-Transition commitments, and transform our content into a more readily accessible strategic asset, we propose the Information Transparency Initiative. Its five primary goals are:

- 1 Develop content governance based on a consistent taxonomy, a comprehensive creation and publication workflow, and a user-centric information architecture and navigation.
- 2 Improve findability of content.
- 3 Improve publishing speed and content quality.
- 4 Future-proof and secure our content.
- 5 Ensure appropriate public content is translated into the U.N. six languages.

## We implement these five goals in three stages

STAGE 1	STAGE 2	STAGE 3
For the first time in ICANN's history, we will audit and tag all externally facing content. The outcomes of this audit will serve as the basis for creating content governance with a taxonomy, information architecture (IA), and improved workflows upon which the entire ICANN public-facing information ecosystem will be built.	Implement content governance through a document management system (DMS) and migrate all public content into the DMS.	Integrate the DMS with a new content management system (CMS) and surface the content through the CMS. Organize the content in a user-centric fashion with improved multifaceted search to allow the public easy access to our public-facing content and help us meet our post-Transition commitments.

## What are the benefits of the solution?

The Information Transparency Initiative will help us meet our post-Transition commitments, reduce our financial risk, and result in the following outcomes:

- 1 A complete governance infrastructure for writing, tagging, and translating content will improve the findability, transparency, security, and quality of our content to different stakeholders across the globe.
- 2 The maintenance costs will decrease as content creation and publishing move to the content owners. In addition, the solution consolidates or sunsets 15 separate external content properties into one external property, which further reduces maintenance costs.
- 3 The tagging, taxonomy and information architecture will ensure our content is future-proof, as metadata will be added to all public-facing content, and will be transferable to any future platforms.
- 4 A new foundation for the ICANN ecosystem will be laid, enabling system-wide search and a shared governance of ICANN's information assets. This system consolidation further reduces maintenance costs.
- 5 Full translation of appropriate public content will improve accessibility to stakeholders in the six U.N. languages.

## What are the risks of the solution?

As with any project involving new technologies, we face several risks if we obtain approval for the Information Transparency Initiative including:

<b>TRANSPARENCY INITIATIVE</b>	<b>MITIGATION</b>
The Information Transparency Initiative budget and contingency are underestimated.	Platforms and appropriate vendors underwent a RFP process to ensure ICANN secured a competitive price for the underlying technology platforms and for qualified, proven vendors. Additionally, a significant contingency of 30% was added to address any potential shortfalls or unforeseen costs.
Future technological advancements render the chosen DMS and CMS obsolete or ineffectual.	The metadata, information architecture and content strategy will help futureproof our content and ensure it would be transferrable to new technology platforms.
Other priorities divert resources and attention away from the Information Transparency Initiative.	Seeking commitment from the Board and the Executive Team in support of the goals and the work involved in the Information Transparency Initiative and have committed to ensuring it remains a priority throughout its implementation. Partnered with CFO to ensure the budget is structured to fund the initiative for the duration of the project through to its completion.
Mission creep sets in as the community demands features beyond the scope.	Make clear what is in and out of scope for phase one. The Information Transparency Initiative includes a communication strategy to share the goals and limits of the project with the community, early and often. It also includes a process whereby the community is asked to provide limited window feedback as features and content are developed. This progress will be shown and feedback collected through an externally-facing testing platform.
The wrong DMS and CMS are chosen to implement the content strategy.	The DMS and CMS were chosen to fit our workflows, content governance requirements, content types, publishing needs and budget limitations.
Internal staff resources are limited to tackle a project of this scope.	Staff backfill costs have been factored into the budget and contractors with ICANN experience have been identified to help tackle labor-intensive audit work, which requires knowledge about ICANN and its content.
Board and Executive Team commitment to the project wavers.	The Initiative passed an extensive review by the Executive Team and earned its full support. If the Initiative earns Board support, regular progress reports and feedback will be provided to allow for ongoing Board and Executive Team oversight and support.

## How are we mitigating other risks?

We understand there may be reticence to commit the time and devote the resources to a project of this size and scope. ICANN has failed in previous efforts to improve the findability of our public content, and we do not have a proven track record with large projects involving technology. However, past is only prologue if we don't learn from our mistakes.

<b>Previous efforts at improving the findability of our public content failed because:</b>	<b>We learned from these failures and migrated our risks by:</b>
There was no content governance created to serve as the foundation for the project.	Placing content governance creation as the foundational element of this initiative.
The technology platforms chosen were ill-suited to our content types and required extensive maintenance support beyond the capabilities and resources of ICANN staff.	Choosing technology platforms to implement the content governance that will shift creation and publishing to content owners.
The goals of the project were unclear.	Establishing clear goals for the project to decrease the chances of mission creep.
There was an unrealistic project timeline on deliverables.	Developing and scrutinizing our project plan deliverables to ensure the timelines are realistic.
There were inadequate resources provided to tackle a project of this scope.	Working with established vendors to ensure we have the resources and skillset to deliver.

## What is the recommended solution and its time, cost and impact on staff, the Board and community?

The recommended solution is build a complete content governance system and DMS/CMS implementation designed to cover 104,000 pieces of externally-facing content, and consolidate or sunset 15 separate external content properties.

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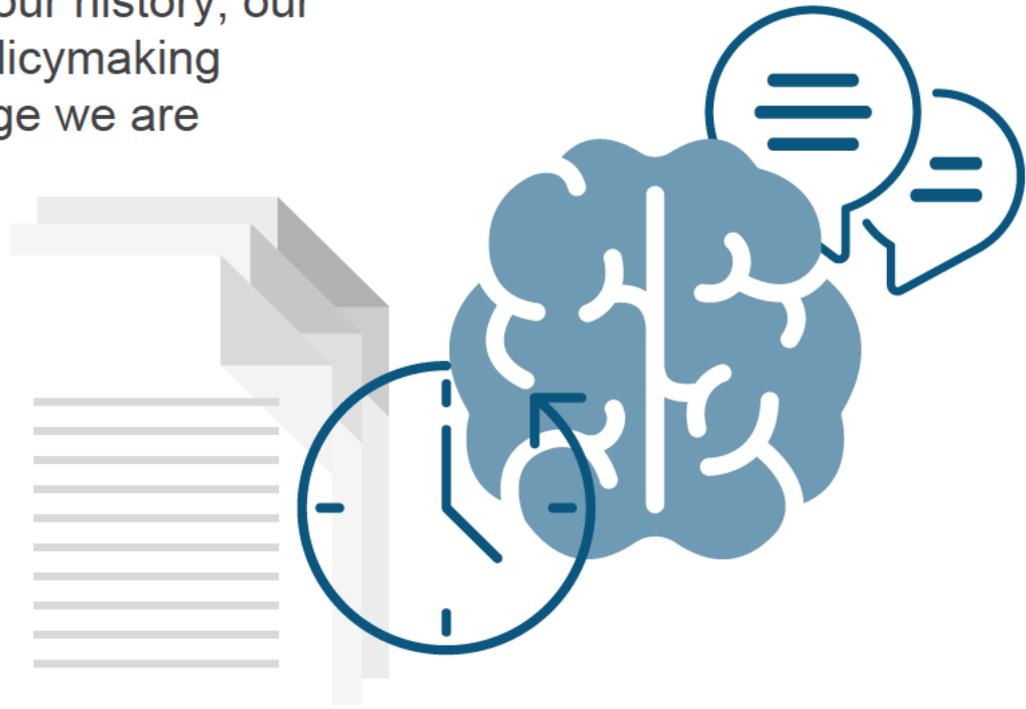


# Information Transparency Initiative

Göran Marby | March 2017

# Why is ICANN's Content Important?

Our information represents our history, our institutional memory, our policymaking dialogues, and the knowledge we are obligated to share with our stakeholders.



It is one of our most valuable assets, and it needs preservation, organization and protection.

# Why is Our Content at Risk?

ICANN has not invested the time or the resources to safeguard our information.

Our current, de facto document management system (DMS) is ICANN.org, and it has rendered our content undiscoverable to many stakeholders.



# Our Post-Transition Commitments

ICANN has post-Transition commitments to and requirements for accountability and transparency.



Through our content, we demonstrate and meet those obligations.

Current and easy-to-find information in all six U.N. languages is a vital part of achieving those commitments.

# Why are Those Commitments At Risk?

Without a DMS to enforce content governance, we make it difficult for stakeholders to find and track information.

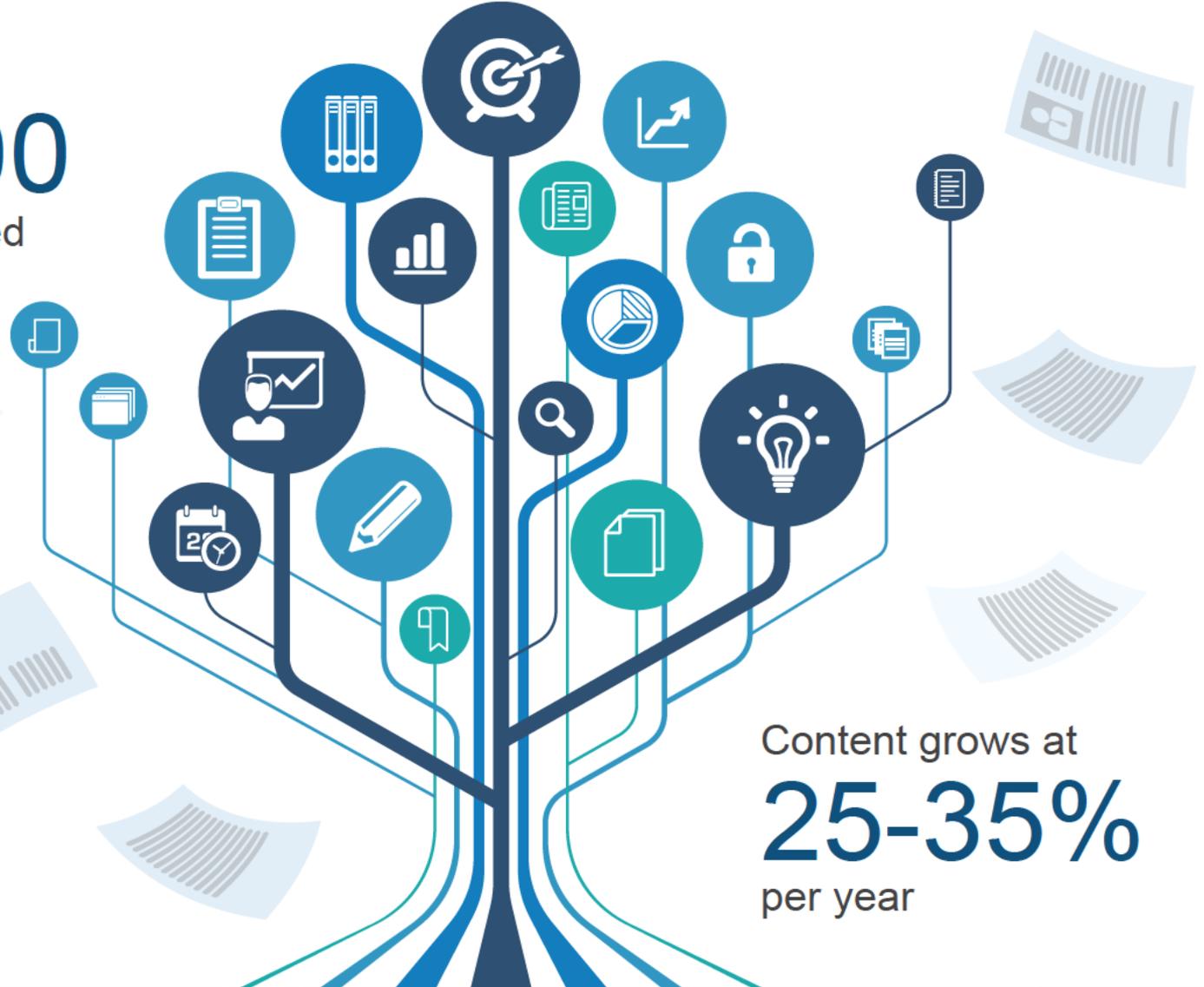
ICANN.org cannot easily surface this content either through its site search or its information architecture.



# ICANN has a lot of Content, and It's Growing

104,000

pieces of published  
content



Content grows at

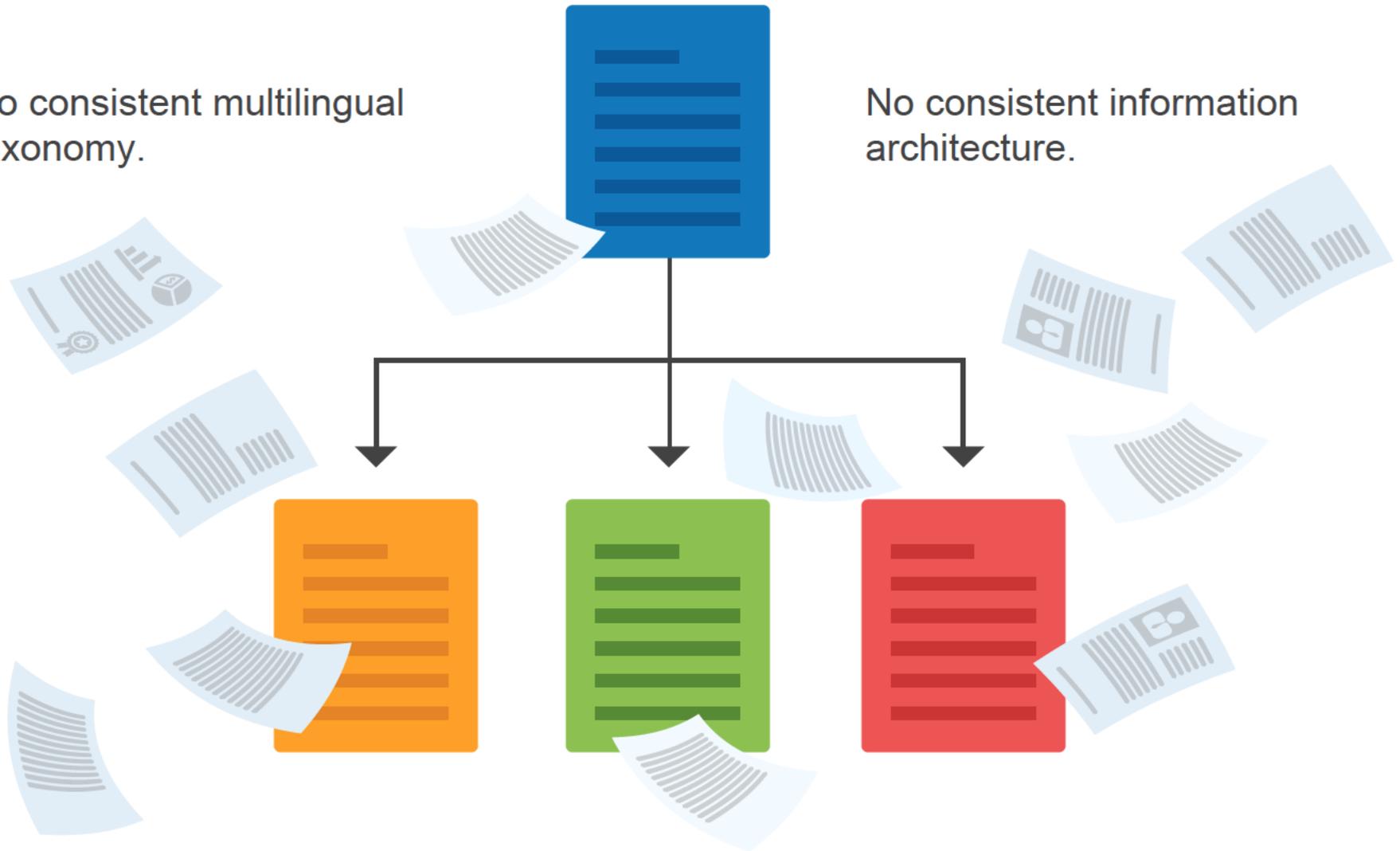
**25-35%**

per year

# Our Content is Uncategorized and Disorganized

No consistent multilingual taxonomy.

No consistent information architecture.

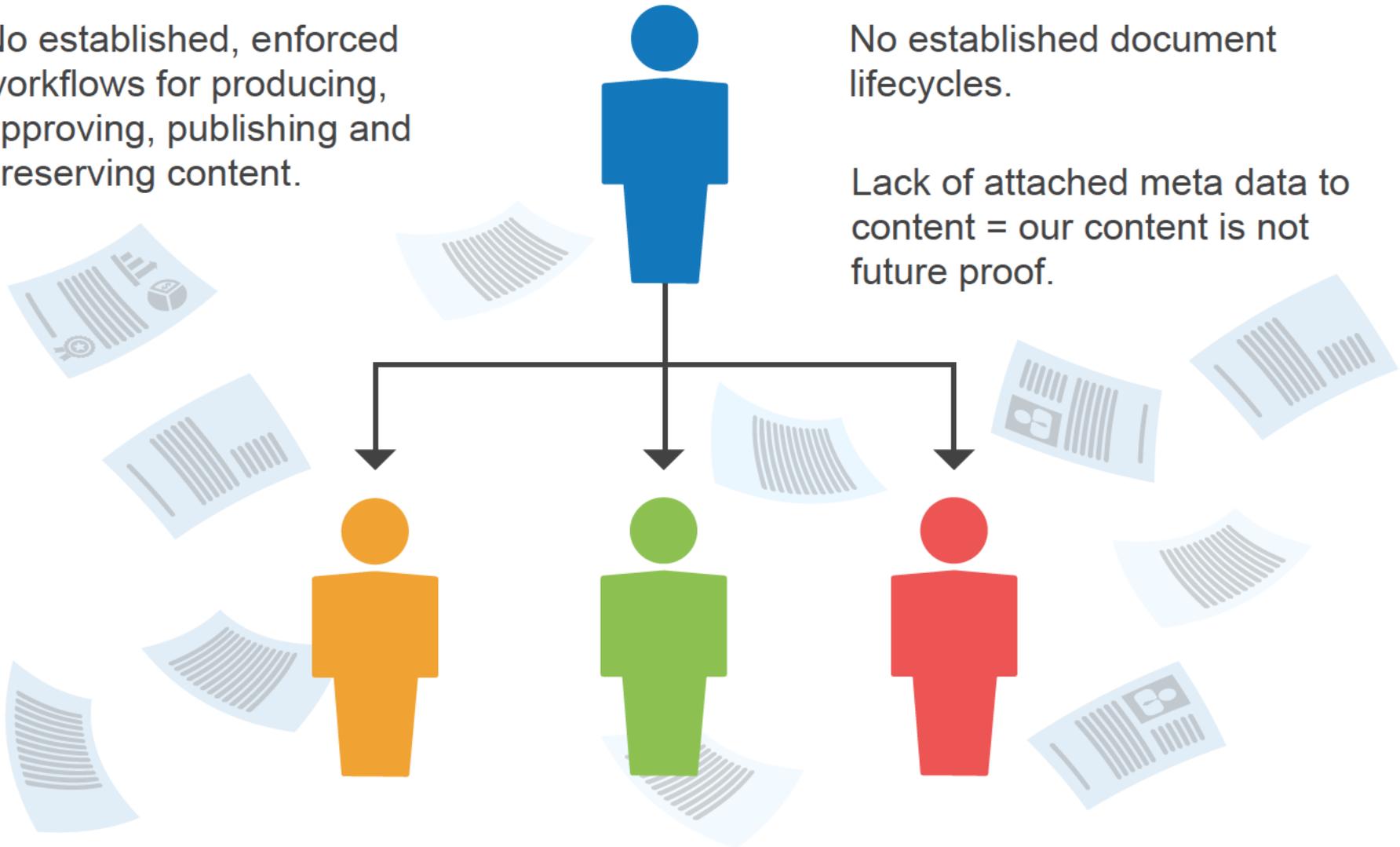


# We Have No Content Governance

No established, enforced workflows for producing, approving, publishing and preserving content.

No established document lifecycles.

Lack of attached meta data to content = our content is not future proof.



# We are Not Serving Our Global Community

A significant amount of our published content is not translated into the U.N. six languages there is no consistency to what is translated and content is difficult to find due to the lack of governance and organization.



# Time & Cost to Fix The Problem Grows Each Year

Engagement becomes more difficult as untagged, unindexed, not translated and non-Search Engine Optimized (SEO) content further erodes search.

- ✓ Growing content means search quality continues to decline because of its unstructured nature and cluttered organization.
- ✓ We miss engagement opportunities with new users and are not making it easy for our stakeholders to find content and stay informed.
- ✓ If we continue to neglect our document management, we risk our reputation and our ability to meet post-Transition commitments.
- ✓ The status quo is an option we can no longer afford and the Cost of Ignoring means we are abdicating our responsibilities to the global community, undermining our ability to meet our commitments, while also increasing the costs we bear down the road.

# Five Project Goals

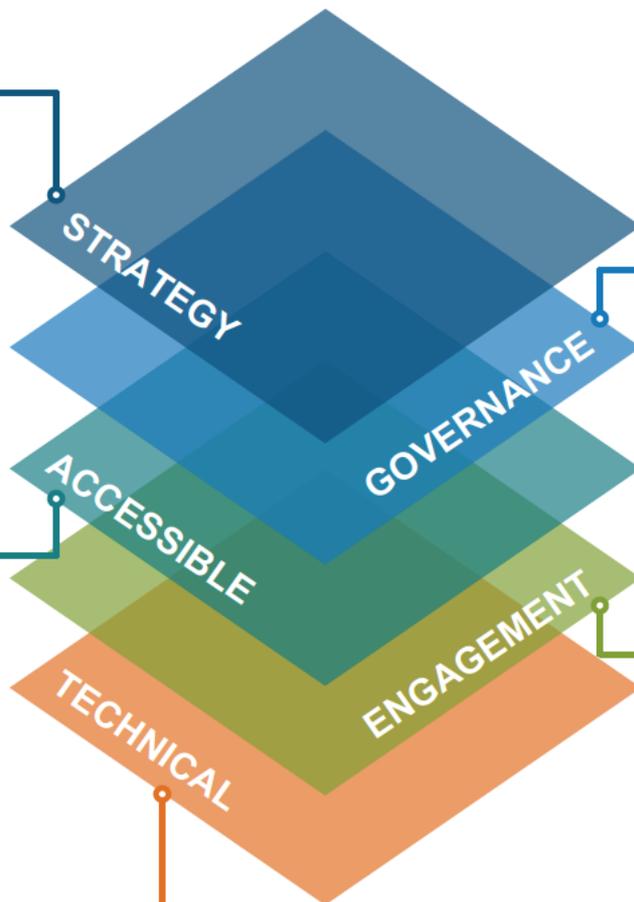
1 Focus on a content strategy and implementation of features that enable us to meet ICANN's accountability and transparency goals and reflect its technical mission. Increase content findability through the creation of a taxonomy, digital content strategy, improved information architecture and user experience.

2 Create and enforce staff content governance and increase publishing speed through distributed content management and improve the writing and develop audience-specific, multimedia content offerings.

3 Develop a mobile first approach, ensure accessibility standards are met and provide a translated user experience in the U.N. six languages.

4 Improve engagement with new and existing stakeholders and enable power users to select content preferences, registrations and perform work  
**Confidential Business Information**

5 Create a scalable platform to implement a future proof content strategy for the ICANN digital ecosystem.



# Timeline

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## CONTENT STRATEGY

A content strategy is the vision for how we transform our content into an asset through the planning of content creation, delivery and governance. The content strategy includes the auditing, taxonomy, information architecture, UX, content matrix and content governance. Content governance is a key pillar of any content strategy. It involves the processes and resources that govern how staff create, publish, store and preserve content. This governance includes documenting content ownership and roles, enforcing standard workflows, producing policies on content lifecycle and training staff on these governance rules.



## TECHNOLOGY

The content strategy defines our technology choices and is implemented through these platforms. The DMS (Alfresco) and the CMS (dotCMS) serve as the backbone for ICANN.org, and will become the technological infrastructure for all of our SO/AC sites. In addition to the DMS and the CMS, the Information Transparency Initiative will also require integrations with scheduling, registration, data visualization, automated content delivery, user profile/engagement measurement and analytics platforms.



ICANN

# Information Transparency Initiative Project Executive Summary

March 2017

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## Executive Summary

ICANN produces, collects and stores a large volume of information. This knowledge represents our history, our institutional memory, our accountability and our policymaking dialogues. It is one of our most valuable assets, and it needs preservation, organization and protection.

Unfortunately, ICANN has not invested the time or the resources to safeguard this information. Our current, de facto document management system (DMS) is ICANN.org, and it has rendered our content undiscoverable to many stakeholders. At current content growth rates of between 25-35% per year, our findability problems will only deepen. At a time in our history when our accountability and transparency are under a brighter spotlight, our publically-facing DMS has put us at risk.

To mitigate that risk, guard our information and transform our content into a strategic asset, we propose the Information Transparency Initiative. Its primary goals are to develop a content governance with a robust taxonomy, establish better content organization, ensure content is translated into the U.N. six languages, improve publishing speed and future proof our content. It is important to stress that the primary goal of the Information Transparency Initiative is not an ICANN.org revamp, rather we view ICANN.org as the route by which stakeholders access a new, publically-facing DMS.

The Information Transparency Initiative does not propose an overly complicated set of features or applications. We propose performing an eyes-on-audit of all our content to inform a verifiable taxonomy and information architecture. This work underpins the entire project.

Think of the Information Transparency Initiative as two connected and interdependent pieces – content and technology - where technology is a means to implement the content governance and strategy. The Information Transparency Initiative team has identified five main objectives:

1. Focus on a content strategy and implementation of features that enable us to meet ICANN's accountability and transparency goals and reflect its technical mission. Increase content findability through the creation of a taxonomy in the U.N. six languages, and an improved information architecture and user experience.
2. Create and enforce staff content governance and increase publishing speed through distributed content management and improve the writing in the U.N. six languages and develop audience-specific, multimedia content offerings.
3. Develop a mobile first experience and ensure accessibility standards are met and provide a translated user experience.
4. Improve engagement with new and existing stakeholders in the U.N. six languages, and enable power users to select content preferences, registrations and perform work through a universal profile environment and automated content delivery system.
5. Create a scalable platform to implement a future proof content strategy for the ICANN digital ecosystem.

ICANN has post-Transition commitments to and requirements for accountability and transparency. Current and easy-to-find information in all six U.N. languages is a vital part of achieving those commitments. ICANN.org is where we demonstrate and meet those obligations. It is our only publically-facing system of record for policies, contracts and bylaws. Our reliance on and demands of ICANN.org to make that information available will only deepen in the coming

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years, and the level of scrutiny of our ability to meet and track those commitments through our content will also increase.

Without a DMS to institute content governance, we are making it increasingly difficult for stakeholders to find and track information. ICANN.org cannot easily surface thousands of pages of content either through its site search or its information architecture. There is little or no meta data attached to our content, there is no holistic taxonomy and no logical organization of information. Additionally, the site does not enable an environment for stakeholders to plan and track their engagements, policy work or content preferences. This means ICANN will struggle to meet its post-Transition commitments to increased accountability and transparency.

Previous patchwork approaches have directly resulted in the issues we must now address. The resources and effort required to establish control over our content is significant. Currently, there are over 100,000 pieces of untagged content. With each passing year, our content problem grows larger and larger, and it is a very public problem that is not going away. At this point in ICANN's history, the status quo is an option we can no longer afford, and the Cost of Ignoring (COI) means we are abdicating our responsibilities to the global community, undermining our ability to meet our commitments, while also increasing the costs we must bear down the road.

We have outlined a case which argues that our lack of attention to our content governance puts us at risk for meeting our post-Transition commitments to accountability and transparency. The Information Transparency Initiative will help us meet these commitments and result in the following outcomes:

1. A complete governance for writing, tagging and translating content will improve the quality and accessibility of our content to different stakeholders across the globe.
2. A fully translated site accessible to stakeholders in the six U.N. languages.
3. The stress on web administration decreases as content creation and publishing is moved from web administration directly to the content owners. This allows web administration to focus on digital projects that require more expert knowledge.
4. The tagging and taxonomy will ensure our content is future proof, as meta data will be added to all content, and will be transferable to any future platforms.
5. Confidential Business Information
  
6. The DMS and CMS setups are foundational work on which all SO/AC sites will be built, enabling ICANN ecosystem wide search and a common, shared governance.
7. A universal, shared ICANN glossary will bring consistency and order to our terminology and definitions of those terms.
8. Confidential Business Information
  
- 9.

The Information Transparency Initiative will kick off content governance across our external and internal content, and build a shared technological infrastructure for all externally-facing web properties across the ICANN organization and the ICANN community.



# Information Transparency Initiative

Göran Marby | May 2017

# Problem Statement

**No centralized system** in place to preserve, organize, and secure the large volume of information we have produced

Over **104,000** pieces of disorganized and unstructured content has **reached a crisis point**

- Results in financial and reputational risk for our organization, the community, and the Board
- Risk increasing over time

# Symptoms

 Inability to find ICANN content, both internally and externally

 Inconsistent content

→ Translations

→ Quality

→ Navigation

 Resource and time intensive publication process

 Incoherent ecosystem of external ICANN websites

# Underlying Condition



## Wildly inconsistent information infrastructure

- \* Multiple, independent content platforms with foundational technologies that are broken, not scalable, and unfit for purpose
- \* Absence of scalable systems/processes to manage documents
- \* Incoherent information architecture



## No comprehensive content strategy

- \* No ICANN ecosystem-wide taxonomy
- \* Inconsistent standards for content quality and translation
- \* Lack of governance and fluidity over creation and editorial process



## Coherent and consistent content strategy

- Comprehensive taxonomy, information architecture and content governance applied to external content



## Implementation of scalable infrastructure

- Deployment of unified Document Management System (DMS) with taxonomy and information architecture
- New external content property on a singular, scalable, and secure platform
  - Leverages new content strategy and new infrastructure

# Proposed Cure: The Information Transparency Initiative

## What is the Information Transparency Initiative?

- ⚙️ Continuous operational activity to improve existing content infrastructure and governance
- ⚙️ Build a foundation of content governance by tagging content, and creating a functional information architecture and consistent work flows
- ⚙️ Migrate content and implement internal content governance through a new DMS, which will serve as the infrastructure for ICANN ecosystem-wide governance (introduce ICANN's first-ever DMS)
- ⚙️ Surface improved content and search to stakeholders through a new content management system (CMS) which will serve as the backbone for all external ICANN properties

# Benefits



Improves findability, transparency, security, and quality of content



Decreases yearly maintenance costs, and consolidates 15 separate external content properties



Ensures content is future-proof and transferable to future platforms



Lays foundation for ICANN shared ecosystem, enabling system-wide search and governance, further reducing maintenance costs



Improves accessibility to stakeholders in the six U.N. languages



**Helps meet our post-Transition commitments and reduces financial risk**

# Options For Consideration

## The Information Transparency Initiative

- Limited to tagging 104,000 pieces of public content
- Implementation of DMS for this content
- Simultaneous implementation of CMS for this content, consolidating or sun-setting (with migration) 15 external content properties, including ICANN.org

## Continue As-Is

- No improvement to content governance or information architecture
- Continue to support and maintain multiple external platforms and infrastructures
- Less expensive in the immediate term

## The Information Transparency Initiative

Lack of internal resources may  
delay/derail progress

Improvements are not seen until  
later stages of the project

Other ICANN priorities may divert  
resources and attention

Mission creep sets in as community  
demands features beyond scope

## As Is

Lack of content governance  
impedes transparency and  
accountability

Community engagement  
becomes more difficult

Cost and time to address content  
issues increases each year

Ability to find content  
continues to degrade





# Why We Recommend the Information Transparency Initiative



Install a fit-for-purpose DMS for ICANN to build the foundation for information accountability and transparency commitments

→ Simplifies translations of documents into all six UN languages



Improve findability and provide its historical context



Retire external websites

→ Remove the need to support/pay for those sites



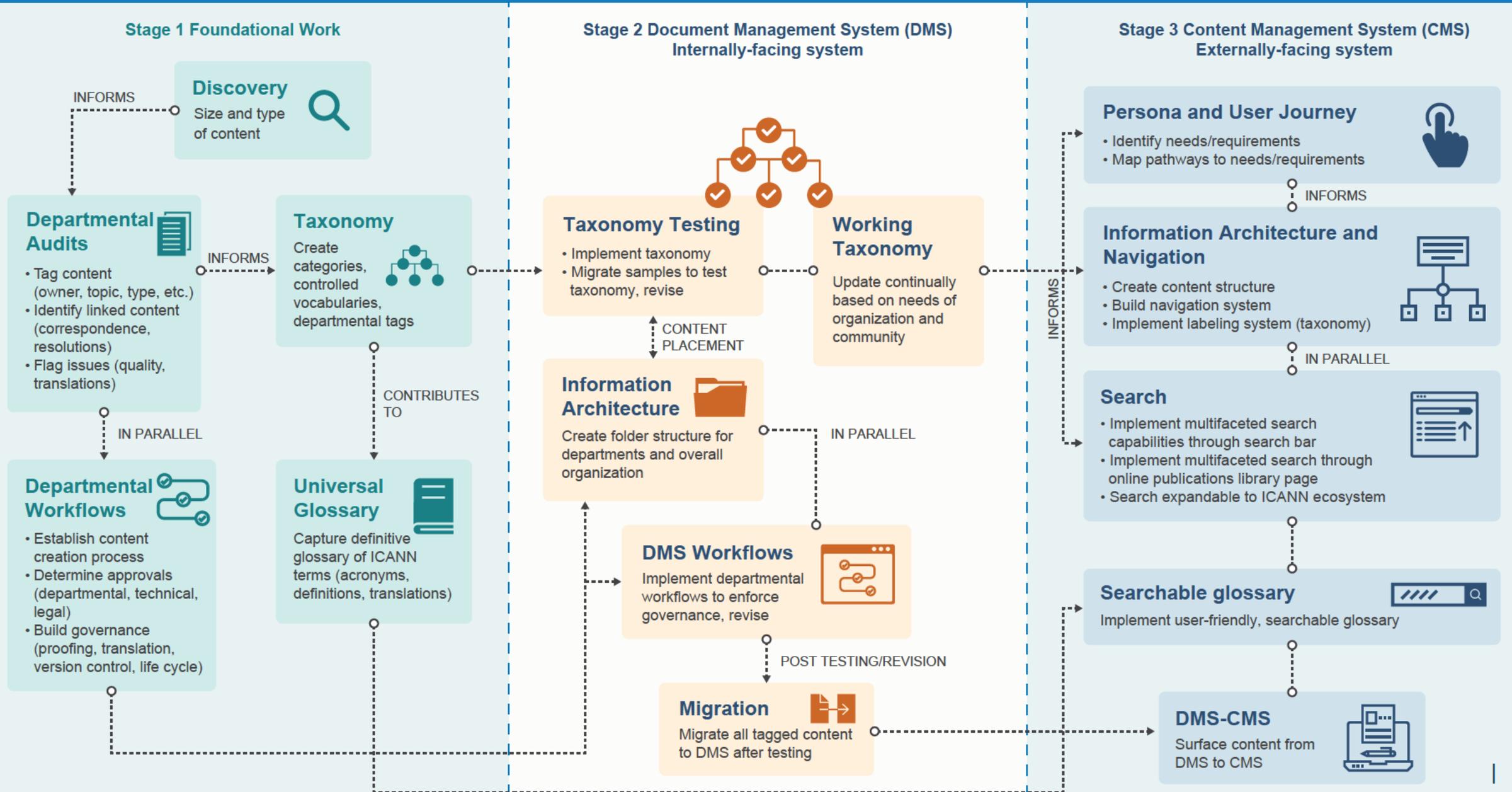
Reduce technical debt and decrease maintenance costs over time

**This approach mitigates risk by drawing on expert third parties for time-bound support, best practices, and an implementation path based on lessons from previous projects.**



# Appendix

# ICANN Content Governance Roadmap



# ICANN community and organization content ecosystem

## ICANN manages 38 content properties

### The Information Transparency Initiative tackles 16 content properties

Track 1: Externally-facing properties



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7 additional community properties not supported by ICANN:

GNSO Business Community, GNSO gTLD Registries Stakeholder Group, GNSO Internet Service Providers & Community Providers, GNSO IP Constituency, GNSO NonCommercial Users Constituency, GNSO Not-for-Profit Operational Concerns Constituency

### 22 smaller content properties are outside the scope of the Information Transparency Initiative

(Note: SSAC and RSSAC currently do not have their own content properties)











# Information Transparency Initiative

Financial information for BFC diligence

Xavier Calvez  
Chief Financial Officer

August 2017



# Table Of Contents

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The content of this document is organized in accordance with the standard diligence that the BFC conducts to recommend Board approval of expenses as per the Contracting and Disbursement policy:

- Q1: Are the ITI cost estimates reasonable?
  - Project cost analysis – slides 3 & 4
  - ITI Budget breakdown – slide 5
  - Breakdown of expenses by vendor – slides 6 to 10
  
- Q2: Was the ICANN Procurement process followed for the ITI project?
  - Platform overview – slides 11 & 12
  - Vendor justification – slide 13
  - Vendor selection process – slide 14
  - Contracting – slide 15
  
- Q2: Are the ITI costs affordable?
  - Project and Annual Operating Expenses – Funding – slide 16
  - Funding discussion and ICANN Cash Flow overview – slides 17 & 18



# Explanation of Operating Costs

## **As-Is Scenario Operating Costs are higher than the Post-Information Transparency Initiative Operating Costs.**

- In the As-Is scenario, some feature development and technical infrastructure improvements would need to be made if the Information Transparency Initiative does not proceed. If the Information Transparency Initiative is approved, there would be no need to improve the As-Is technical environment, as this environment would be replaced with the new DMS/CMS. The current environment would exist in parallel to the Information Transparency Initiative until the project is complete.
- In the Post-Information Transparency Initiative scenario, there will be a reduction in development staff dedicated to maintaining the 15 sites included in the project. This is due to the fact that the DMS/CMS will allow content owners, in most cases, to publish content directly to the sites, without the need for development support.
- The majority of the maintenance costs and upkeep for the DMS/CMS would be performed in-house using existing Engineering & IT staff, who would obtain extensive training on these new platforms. Staff training is part of the ITI project costs. Additionally, the licensing costs for Alfresco and dotCMS include support, and this is included in the operating cost.
- There is some risk that Engineering & IT staff could experience difficulty learning the new platform; however, this risk is mitigated with the time that has been set aside for training with the dotCMS experts at Architech. The current ICANN development team has existing experience with the platform due to the GAC project and developers have transferrable Java skills, as dotCMS is Java-based. Regarding Alfresco, the ICANN organization's development partner Zensar has some previous experience with Alfresco and again, extensive training will be provided (pending approval of the project) to members of the Engineering & IT team (costs accounted for in project costs).













# Platform Overview 1/2

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To meet the requirements of the Information Transparency Initiative, it is necessary to implement two integrated platforms in a Document Management System (DMS) and Content Management System (CMS). This slide provides a summary of how these platforms were selected.

## Platform Selection

As mentioned in Slide 15, a competitive selection process was conducted for each platform. The following table illustrates the vendors under consideration:

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## Similar Technology Landscape

A review of other organizations with similar technology landscape was conducted through either the same platform combination or platforms with a Java foundation.

# Platform overview 2/2

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The organization has conducted and completed important work in support of the Information Transparency Initiative:

## Technology Platforms:

- An RFP was conducted for the DMS resulting in the selection of Alfresco.
- A competitive selection process was conducted for the CMS with a nine-month review of five systems resulting in the selection of dotCMS.
- **Alfresco and dotCMS yearly platforms costs are incurred in existing engineering budget and are not part of Information Transparency Initiative costs.**

## Other Work:

- An Alfresco preferred vendor, Zia, has set-up the DMS environment to best practices.
- New GAC site used dotCMS as its CMS, which provided valuable learnings.
- Content strategy firm, Formative, completed foundational content strategy work. (See page 12 of [White Paper](#)).
- **These costs have already been incurred and are not part of the Information Transparency Initiative costs.**

# Vendor Justification

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The selection process for the ICANN organization content strategy and technical implementation vendors was based upon several factors. The following table provides some of the key assessment criteria used in the evaluation of vendors:

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# Vendor Selection Process (Vendors not contracted yet)

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# Contracting

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# Appendices

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**DRAFT – Version 2**  
BOARD OVERSIGHT OVER THE PROPOSED ITI PROJECT  
Questions / Criteria  
29 May 2017

**OVERSIGHT ROLE**

The ICANN Board has oversight responsibility over significant projects undertaken by ICANN Org. Significant means that the Board considers that a project has one or more of the following characteristics:

- Strategically important
- Mission critical
- High cost
- High risk
- Considerable impact on the ICANN Community.

The Board therefore classifies the ITI Project as a significant project.

**APPROACH**

The Board will undertake its oversight role over the ITI Project in six steps:

Step 1: Board defines its requirements/questions.

The Board will submit to ICANN Org a list of questions that require answers before the Board approves the ITI project. These questions fall into two categories:

- A – [Project Plans](#) (scope, options considered, risks, milestones, deliverables, timescales, etc.)
- B - [Project Costs & Funding](#).

Step 2: Staff prepares answers to Board questions.

Staff will prepare answers to the Board questions (Categories A & B).

Step 3: BTG signs-off on the Project Plans

The BTG will review the answers to Category A questions. Once the BTG has reached closure with ICANN Org. on the Project Plans, the results will be reported to the BFC and the full Board.

Step 4: BFC signs-off on the Project Costs & Funding

The BFC will review the answers to Category B questions and signs-off on the

Project's Costs & Funding and submit a report to the full Board. The BFC will meet after the BTG signs-off on the ITI Project Plans and not before, because it is possible that the scope of the ITI Project may change as a result of BTG's review of the Project Plans.

#### Step 5: Board makes a Final Decision on a Project

The Board will review the recommendations made by Management, BTG and the BFC and make a final decision on the ITI Project.

#### Step 6: On-going Monitoring of Progress

The BTG will interact with ICANN Org on an on-going basis to monitor progress of the ITI Project, and report to the Board.

### **SCOPE OF THIS DOCUMENT**

This document contains the list of questions approved by the Board for both Categories A & B for the ITI Project.

### **CATEGORY A QUESTIONS – ITI PROJECT PLANS**

This set of questions is aimed at providing the BTG (on behalf of the Board) with a sound understanding the ITI Project Plans, starting with the scope of the project.

#### Project Scope

1. What is the scope of the ITI project?
  - A new DMS serving as the backbone for all ICANN content and new CMS for presenting all published content.
  - Consolidation of a portion of 16 web content properties ICANN currently maintains. Details are on slide 16 of the "May 2017 ITI Presentation"
  - A centralized ICANN glossary (there are presently at least seven unique glossaries maintained)
  - Establishing a consistent translated experience
  - Mobile-first user experience for surfacing the content
  
2. Describe the problems that ITI is trying to solve without reference to any technical implementation framework.
  - Inability to find ICANN content, both internally and externally. Not just search, but fulfilling DIDP, Subpoenas, etc
  - Inconsistent content

- o Translations
  - o Quality
  - o Navigation
  - Resource and time intensive publishing process
  - Incoherent ecosystem of external ICANN websites
3. If the major problems are (1) the poor condition of ICANN information's public access through the web site(s), and (2) the difficulty in finding historical documents, how much of the second problem would be mitigated if the first were solved well?

Correct that one of the major problems is the poor condition of ICANN content through the website. The second problem of historical content findability will be immediately addressed through tagging and improved information architecture (i.e. navigation)

4. What is the relative value of making documents being produced now and in the future more findable relative to the value of increasing the findability of historical documents (a now (b) in one year © in two years. Please make your arguments without considering some notion of complete transparency.

While transparency is a key value of improved findability, another way to look at the problem of findability is the poor structure of how we publish content today. At a time when ICANN needs to tighten up on spending, inadequate use of resources has a direct cost impact. One of those areas is the costs incurred in maintaining or misusing various teams for managing content:

- content operations team \$300k/yr
- development - Many of our pages have to run through the development cycle which is a wasted use of our development skillset as ICANN would be better served with focus on providing features to the community

The lack of an appropriate information architecture adds further complexity to the publishing process and combined with above, leads to the findability issues. By creating a well-defined information architecture driven by a structured taxonomy, the need for a full-time content operations team diminishes and the development team is freed up to work on more value-add capability. This ultimately not only improves findability, but allows ICANN to increase value while reducing costs over the long run.

Another way to look at this problem is through community productivity / efficiency. The community commonly complains about its inability to find

information and since most have “day jobs”, any delay in finding the information they need adversely impacts their ability to efficiently do their work.

## 5. What is the value of doing this work retroactively?

- Number of pieces of content: While there are over 100,000 pieces of untagged content, only around 25% of the content requires a full eyes-on audit. The remaining content would be tagged either through automation for simple tagging, or surfaced and searchable through a database.
  - 48,000 Monthly Registry Reports (surfaced through database)
  - 18,700 Registry Agreements (automated )
  - 12,000 translated content (linked to English)
  - 3,200 images (eyes-on to meet Accessibility requirements)
  - 22,000 pieces of content (eyes-on)
- Improve findability: One of the core problems we are trying to solve is findability. Currently, ICANN.org has no taxonomy or content categorization. In order to improve content findability, we need to audit existing ICANN.org content. We cannot develop a taxonomy and tagging language without knowing what content we have. This audit will answer questions like: who is the content owner, what is the subject, when was the content created, does the content have a life cycle (regular updates), what is the quality of the content, etc. The answers to these questions enable us to develop the tagging language. ICANN has never developed a taxonomy for its content, and this is a standard process of implementing a useable document management system, and multifaceted search capabilities. Without an audit, we’d been unable to develop a taxonomy that covers our content needs. Additionally we’d be unable to structure a navigation based on this taxonomy. It would not be worth it to implement a document management system without a workable taxonomy.
- Establishes content governance and future proof: There is no doubt that the audit is labor intensive work, but we view it as short-term pain we need to endure in order to establish a proper content governance. All new content would use this taxonomy and we’d never need to audit our content again, as it is now future proof.
- Improve quality and accuracy: A large percentage of explanatory content that exists and is weaved throughout the site, is of poor quality and in many cases, contains factual or other problematic errors. For example, there may be upwards of 300 instances of “domain name owner” contained in ICANN.org content, when the correct term is “domain name holder.” This is a distinction ICANN legal has indicated is worrisome. There are other instances like this, where the description

of a function or term on the site is inaccurate or inconsistent. Poor quality content would be flagged for revision during the eyes-on and would be improved.

- Create system-wide governance: Creating the taxonomy for ICANN publically-facing content will allow us to apply to taxonomy to the SO/AC family of site. This will create a system-wide taxonomy to enable multifaceted search across the ICANN ecosystem of sites.
- Linked content: In order to ensure content that is related is linked and easily accessible, the eyes-on audit would include a related content field to ensure documents to identify and group related content. As an example, drop catching and zero value registries are issues currently being discussed by the Board, and there are old documents that some Board members knew about and were able to locate on these issues. However, none of the documents around the issue of drop catching and zero value registries are tied together through a taxonomy, so using simple Google search does not provide a proper account of content related to these issues and so unless you knew exactly what you were looking for you wouldn't have found the relevant documents. This applies to many topics and content types, particularly new gTLD issues. The ability to "build a story" for any given document has contextual value to the community

6. Why not tag the 20% of docs that "really" matter vs. a full sweep? (More than 90% of docs do not contain relevant tags, page titles, or meta descriptions. 100,000 untagged docs. 35,000 new docs per year are being added).

Because we don't currently have a taxonomy or proper categories for our content, it would be difficult to choose 20% of content that is a good representation of all ICANN content. For example, a sample of our most accessed content would not provide a good representation of all of our content because the most accessed content concerns only a few topics around registrar complaints. Additionally, the remaining 80% of untagged content, would be outside the taxonomy, therefore not accessible through the multifaceted search and navigation. Lastly, without a comprehensive tagging of all content, ICANN will be unable to capture the interlinking of related content that GDD and Legal has highlighted as particularly important to our stakeholders and business needs.

7. How do you know that document retrieval with tagging will work effectively? What are the measures of effectiveness?

It is important not to view ITI as a technology-driven project. Project failure occurs when there is a lack of planning and lack of clear goals. The goal of ITI is to establish document / content governance and a content strategy. This is an important part of the planning process and requirements gathering, which are the foundational elements of the entire

project. The technology is a means to enable that governance and strategy. In coordination with a content strategy firm formally selected through an RFP process, ICANN is ensuring we're following best practices. Proper tagging of content will yield a better experience of findability as measured below:

- Faceted search for public content
- Improved bounce rate (<40%) from search results page
- Improved rate for searches requiring more than one attempt (<17.5%)
- Improved navigation resulting in finding content without search (<31%)
- System-enforced workflows ensuring content is not prematurely published without legal and quality controls.
- Decreased internal workloads and timeframes for publishing and document management

8. Will MyICANN be maintained in the DMS?

No - MyICANN does not house its own content. Instead, it serves features (<https://features.icann.org>) and a content aggregator to provide subscription services to the community. The former will be migrated to ICANN.org and the latter will be replaced by a more scalable and cost-effective solution.

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10. "Stakeholders can accuse ICANN of burying information and of not being accountable and transparent" - How would building the DMS and CMS will relieve ICANN of these risks?

Agreed the risks will not be completely eliminated. However, the risks will be mitigated considerably as content findability will increase. Additionally,

ICANN Legal has identified our current content findability puts us at risk of not meeting our transparency and accountability commitments now and in the future. After consultation with ICANN Legal, we do view this as a risk. Tagging historical content will give us the ability to “build stories” and provide context to issues.

11. What is the rationale of web sites in scope and out of scope? Why New gTLD site and PTI site among others are out of scope? (white paper p.7 – What is and is not included in the ITI)

While the proposed ITI scope is a large effort, rationale for what is in vs out was primarily focused on making progress with content iteratively and as expeditiously as possible to show progress while delivering value. In addition to the estimated 25,000 pieces of content that would need to be audited and tagged, the new gTLD site has at least a couple development-centric pages that would need to be converted.

While content strategy would be minimal for PTI, it was ultimately left out of scope because it would require a separate infrastructure to be implemented and maintained. However, it could be considered “on the bubble” as a potential add to ITI, but we felt the scope was pretty full already.

### Options Considered

1. What are the various options considered and what criteria have been used to evaluate these options?

The Information Transparency Initiative team explored several options over the last 18 months to try and tackle our findability and content governance issues including:

- Improving the search capabilities of public content without changing the existing technical landscape. We rejected this option as the current technical environment does not include a document management system to create and enforce content governance. Further, the current technical environment hampers our publishing process and scalability. Due to the heavy reliance upon custom development, the existing technological architecture is flawed and adding a third platform (Document Management System) will only make it worse even as a short-to-midterm solution.
- Focusing content tagging and governance on a limited amount of content created within the project timeframe. We rejected this option as it would restrict our ability to create a thorough ICANN-taxonomy and document management system, content quality and user experiences

would be widely inconsistent, search would only be improved for a limited amount of content and multifaceted search would only be enabled for a subset of the content.

- Using internal ICANN organizational and engineering strategic partner (Zensar) for content strategy and technical implementation. We rejected this option as the ICANN organization does not have either the capacity or the necessary capability for a project of this scope. This creates a significant risk to be able to deliver in an acceptable timeframe. A recent example is the current GAC content project . The GAC produces less than 10% of ICANN's public content and the technology will not include a Document Management System in the initial release, yet will have taken almost as much time as the proposed ITI timeline to complete. ICANN has shown a better track record when partnering with premier partners on new platform implementations.
- Using a single contractor for the content strategy and technical implementation of the DMS and CMS. We rejected this option based upon our experience with the 2014 project involving ICANN public content. ICANN engaged with only one contract partner and focused primarily on technical implementation over content strategy. That experience did not result in improved findability, content governance or search. Our assessment is that it involves too much risk to engage with only one vendor, as opposed to finding vendors who are respectively experts in our specific technical implementation and content strategy. We also determined the approach would not result in significant cost savings while significantly reducing the project benefits.
- Breaking the content strategy and technical implementation into smaller chunks. We rejected this option because the only way to establish a complete taxonomy and identify how content is interrelated requires an exhaustive content audit. Not having the content strategy complete upfront would require revisiting previously tagged content at a later point, resulting in a longer timeline and higher backfill costs. Further detail on the results of our investigation into this approach are included in the attached deck.
- Starting a small proof of concept to substantiate architecture before tackling the larger set of public content. We rejected this option because the proof of concept needed to be relevant, yet not already established. SSAC and RSSAC were considered, but ultimately do not have a suitable amount of content to provide a sampling to establish content strategy goals such as taxonomy. Additionally, this approach provides little community value and would further delay the much more urgent need of tackling the larger set of external content.

2. Why is the proposed solution presented to the Board considered to be the only feasible option?

This approach was the result of months of collaborative effort between

ICANN org and selected content strategy and technical partners. It mitigates risk by drawing on expert third parties for time-bound support, their experience with best practices, and ICANN's lessons learned from previous projects.

3. How it has been ensured that the choices of package software and vendor/consultant is the best and capable to fulfil the project purpose?

A risk assessment regarding project deliverables is included in the enclosed supplemental material. At the program's core, there are two key risks - cost and time overruns. These two fundamental risks have been mitigated through the planning process by:

- Adding a 30% contingency for any potential cost overruns
- Allocating \$900k for backfill to minimize staff disruption and put us in an improved position to meet milestones
- Scheduling a six-month buffer into the timeline to account for any unforeseen circumstances including project stalls
- A robust list of system requirements (Content and Document Management Systems) were compiled culminating in selection of scalable systems that meet ICANN's needs
- Premier partners were selected with extensive experience in the platforms and content strategy work purposed as part of ITI

### Architecture

1. What is the functional architecture of the proposed solution?

Content will initiate in the DMS, leveraging native capabilities for enforcement of tagging and content consistency as well as systematic workflows for content quality and self-service publishing. Content will be automatically published to the appropriate location on the site based upon business logic driven by the content strategy.

2. What is the technical architecture of the proposed solution?

There are two integrated enterprise systems that serve as the core platforms:

- DMS - System of record for all ICANN content
- CMS - Presentation layer for approved public content

Other systems such as Marketo for content subscription capability and an as yet to be determined calendaring solution will be integrated into the core..

3. Will the pieces fit together as planned?  
Yes, a formal selection process was followed to ensure the DMS and CMS both meet ICANN's functional requirements, fit into our development platform strategy (Java), and offer integration scalability through REST API. Further, we engaged our DMS and CMS partners to ensure an integrated solution architecture from both perspectives.
4. Where are the checkpoints regarding functional behavior?  
Premier partners for our DMS and CMS have already been engaged and would serve as our ITI technical implementation vendors, to ensure both systems were implemented to best practices. The first phase of the technical work stream of ITI is foundational and intended to establish a scalable integration between the two systems. There are additional releases through the course of the project that will serve as further checkpoints. A detailed project plan with milestones is available upon request which builds in testing of migrated content types before full migration.
5. Where are the checkpoints regarding system performance?  
Performance of the DMS and CMS have been scrutinized individually during recent engagements. Alfresco (DMS vendor) has already established the infrastructure with load testing and scalability complete. The CMS has been tested with GAC as the pilot project and the ITI vendor Architech, has performed a security and configuration audit. Additionally, dotCMS support has provided best practices setup for the GAC, which can be repurposed for ICANN.org. At the end of the foundational phase of the project, these same load testing tools and best practice documentation provided by our vendors will be expanded to verify the integration points meet the same level of performance quality.
6. How the taxonomy and document architecture will be ensured to be future proof or not to obsolete?

Through the workflow functionality the DMS provides, we will be able to enforce governance that ensures content is appropriately tagged prior to publication. It will also future proof our content, as the meta data added to the content can be easily migrated should we need to transition away from our chosen platform.

### Estimated Effort & Timescales

2. What are the main assumptions underlying the estimates?

Assumptions were driven by initial analysis from premier partners based upon scope, a sample content audit conducted in October 2016, and interviews with each executive on available capacity. Based upon this analysis, timeline and budget were established.

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3. What is the overall elapsed time?

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4. Provide a summary chart showing the main tasks, corresponding effort and timeline.

Summary Chart including tasks and efforts are included in the high-level timeline in the latest ITI presentation.

Milestones & Deliverables

1. What are the key milestones and the corresponding dates?

Milestones, including corresponding dates are included in the high-level timeline in the latest ITI presentation.

2. What are the key deliverables and the corresponding dates?

Key deliverables including corresponding dates are included in the high-level timeline in the latest ITI presentation.

Transition Plans

1. What is the transition plan from the old (as-is) to the new (ITI) system?

We recognize the importance of providing the community with visibility into the Information Transparency Initiative, and encouraging the community to submit feedback. To support that effort, we will launch an Alpha version of the site called [evolution.icann.org](http://evolution.icann.org). This site will show progress on the external benefits of a document management system and how this improved content governance will manifest itself externally and be displayed on ICANN.org and what content types will look like on the new

ICANN.org. We'll solicit "limited window" feedback opportunities. We'll incorporate this feedback to improve user experience. The community is central to what ICANN staff do and evolution. icann.org reflects their importance in the decision-making process. While we build the DMS and new ICANN.org, the current ICANN.org will continue to serve as the official ICANN site.

## Resources

### 1. What is the impact on ICANN Org resources?

For the content strategy (primarily the eyes-on audit), ICANN organization resources will be impacted depending upon the amount of content each owns. For those at risk of impacting daily work, we have budgeted for backfill to ease the burden.

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## Risks

### *Worst case scenarios:*

#### 1. What are the worst case scenarios that could happen:

Complete project failure

Corruption of data

Inability to handle needs.

How have you mitigated against catastrophic issues like these?

These above risks have been mitigated through the planning process by:

- Complete project failure
  - If ITI fails completely, the as-is system remains and is still functional, except for new functionality provided by ITI. As such,

the worst thing that can happen is the  
money/time/staff/reputation investment in ITI is thrown away  
Confidential Negotiation Information

- o Continuing to run current icann.org until ITI is ready
- Corruption of Data
  - o Automated A/B testing to ensure source / target data are equivalent
  - o Manual QA eyes-on validation data sampling
  - o Legacy systems remain available in read-only state for determined period of time
  - o Full backup of legacy systems before transition
- Inability to handle needs
  - o A robust list of system requirements aimed at addressing current and anticipated needs was defined prior to selection process for CMS and DMS platforms

*As-is risks include: "Degraded ability to find content" :*

2. What is the need to find content in the current document set? Who is being harmed?
  - Internally, the need is driven by requirements to identify and/or compile documents based on a particular format. There is no consistent mechanism by which documents can be searched. Instead, searches are done manually, typically interrupting staff work in the cases of time sensitive searches (e.g., DIDPs or authorized requests from law enforcement)
  - Externally, there are a constant and increasing number of complaints voicing frustration with the current site and the inability to find various forms of content, and those complaints are increasingly targeted at the ICANN Board and staff:
    - o Almost 40% of users exit the site after conducting an onsite search which indicates users are not finding what they want through site search
    - o Onsite search is limited (ineffective multifaceted and advanced search options), which results in 40% of users exiting the site after conducting search

- o Navigation issues contribute to ICANN's high average bounce rate of 66% (industry average is 41%)
- o A sample audit revealed that 3.76% of URLs of the 3,298 most popular pages on ICANN.org led to error pages, an unacceptable level of errors. For example, one error URL for a ccTLD page has been clicked 11,740 times over a 12-month period. Redirects also pose a problem for version control, technical management
- o The site does not meet W3C WCAG Level ADA Guidelines. An accessibility assessment performed in February 2016 reviewed 504 ICANN selected URLs and uncovered 302 accessibility related issues, 78% of which were Level A issues, the most severe type.
- o Additionally, ICANN Legal has identified our current content findability puts us at risk of not meeting our transparency and accountability commitments now and in the future. After consultation with ICANN Legal, we do view this as a risk.
- o Content is inconsistently translated and is not available/findable on the website outside of English

3. What is the damage to the corporation due to not having the ability to have tagged content? (this appears to be a solution in search of a problem)

- The site search does not perform well and we don't have functional multifaceted search. This is directly related to the lack of metadata (applied taxonomy) on our content. If we neglect doing the heavy lifting, the content governance piece, we will find ourselves in the same position as the current site. This work underpins the entire project. We do not recommend proceeding with ITI if this foundational work is omitted.
- There's value in being able to track back any document to its origination and be able to associate that path with other documents
- As with any initiative involving technology, the implementation is only as good as the data it holds. ICANN.org ranks poorly in search results because it does not follow even the minimal best practices for SEO as identified by a third party evaluation. The following are specific issues found:
  - o ICANN.org content consistently ranks poorly in Google
  - o ICANN.org content does not have meta descriptions which impacts the user's ability to understand the nature of a search result and if it will meet their needs
  - o ICANN.org content does not use proper page structure elements which negatively impacts a search engine's ability to understand content priority on a page, devaluing the ranking of content

- o Additionally, ICANN Legal has identified our current content findability puts us at risk of not meeting our transparency and accountability commitments now and in the future. After consultation with ICANN Legal, we do view this as a risk.

All of the above issues impact the communities' ability to find content which could be perceived as ICANN not delivering upon its accountability and transparency obligations in the future.

*As-is risks include: "Community engagement more difficult" :*

4. What are the metrics that indicate that community engagement will become better in a new architecture?
  - Our engagement teams work hard to drive people to engage with and participate in ICANN, our bounce rates and the number of "new" visitors that we lose when they get to icann.org is showing that we have a "hole in the bottom of the bucket" that no matter how much we spend on bringing new participants into the work and policy development there will be a significant performance/conversion loss/risk given the site.
  - ICANN.org will utilize Google Analytics, or other web analytical tools, as well as Marketing Automation that will provide content subscription metrics.
5. What promises are ICANN making regarding community engagement in the new system?
  - Improved content quality translated in the six UN languages with improved findability and multifaceted search capabilities will improve community engagement.
  - A complete governance for writing, tagging and translating content will improve the quality and accessibility of our content to different stakeholders across the globe.

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- The DMS and CMS setups are foundational work on which all SO/AC sites will be built, enabling ICANN ecosystem wide search and a common, shared governance.
- A universal, shared ICANN glossary will bring consistency and order to our terminology and definitions of those terms.

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*As-is risks include: “Transparency and accountability impeded”:*

6. Is this true? Are there complaints about this, if yes, how many and from whom?
  - The Executive Team and the Core Team have identified our current content findability puts us at risk of not meeting our transparency and accountability commitments now and in the future. After consultation with ICANN Legal, we do view this as a risk.
  - Our information is ICANN’s most valuable asset. It represents our history and our institutional memory, and supports our accountability and our policy making dialogues. We need to take additional steps to safeguard that information and make it more readily accessible. **This duty to protect our information is not optional, but a critical component of our viability.** It is our collective responsibility to resolve this content crisis.
  - **We have made post-Transition commitments to and requirements for accountability and transparency. Current and easy-to-find public information in all six official U.N. languages is a vital part of achieving those commitments.** The level of scrutiny of our ability to meet and track those commitments through our system of record for information – and in particular, public-facing policies, contracts, and bylaws – will only increase.
  - There is some urgency to resolve this issue while reasonable options remain available. Each day that our content grows, the amount of effort and cost to fix the problem also grows. As such, reasonable options dwindle and our solutions to fix the problem become more expensive, resource-intensive, and constrained. **It is not only the fact that we will face serious financial consequences the longer we wait to resolve this issue, but we risk being unable to meet our post-Transition commitments in the future.** We need to change our thinking about the importance of information governance and apply the same strict and acknowledged standards to our information that we apply to operational, financial, and legal management.
  
7. What are the measures for “unimpeded” transparency and accountability?  
The Board should agree upon these measures
  - We are trying to make published ICANN content as findable and open as we are able to, in the six UN languages.
  - Yes we are seeking the Board’s input and views on how to treat this matter. From an architectural viewpoint, we have created a closed environment for all content which is not visible to the public until an

explicit workflow is initiated with appropriate levels of review and release authority. Only then would the content be visible to the community.

*ITI risks include: "Lack of internal resources":*

8. Why is this a board issue? If the board approves the project and management is unable to procure internal resources, it indicates management failure.

We agree to remove this as a risk

9. This is a generic risk that is equally true of any project

We agree to remove this as a risk

*ITI risks include: "Reprioritization since benefits take long time to manifest" :*

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11. If reprioritization of this project happens for the stated reason, it is a leading indicator that the project is not important enough and should be immediately shelved. What are the plans for that eventuality?

This is an incorrect assertion: re-periodization merely means that some other project has taken a higher priority. This could be for an unanticipated, time-sensitive, critical requirement. It doesn't mean the project is "not important enough", rather that something else is more important. It is possible that a higher priority project drains resources from ITI. It is always a risk.

12. If reprioritization of this project occurs for the stated reason, it is also a leading indicator that the benefits were of a speculative nature. How can we be reassured of the benefits not wishful thinking?

- There has been a misinterpretation of the reason for re-prioritization.
- As stated above, we would not anticipate the project being re-prioritized as a result of not achieving benefits, but rather the result of another unknown initiative taking on greater importance and need. That is something that we cannot mitigate or plan for, rather is dependent on the composition of the Board and the Executive Team, and their views and stated priorities.

*ITI risks include: "Mission creep from community input" :*

13. What is the acceptable level of mission creep? What is the unacceptable level?

An acceptable level of mission creep are requests that do not impact project timeframe, costs and provides overall project value. When those requests are identified, each will be analyzed to ensure they meet the above stated criteria. An unacceptable level of mission creep are requests that impact the project timeframe and / or costs, and are outside of the agreed upon project goals and deliverables.

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*ITI promises "improved accessibility":*

15. How is improved accessibility measured? Improved by what %?

By using Level A and Level AA as outlined in the W3C Web Content Accessibility Guidelines (WCAG) 2.0 outlined below.

- Level A: These are the most severe errors to be addressed as they violate minimum requirements for accessing web content.
- Level AA: These are the most common errors, ensuring these are addressed is considered in compliance with accessibility guidelines.

Conformity to this standard will be measured through use of an automated testing platform procured in 2016 for accessibility.

16. To what standard/SLA?

ICANN has adopted the W3C Web Content Accessibility Guidelines (WCAG) which is a commonly adopted standard for accessibility throughout the world.

### **CATEGORY B QUESTIONS – ITI PROJECT COSTs & FUNDING**

This set of questions is aimed at providing the BFC (on behalf of the Board) with a sound understanding the ITI Project Costs and Funding.

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1. How will the ITI Project be funded? Describe the trade-offs between:

- Adjusting the Strategic Plan. The Board was informed in Geneva that ICANN funding over the next three fiscal years is not sufficient to fund the three years left in the Strategic Plan and that some adjustments to the Strategic Plan are required. The Board therefore needs to understand which projects in the Strategic Plan/Operating Plan need to be eliminated or downsized to make room for the ITI project.
- Replenishing the Reserve Fund. The Reserve Fund is nowhere near the level it should be, as it was severely depleted by almost USD 30 millions to fund the Transition. The Board therefore needs to know why funding the ITI Project is more important than replenishing the Reserve Fund.
- Reducing Operating Expenses. What measures ICANN Org will take to identify savings from operations over the next three years to fund fully or partially the ITI Project.
- Usage of the net asset surplus (approx USD 1 generated during FY16 and FY17. The Board needs to know how this money will be used.

2. What else will ICANN not do if the Board approves this project?

It has been determined that FY18 will be covered by excess funds from FY17 so nothing needs to be adjusted from the current FY18 plan. ITI would be part of the normal FY19 planning so other initiatives would be prioritized accordingly..

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3. If as-is such a bad option, why is the cost of maintenance not rising sharply in future years as the current system becomes more unstable, shaky and difficult to manage? The current maintenance plan appears to apply a straight-line approach, which is unreasonable if the system is bad.

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- It is difficult to determine what the costs of maintaining the current site will be in the years to come. We experience new problems with the site each day, and are constantly reacting to fixing bugs, and site improvements are either greatly delayed and/or deferred. For example, the level of redirects means that often content returns an error page. We can continue to maintain this site in the manner with which we

have, however, this poses security and reputational risks. Maintaining the current site however we believe only defers the inevitable ITI (or ITI like) price tag that will in itself be higher as time goes on. So, whether we do ITI now or later, this is a bill that we face and cannot avoid, as the system is unsustainable. Not only is the technical infrastructure unsustainable, but the staffing is unsustainable as there is no staff dedicated to maintain a site of this size and scope.

4. Why is the cost so high for a newly architected and newly built system?
  - There is a resource cost for consistent quality and timely delivery of content, which we don't have with the current site. We have a technical and content debt from the current site(s). Resources were never properly allocated to maintain a site of this size and scope, and demands from our stakeholders for content and standard features have only increased. There are no dedicated staff to maintain the current ICANN.org from a quality control, development or project management perspective. Each staff person is only a part-time resource to the site, resulting in a massive backlog of requests and bug fixes. ITI factors in minimal but dedicated resources to maintain a site of this size on an ongoing basis. Although most content creation and publishing will be performed directly by content owners, eliminating the need for development or web team resources, there are quality and lower level but continual development resources and management that will still be required.
  - Secondly, ITI only addresses content published on ICANN.org in Phase 1. There is still a maintenance cost for the SO/AC sites until they are consolidated into the DMS/CMS architecture. Once consolidated on the new platform, development resources will be reduced further.

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5. The maintenance cost of the ITI system should increase as we get to the later years of the project. Is that reflected appropriately?

This is reflected in the fact that the rise in maintenance costs for ITI will be flatter than continuing as is. The maintenance costs will actually decrease slightly as we continue platform consolidation post-ITI with the other SO/AC sites. Maintenance costs will decrease as the bugs and lack of features inherent in new system deployment are remedied.

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7. Are there any components in the current system that are vulnerable to catastrophic events (such as a vendor going out of business)?

The existing systems have been implemented to scale against common catastrophic events such as earthquake, fire, etc. However, we are dependent upon Zensar as our strategic development partner for institutional knowledge gained in our systems. Going out of business would cause a lag in development until replacements are sourced and trained. Given our current environment is heavily dependent upon developers for publishing, this would pose a threat to timely content publishing.

8. Are there any components in the new system that are vulnerable to catastrophic events (such as a vendor going out of business)?

There are always risks with any system, but we have worked and will continue to monitor, mitigate and diversify to ensure we are as well placed as appropriate for business continuity and disaster recovery in the light of a catastrophic event as part of ICANN organization's wider strategy. The DMS and CMS platforms offer an open source variant ICANN can use as a fall-back to buy time until suitable replacement platforms can be identified. Product support would be the only impact which can continue through the same premier partners we will leverage for ITI if required. However, the ITI platform architecture is less complicated, and has fewer dependencies.

*Other:*

9. What is the cost of tagging the 20% of docs that really matter vs a full sweep?

Because we don't currently have a taxonomy or proper categories for our content, it would be difficult to choose 20% of content that is a good representation of all ICANN content. For example, a sample of our most accessed content would not provide a good representation of all of our content because the most accessed content concerns only a few topics around registrar complaints. It also prevents our ability to "build a story" as mentioned above. Additionally, the remaining 80% of untagged content, would be outside the taxonomy, therefore not accessible through the multifaceted search and navigation. Lastly, without a comprehensive tagging of all content, ICANN will be unable to capture the interlinking of related content that GDD and Legal has highlighted as particularly important to our stakeholders and business needs.

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# Information Transparency Initiative Risks & Mitigation

In a program with the size and scope of the Information Transparency Initiative (ITI), it is important to conduct a thorough risk analysis and mitigation strategy. This risk assessment examines high-level risks and our mitigation plan and includes a more detailed risk assessment broken down by quarter and deliverable.

## High-level risks and mitigation for ITI

Risk	Mitigation
The ITI budget and contingency are underestimated.	Platforms and respective expert vendors underwent a RFP process to ensure ICANN secured a competitive price for the underlying technology platforms and for qualified vendors. Confidential Negotiation Information
Future technological advancements render the chosen DMS and CMS obsolete or ineffectual.	The metadata, information architecture and content strategy will help futureproof our content and ensure it would be transferrable to new technology platforms.
Other priorities divert resources and attention away from ITI.	We obtained commitment from the Executive Team in support of ITI's goals and work. They have committed to ensuring it remains a priority throughout its implementation. We have also partnered with the CFO to ensure the budget is structured to fund the Initiative throughout the duration of the project through to its completion. We are in the final stages of matching that commitment with the Board, through a consistent engagement with the Board ITI subcommittee. Additionally, we drafting a plan for how we will build support with the community to ensure the SO/ACs support ITI's goals, work, and cost.
Mission creep sets in as the community demands features beyond the scope.	In the lead up to and throughout ITI, we plan a consistent communication strategy about what is in and out of scope for phase one. This includes sharing the goals and scope of the project with the community, early and often. It also includes an online process, through a site called <b>evolution.icann.org</b> whereby the community is asked to provide limited window feedback as features and content are developed. To encourage actionable responses, we will provide a

	structured and specific feedback process.
The wrong DMS and CMS are chosen to implement the content strategy.	The DMS and CMS were chosen with configuration capabilities to handle our workflows, content governance requirements, content types, publishing needs, and budget limitations.
Internal staff resources are limited to tackle a project of this scope.	Staff backfill costs have been factored into the budget and contractors with ICANN experience have been identified to help tackle labor-intensive audit work, requiring knowledge about ICANN and its content. We recognized ICANN does not have the capacity to tackle the heavy lifting involved in creating the content strategy and implementing the DMS and CMS. While the organization is providing the leadership and institutional knowledge of the content and technical aspects of the project, we are relying on expert external vendors to perform most of the work.
Technology Failure	The as-is system remains as a rollback option and is still functional keeping any issues seamless from the end user.
Premiere partners no longer available	We will engage our platform vendors for a new partner as necessary. For CMS, it would mean a non-premier partner. Content strategy can be replaced by leveraging a combination of CMS and DMS partners.
Project leadership no longer available	Internal backup resources identified to fill leadership roles.
Board, community, and Executive Team commitment to the project wavers.	The Initiative passed an extensive review by the Executive Team and earned its full support. If the Initiative earns Board and community support, regular progress reports and feedback opportunities will be provided to allow for ongoing Board, community, and Executive Team oversight and support.



**ICANN**

# The Information Transparency Initiative

March 2017

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## Introduction

It is said there are “two kinds of knowledge – we know a subject ourselves, or we know where we can find information on it.” ICANN has, over its 18-year history, accumulated a trove of information. This information represents our history, our institutional memory, our policymaking dialogues, and the knowledge we are obligated to share with our stakeholders. It is one of our most valuable assets, and it needs preservation, organization and protection.

Unfortunately, ICANN has not invested the time or the resources to safeguard this information. Our current, de facto document management system (DMS) is ICANN.org, and it has rendered our content undiscoverable to many stakeholders. At current content growth rates of between 25-35% per year, our findability problems will only deepen. As Göran Marby recently wrote, “It is a changing world for us after the Transition...We need to be sharper, more transparent, and the stakes are higher.” At a time in our history when our accountability and transparency are under a brighter spotlight, our publically-facing DMS has put us at risk.

In an effort to mitigate that risk and guard our information, we propose the Information Transparency Initiative. Its primary goals are to develop a content governance with a robust taxonomy, establish better content organization, improve publishing speed and future proof our content. It is important to stress that the primary goal of the Information Transparency Initiative is not an ICANN.org revamp, rather we view ICANN.org as the route by which stakeholders access a new, publically-facing DMS.

We are well aware that there may be some reticence to devote time and resources to a project of this size and scope. Additionally, ICANN has not had a proven track record with these types of projects. However, what this white paper will illustrate is that building a content governance and strategy is the foundational work on which the entire DMS will be built. This is new for ICANN and is what makes this project different. The Information Transparency Initiative does not propose an overly complicated set of features or applications. We propose performing an eyes-on-audit of all our content to inform a verifiable taxonomy and information architecture. This work underpins the entire project.

This takes time and involves many stakeholders, but without completing this time-consuming, labor-intensive work, the project goals will not be met. Alfresco and dotCMS will serve as our respective DMS and content management system (CMS). These two platforms are the technological frameworks upon which the content governance is built.

### The Information Transparency Initiative has identified five main objectives:

1. Focus on a content strategy and implementation of features that enable us to meet ICANN’s accountability and transparency goals, and reflect its technical mission. Increase content findability through the creation of a taxonomy in the U.N. six languages, and an improved information architecture and user experience.
2. Create and enforce staff content governance and increase publishing speed through distributed content management, and improve the writing in the U.N. six languages and develop audience-specific, multimedia content offerings.
3. Develop a mobile first experience and ensure accessibility standards are met and provide a translated user experience.

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5. Create a scalable platform to implement a future proof content strategy for the ICANN digital ecosystem.

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This white paper provides a summary of our current challenges and a blueprint to tackle them.

### Why do we need to set up a DMS to help ICANN meet its post-Transition and global public interest commitments?

ICANN has post-Transition commitments to and requirements for accountability and transparency. Current and easy-to-find information in all six U.N. languages is a vital part of achieving those commitments. ICANN.org is where we demonstrate and meet those obligations. It is our only publically-facing system of record for policies, contracts and bylaws. Our reliance on and demands of ICANN.org to make that information available will only deepen in the coming years, and the level of scrutiny of our ability to meet and track those commitments through our content will also increase.

A DMS enables ICANN to establish and enforce content governance over our information, which in turn leads to improved accountability and transparency. That important information is then made accessible, organized and displayed for stakeholders through ICANN.org.

### Content governance enforced through a new DMS will:

1. Set policies and standards for mandatory tagging and content creation.
2. Establish workflows for staff when creating and publishing content including: style rules, version control, approvals (departmental, legal, technical), translation and publication.
3. Enable easier content retrieval.
4. Enhance security for internal and external content permissions.
5. Allow for improved content collaboration.
6. Establish document lifecycle.
7. Provide the groundwork for building content governance for internal content (content that will not be published to ICANN.org).

### What do we mean by content governance and content strategy?

It may be useful to briefly explain what we mean by content governance and content strategy. We just outlined the improvements that enforcing a content governance through a DMS will bring. But, the DMS is only the technological component. Think of the Information Transparency Initiative as two connected and interdependent pieces – content and technology, where technology is a means to implement the content governance and strategy.

Content governance is a key pillar of any content strategy. We cannot begin to fix our content problem or set up a DMS without outlining our governance. Content governance involves the processes and resources that govern how staff create, publish, store and preserve content. This governance includes documenting content ownership and roles, enforcing standard workflows, producing policies on content lifecycle and training staff on these governance rules.

The content strategy includes this governance but is about the overall vision for how we transform our content into a strategic asset. This means “getting the right content to the right user at the right time through strategic planning of content creation, delivery and governance.” Without a content strategy, we cannot improve our content governance or ICANN.org. The content strategy includes the auditing, taxonomy, information architecture, UX, content matrix and content governance.

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## Why else is a DMS integrated with a new ICANN.org important?

ICANN.org is our most powerful and visible engagement tool - the 24/7 face of ICANN. Our site earns 250,000 users each month, with upwards of 70% of those users being new visitors. This is a greater reach than our public meetings, social media, webinars and newsletters combined. The site helps deepen our engagement with stakeholders and reinforce our reputation for competence and quality, accountability and transparency.

New and existing power users will judge the professionalism and credibility of our organization based on their experience with our website. Is content easy to find? Does it provide a seamless, enjoyable user experience? Does the website contain content that is approachable and in one of the six U.N. languages? Is content updated regularly? Is it mobile friendly?

## How is our lack of a DMS and the current state of ICANN.org jeopardizing our ability to meet post-Transition commitments?

Without a DMS to institute content governance, we are making it increasingly difficult for stakeholders to find and track information. ICANN.org cannot easily surface thousands of pages of content either through its site search or its information architecture. There is little or no meta data attached to our content, there is no holistic taxonomy and no logical organization of information. Additionally, the site does not enable an environment for stakeholders to plan and track their engagements, policy work or content preferences. This means ICANN will struggle to meet its post-Transition commitments to increased accountability and transparency. Stakeholders can accuse ICANN of burying information and of not being accountable and transparent, when in actuality, it is the lack of a DMS and ICANN.org's structure that is preventing greater and easier access to content.

## How do we fix our content problem and why do we need to fix it now?

ICANN needs to establish content governance through a DMS, and integrate that DMS with a new CMS. But before we can set up a new DMS integrated with a CMS, we need to work on our content. We cannot meet our accountability and transparency goals by merely reskinning the current ICANN.org, as has historically been the approach. We have both a technology problem and a content problem. The key to resolving our content issues is dependent on creating a content strategy and governance, which is then implemented through a DMS and displayed on ICANN.org.

Band-aid solutions have only served to exacerbate problems. For example, there are eight different redirects at some levels of the site. Previous patchwork approaches have directly resulted in the issues we must now address. We have avoided the difficult and laborious work of auditing all our content for far too long. The time has come.

We propose, for the first time in ICANN's history, auditing and tagging all externally facing content, and creating a content strategy with a taxonomy, information architecture (IA) and user experience (UX) on which the entire ICANN ecosystem will be built upon.

The resources and effort required to establish control over our content is significant. Currently, there are over 100,000 pieces of untagged content. With each passing year, our content problem grows larger and larger, and it is a very public problem that is not going away. At this point in ICANN's history, the status quo is an option we can no longer afford, and the Cost of Ignoring (COI) means we are abdicating our responsibilities to the global community, undermining our ability to meet our commitments, while also increasing the costs we will have to bear down the road.

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## Nine Information Transparency Initiative Goals

The Information Transparency Initiative has identified nine goals to meet the five objectives outlined in the introduction of this white paper.

1. Focus on a content strategy and implementation of features that enable us to meet ICANN's accountability and transparency goals.
2. Increase content findability through the creation of a taxonomy and digital content strategy, and an improved information architecture and user experience.
3. Provide a translated user experience.
4. Improve the writing and develop audience-specific, multimedia content offerings.
5. Ensure that ICANN's technical mission is reflected throughout our content.
6. Create and enforce staff content governance and increase publishing speed through distributed content management.
7. Develop a mobile first experience and ensure accessibility standards are met.
8. Improve engagement with new and existing stakeholders, and enable power users to select content preferences, registrations and perform work through a universal profile environment and automated content delivery system.
9. Create a scalable platform to implement a future proof content strategy for the ICANN digital ecosystem.

## What future impacts will the Information Transparency Initiative produce?

We have outlined a case which argues that our lack of attention to our content governance puts us at risk for meeting our post-Transition commitments to accountability and transparency. But, there are other Information Transparency Initiative benefits including:

1. A complete governance for writing, tagging and translating content will improve the quality and accessibility of our content to different stakeholders across the globe.
2. The stress on web administration decreases as content creation and publishing is moved from web administration directly to the content owners. This allows web administration to focus on digital projects that require more expert knowledge.
3. The tagging and taxonomy will ensure our content is future proof, as meta data will be added to all content, and will be transferable to any future platforms.
4. Universal profiles will ensure stakeholders can manage and track their engagements, content preferences and work. This data will enable us to accurately report KPIs, and this tracking will also help us meet our accountability and transparency goals.
5. The DMS and CMS setups are foundational work on which all SO/AC sites will be built, enabling ICANN ecosystem wide search and a common, shared governance.
6. A universal, shared ICANN glossary will bring consistency and order to our terminology and definitions of those terms.
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8. The DMS setup will create the foundational elements for phase two of the DMS implementation, which includes internally-facing documents.

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## What is and is not included in the Information Transparency Initiative?

### In scope:

- ICANN.org
- meetings.icann.org. However, older meeting content will not be tagged, as there are tens of thousands of pieces of untagged meeting webpages, PowerPoint presentations and audio files in archive. This would involve an enormous effort in itself to include in the new taxonomy. These pieces of content will be migrated to the new DMS, but all future meeting content will be tagged and included in the taxonomy and information architecture. Older meetings content is rarely searched for, but we can explore whether an increase in scope to accommodate older meeting content into the taxonomy is desired.
- myicann.
- ICANN glossary

### Out of scope:

- New gTLD site
- ICANN Learn. We will be adding, creating, revising and translating learning content on ICANN.org.
- SO/AC sites. However, the taxonomy, IA, universal profiles and glossary will serve as the foundation and templates for rebuilding SO/AC sites.
- WHOIS site
- New IANA (PTI) site
- Collaboration tools for SO/ACs, but universal profiles will serve as the foundation for this tool.

## How will we provide community visibility into the Information Transparency Initiative, and what happens to the current site while the new DMS and ICANN.org are built?

We recognize the importance of providing the community with visibility into the Information Transparency Initiative, and encouraging the community to submit feedback. This is the multistakeholder model in action. To support that effort, we will launch an Alpha version of the site called [evolution.icann.org](http://evolution.icann.org). This site will show progress on how content governance will be displayed on ICANN.org and what content types will look like on the new ICANN.org. We'll solicit "limited window" feedback opportunities. We'll incorporate this feedback to improve user experience. The community is central to what ICANN staff do and [evolution.icann.org](http://evolution.icann.org) reflects their importance in the decision-making process. While we build the DMS and new ICANN.org, the current ICANN.org will continue to serve as the official ICANN site.

## What does it cost to create a content strategy, and set up a new DMS and CMS?

The ICANN organization is not a document management company, nor a website development company. We do not have the expertise or idle resources to tackle a project of this size on our own.

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It is also important to emphasize that ICANN produces a lot of content – over 100,000 pieces of content exists on the site. We have never performed an audit of its content or developed a content strategy. These over 100,000 pieces of content include: webpages, PDFs, videos files, audio files, jpgs, PowerPoint presentations, Word documents and Excel spreadsheets. It requires a significant amount of human effort to ensure we create and execute the right taxonomy, and content and migration strategy.

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2. Use of an external vendor to perform and execute the development effort. Internal resources are not available to tackle a project of this size and sophistication. Additionally, internal resources need to maintain the existing site during the Information Transparency Initiative.
3. Need to introduce new technological platforms. We do not have a DMS and the current Rails/Drupal CMS setup on ICANN.org hinders our ability to make significant changes to the site. Our two new platforms require external skills and support to execute effectively.
4. Staff backfill and content auditors with ICANN knowledge are needed to assist with the content tagging and taxonomy.
5. A large percentage of content requires translation.

### What are the costs of the status quo?

#### *Findability worsens*

There are currently over 100,000+ pieces of content on ICANN.org. As the amount of content rises, the problems also increase. For example, search quality continues to decline because of the unstructured nature of our content and cluttered organization. Also, the lack of content structure and document governance limits our ability to accommodate translated content and provide a consistent language experience to users.

#### *Resource constraints become more acute*

The resource limitations on web administration also widens, as staff requests for new or updated webpages grow.

#### *Engagement becomes more difficult*

Because content is untagged, unindexed, not translated and does not adhere to Search Engine Optimization (SEO) best practices to improve search on Google, we are missing engagement opportunities with new users. Additionally, there is very little content written for new users, which hinders our engagement efforts. It also undermines our ability to deepen engagement with existing users. We are not making it easy for our stakeholders to find content and stay informed.

#### *Lack of governance over document management impedes transparency and accountability*

ICANN has made accountability and transparency commitments. If we continue to neglect our document management on ICANN.org, we risk our reputation and our ability to meet those post-Transition commitments.

### What risks exist with the current Information Transparency Initiative plan?

#### *Unknown unknowns*

Our primary challenge in the coming months is determining the content governance and strategy. This is predicated on performing the eyes-on-audit of all our content. As outlined earlier, the content governance and strategy are foundational and informs and provides clarity to the rest of the project.

Confidential Negotiation Information

proposed increase in scope would need the Committee's approval.

Likewise, any

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While the content strategy will provide greater clarity into the project, there are other factors that we cannot predict; for example:

1. Future technological advancements render dotCMS and Alfresco obsolete or ineffectual.
2. ICANN does not have the right internal resources to implement the project plan.
3. Other ICANN priorities divert resources and attention away from the Information Transparency Initiative.
4. The content strategy does not fit the changing needs/demands of the community and staff.
5. The wrong DMS and CMS were chosen to implement the content strategy.

#### *ICANN staff resources*

ICANN internal resources are limited. The Information Technology and Communications Departments will face significant challenges trying to maintain ICANN.org during the Information Transparency Initiative. Departments throughout ICANN will also be asked to assist during the content strategy and workflow processes, placing stress on those departments to deliver timely feedback, and assist with audits. This effort requires meaningful buy-in, change management and communication with the entire organization. The level of effort required by each department will be dependent on the amount of content each department currently owns on ICANN.org. This means that departments may need to provide backfill staff to replace staff who are working on the eyes-on audit.

#### *What level of effort do we estimate is required from staff?*

##### *Exploratory Audit*

From 17-21 October 2016, a small team from ICANN and Formative worked together to perform an exploratory eyes-on content audit of 4,500 pieces of ICANN.org content. The goals were to provide initial findings on the taxonomy and estimate the level of effort the Information Transparency Initiative would require from staff.

Additionally, Formative worked with ICANN's Web Administration Team to provide the ICANN Information Transparency Initiative team with a breakdown of all the content pieces on ICANN.org. Here, it was possible to group some of the content by content owner to help estimate the level of effort that would be required during an eyes-on audit.

As we discovered during our exploratory audit week, it can be a slow process, as the content owner and topic of a particular piece of content are not always obvious. Outsiders would have a very difficult time adding all the fields we need (owner, sub owner, topic, sub topic, meta description, etc.). Our own people have difficulty determining content owners and topics.

##### *Audit Recommendation*

However, going forward, we recommend performing eyes-on audits with the content owners. The audits would be better informed and take less time. This frontloads the level of effort for departments but decreases the overall effort. Content owners would weigh in on the taxonomy in real time, which eliminates a separate taxonomy review. Content owners would also flag content for revision/translation in real time, which eliminates a separate review during the content matrix and priorities phase. Lastly, content owners would have better insights into their requirements and content needs, which saves time during the requirements gathering and UX reviews.

The audit teams would include one-two content owners and members of the Information Transparency Initiative Team. An audit firm, Autonomy Works, would do an initial pass over the content to add titles and other obvious data.

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### How much content?

Before reviewing the level of effort, it's important to provide some background on the content currently on ICANN.org.

The totals below are estimates.

#### **Total number of content pieces on ICANN.org = 104,000.**

- 48,000 GDD (Monthly Registry Reports)
- 18,700 GDD (Registry Agreements)
- 3,200 (images)
- 12,000 (translated content)
- 22,000 all other content

Monthly registry reports and registry agreements belong to GDD, and there are other methods we can deploy to tag, post and organize this content, without requiring an eyes-on audit by staff.

**The remaining content = 22,000** (subtract languages, registry reports and agreements and images) and this is the content we are currently concerned with.

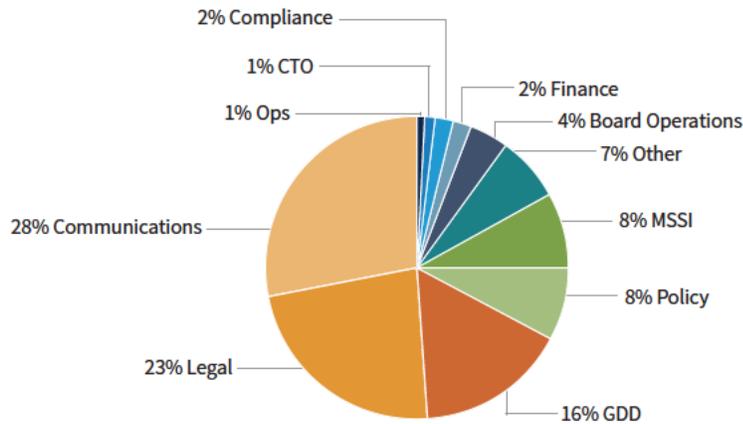
Note#1 In addition to owning their own content, the Legal and Office of the CTO Departments will need to review content that belongs to other departments to ensure it is technically and legally accurate, and to ensure we are preserving the content appropriately. Therefore, the level of effort for these departments is based on the amount of content we estimate they own on the site and the amount of content they may need to review. We'll have a more accurate measurement of the time needed when we have begun the audit. All content owners can be broken down into sub-owners; for example, GDD can be broken down into Registry Services, IANA Functions, WHOIS, etc. For simplicity purposes, we have maintained the overall owner. Also, we have grouped MSSl and Transition materials together.

Note#2 We have not included translated content as it can be linked to the original English, and the tagging process can be automated.

### How did we determine the current scope of the Information Transparency Initiative?

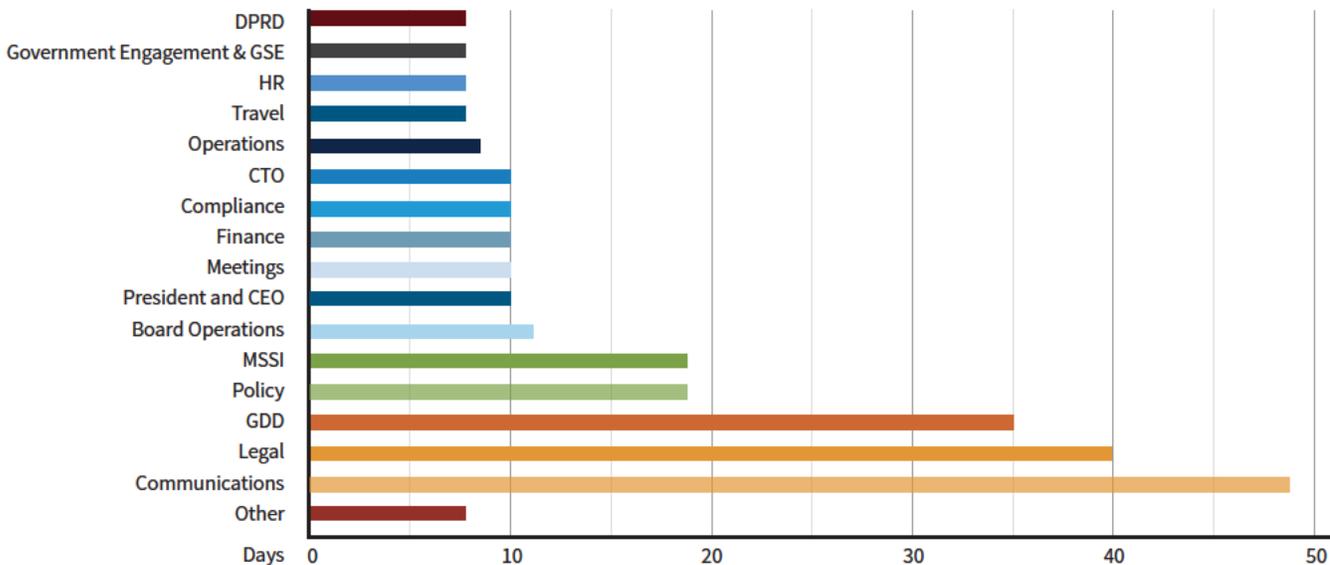
Our understanding of the problems and resources required to solve our content governance issues has increased. The initial research we performed with Formative uncovered problems which are greater than initially estimated, and basic solutions became unavailable to us. For example, current ICANN.org content contains little (if any) meta data. This means we were able to glean very little information from the automated content audit. Google Analytics was not set up properly which made historical site search data unavailable. We believe that the outlined scope and resources required are essential to meet the Information Transparency Initiative's goals and provide the foundational roadmap for the future ICANN document governance and ICANN ecosystem of SO/AC sites.

Percentage of ICANN.org content by owner  
(does not include monthly registry reports or agreements)



*Other* content represents DPRD, GSE, Government Engagement, Meetings, Ombudsman and other miscellaneous content owners who own less than 100 pieces of content.

Level of Effort Required by Staff (in work days)



What has the Information Transparency Initiative team accomplished thus far?

As part of our due diligence into determining the goals, timelines, resources and costs, we have undertaken a limited scope of exploratory work. We have kept these costs low, as we are cognizant that the project needs Board approval first. We are now at the turning point in the project, where we need support and approval to move forward.

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Below is a list of the tasks we have performed thus far, as part of the Information Transparency Initiative exploratory work:

1. Purchased dotCMS (CMS)
2. Purchased Alfresco (DMS)
3. Contracted content strategy firm, Formative
4. Identified technology partner for dotCMS, Architech
5. Delivered audience insights and metrics analysis report
6. Delivered current ICANN.org content and UX analysis research report
7. Interviewed staff at ICANN56 about their content
8. Delivered best in class website report
9. Performed automated content crawls
10. Delivered SEO recommendations report
11. Completed exploratory audit of 4.5k pieces of content
12. Delivered initial findings of exploratory audit
13. Estimated level of effort for staff
14. Delivered beginnings of taxonomy
15. Identified content tagging firm, Autonomy Works
16. Work begun on conflict terms, acronyms and glossary
17. Work begun on revised personas and user journeys report
18. Identified core and expanded Information Transparency Initiative teams
19. Completed RACI, Information Transparency Initiative governance and project plan

## Implementation Strategy

The focus of the implementation strategy is first on public content, chosen because of ICANN's increased obligation to accountability and transparency. The proposed plan iteratively organizes content in the document management system through comprehensive tagging, which informs a new information architecture, search and navigation scheme on our content management system. The result of this effort will ultimately be surfaced on ICANN.org. This implementation strategy remains under review to identify opportunities for delivering value to the community sooner. However, as this is a fundamental and long overdue document engineering project, it will require dedicated time and resources to execute successfully.

## Who are the Information Transparency Initiative's external vendors?

Architech is dotCMS's only Platinum (highest tier) partner in North America and has been serving clients for over 12 years. They are a company of over 120 engineers and consultants headquartered out of Toronto, Canada with a European office in Krakow, Poland. Architech has experience integrating and implementing highly complex CMS projects for clients that include RBC, Blue Cross Blue Shield, Roto Rooter and Equinix.

Formative is a strategic digital content firm that works with some of the world's leading organizations to plan, design, launch and manage platforms, programs and campaigns, and is comprised of content strategy, media, analytics, CRM, UX, creative, and development capabilities. A substantial part of Formative's work focuses on foundations, not-for-profit and advocacy organizations, whose primary purpose is to engage audiences, and build and serve member bases and communities. Their clients include: The Gates Foundation, Intel, Visual IQ and many others. Formative is based in Seattle, WA.

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## The Information Transparency Initiative's Plan – Nine Goals

To help explain our path forward, we have outlined each goal, its benefits, the necessary tactics needed to implement each goal and the owner from the Information Transparency Initiative team who is responsible for the goal.

**Goal #1** Focus on a content strategy and implementation of features that enable us to meet ICANN's accountability and transparency goals.

### BENEFITS

- All content work and features are focused on meeting one clear objective. If work and features do not contribute to our accountability and transparency goals, they are not priorities and should not be tackled in the scope of work.
- Our reputation post-Transition is dependent on meeting these two objectivities.

### HOW?

- Content strategy and feature implementation.

### WHAT?

- Content strategy, features and implementation are vetted through this lens.

### WHO?

- Steering Committee

**Goal #2** Increase content findability through the creation of a taxonomy and digital content strategy, and an improved information architecture and user experience.

### BENEFITS

- New and existing users will be able to find new and older content through improved, multifaceted search; increasing and deepening our engagement.
- Stakeholders are up-to-date on the latest ICANN news.
- Content becomes future proof, as meta data is now added to all content.
- Increases our ability to meet transparency and accountability commitments.
- Reinforces our reputation for quality and competence to the community and new audiences.
- Foundational work for the ICANN digital ecosystem.
- Improved user experience.

### HOW?

- Content strategy

### WHAT?

- Revise personas and user journeys.
- Perform eyes-on-audit of all content.
- Create taxonomy, information architecture and new URL structure.
- Develop new user experience design.
- Tag all content using taxonomy for site search and apply SEO for external search.
- Implement robust multifaceted search experience with search in all U.N. six languages.
- Online searchable glossary.

### WHO?

Contact Information Redacted

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**Goal #3** Provide a translated user experience

**BENEFITS**

- Increases our ability to engage with new and existing users in multiple languages.
- Expands the pool of new users.
- Meets our commitments to further globalize ICANN.

**HOW?**

- Translate first and second level content, expanding to other levels.
- Enable language support and user selectable language interface throughout the entire site.

**WHAT?**

- Working with the content prioritization contained in the content matrix, Language Services will translate content using the new DMS/dotCMS workflow.
- Enabled language support parallel to English content throughout the entire site.
- Export/import of English content suitable for LS Translation Workflow process.
- Full universal navigation/language bar consistently applied to each page throughout the entire site.

**WHO?**

Contact Information Redacted

**Goal #4** Improve the writing and develop audience-specific, multimedia content offerings.

**BENEFITS**

- Increases our ability to deepen our engagement with various audience types with multiple content types.
- Improves our ability to translate content.
- Content is easier to understand and is more welcoming, increasing our ability to attract newcomers.

**HOW?**

- Content strategy and matrix

**WHAT?**

- Content prioritization for creation and revision.
- Team of writers create and revise content.
- Designers create multimedia content to complement and enhance user experience.

**WHO?**

Contact Information  
Redacted

**Goal #5** Ensure that ICANN’s technical mission is reflected throughout our content.

**BENEFITS**

- Provides consistent messaging to new audiences and existing stakeholders.
- Focuses staff and community on our mission and goals.

**HOW?**

- Content matrix informs prioritization of content creation, revision, tagging and migration.

**WHAT?**

- Content revised to reflect and marble our technical mission throughout our content.

**WHO?**

- David Conrad

**Goal #6** Create and enforce staff content governance and increase publishing speed through distributed content management.

**BENEFITS**

- Decreases time it takes staff to post content to the site.
- Stakeholders have access to timely information more quickly.
- Content governance is established, meaning all content will be distributed to content owners.
- Simplified content authoring and publishing to dramatically reduce reliance upon IT.
- Workflows to support structured and simplified content approval and translation processes.

**HOW?**

- Content owners are responsible for creating and revising their content.

**WHAT?**

- Create and document governance on workflows, processes and content ownership.
- Staff training on new workflows and governance.
- Internal communication with staff on change management.
- Support from Executive Team and managers on new processes.

**WHO?**

Contact Information  
Redacted

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**Goal #7** Develop a mobile first experience and ensure accessibility standards are met.

**BENEFITS**

- Futureproofs the site to ensure we are delivering content to where audiences increasing are (on mobile).
- Ensures we are delivering to audiences with accessibility requirements.

**HOW?**

- Mobile first UX.
- Accessibility UX and features that meet W3C WCAG Level AA Guidelines.

**WHAT?**

- All pages developed with mobile first design, standard industry practice.
- All pages, features must pass accessibility checklist.

**WHO?**

Contact Information Redacted

**Goal #8** Improve engagement with new and existing stakeholders, and enable power users to select content preferences, registrations and perform work through a universal profile environment and automated content delivery system.

**BENEFITS**

- Robust and reliable content subscriptions.
- Timely information delivery for stakeholders based on their content and language preferences.
- Actionable data on content preferences, meeting registrations, policy work.
- Foundation for policy work environment for stakeholders.

**HOW?**

- Community members and new users create profiles, subscribe to content preferences, registrations for events, policy work.

**WHAT?**

- Automated content delivery platform integrated with Salesforce which becomes the central repository for all data concerning user preferences, community group members, language preferences, all meeting registrations (not limited to public meetings) and community work.

**WHO?**

Contact Information Redacted

**Goal #9** Create scalable platform to implement a future proof content strategy for the ICANN digital ecosystem.

**BENEFITS**

- Consolidates platforms for all ICANN web properties.
- Standardizes delivery mechanisms and processes.
- Enables content strategy, translations, technical content and governance goals.

**HOW?**

- Investment in key integrated platforms to ensure technologies are scalable for continued growth of ICANN.org and support future websites in the ecosystem.

**WHAT?**

- Document Management (Alfresco), system of record for all ICANN content.
- Content Management (dotCMS), presentation layer for all published content.
- Visualization platform (TBD), data rendering.
- Contact Management (Salesforce), community profile data repository.
- Marketing Automation (Marketo), content subscription automation.
- Enterprise Calendaring (TBA), meetings calendar management.
- Event Registration (TBA), public and all ICANN events.
- Glossary (TBD), searchable, centralized repository for ICANN terms, acronyms and definitions.
- Analytics (Google Analytics, TBD), web analytics tool set.
- Search (Google, Elastic Search, TBD), search based on taxonomy.
- Ticketing system integration (Samanage), language translation and content request tracking.
- Identity Management System (Okta), community single sign-on.
- Full language enablement required now and in future technology integrated.

**WHO?**

Contact Information  
Redacted

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## The Information Transparency Initiative: Estimated Future Spend

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## Board Accountability Mechanisms Committee Charter | As Approved by the Board of Directors on 23 September 2017

### I. Purpose

The Board Accountability Mechanisms Committee is responsible for:

- A. Considering and responding to Reconsideration Requests submitted to the Board pursuant to ICANN's Bylaws;
- B. Considering any recommendations arising out of the Independent Review Process prior to the recommendation being submitted by the Board;
- C. Considering Ombudsman's "own motion" investigations; and
- D. Provide input on specific matters at the request of the Board.

### II. Scope of Responsibilities

- A. Considering and responding to Reconsideration Requests submitted to the Board pursuant to ICANN's Bylaws.
  - 1. Article 4, Section 4.2 of ICANN's Bylaws sets forth procedures with respect to requests by the ICANN community for reconsideration of staff and Board action or inaction. The Committee is charged with reviewing and responding to such requests pursuant to the requirements of ICANN's Bylaws.
  - 2. The Committee shall annually report to the Board regarding its actions over that past year as set forth in Article 4, Section 4.2(u) of ICANN's Bylaws.
- B. Considering matters regarding the Independent Review Process prior to the matters being submitted to the Board for consideration;
  - 1. Article 4, Section 4.3 of ICANN's Bylaw sets forth procedures for a process for independent third party review of staff and Board action or inaction that allegedly violated the Articles of Incorporation or Bylaws.
  - 2. The Committee is charged with considering any recommendations arising out of the Independent Review Process prior to the recommendation being submitted by the Board, including recommendations regarding interim action or emergency relief if timing permits, and recommendations set forth in an Independent Review Process Panel's Final Declaration.

C. Considering the Ombudsman's proposals for "own motion" investigations.

1. Should the Ombudsman believe starting an investigation on his/her "own motion" would be appropriate, the Ombudsman will request authority to do so from the BAMC.
2. The BAMC shall determine, based on the information provided by the Ombudsman and any information it obtains on its own, whether such an "own motion" investigation is sanctioned and thus whether or not the Ombudsman is authorized to proceed with that investigation.

D. Provide input on specific matters at the request of the Board.

1. The BAMC shall consider and provide input on matters referred by the Board.

### III. Composition

The Committee shall be comprised of at least three but not more than seven voting Board members, as determined and appointed annually by the Board, each of whom shall comply with the Conflicts of Interest Policy (see <http://www.icann.org/en/committees/coi/coi-policy-04mar99.htm>.) The voting Directors on the Committee shall be the voting members of the Committee, and the majority of the Committee members must be voting Directors. The members of the Committee shall serve at the discretion of the Board.

Unless a Committee Chair is appointed by the full Board, the members of the Committee may designate its Chair from among the members of the Committee by majority vote of the full Committee membership.

The Committee may choose to organize itself into subcommittees to facilitate the accomplishment of its work. The Committee may seek approval and budget from the Board for the appointment of consultants and advisers to assist in its work as deemed necessary, and such appointees may attend the relevant parts of the Committee meetings.

### IV. Meetings

#### A. Regularly Scheduled Meetings

The Board Accountability Mechanisms Committee shall meet at least quarterly, or more frequently as it deems necessary to carry out its responsibilities. The Committee's meetings may be held by telephone and/or other remote meeting technologies. Meetings may be called upon no less than forty-eight (48) hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together, provided that regularly scheduled meetings generally shall be noticed at least one week in advance.

## B. Special/Extraordinary Meetings

Special/extraordinary meetings may be called upon no less than 48 hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together. The purpose of the meeting must be included with the call for the meeting.

## C. Action Without a Meeting

### i. Making a Motion:

The Committee may take an action without a meeting for an individual item by using electronic means such as email. An action without a meeting shall only be taken if a motion is proposed by a member of the Committee, and seconded by another voting member of the Committee. All voting members of the Committee must vote electronically and in favor of the motion for it to be considered approved. The members proposing and seconding the motion will be assumed to have voted in the affirmative. The action without a meeting and its results will be noted in the next regularly scheduled Committee meeting and will be included in the minutes of that meeting.

### ii. Timing:

- a. Any motion for an action without a meeting must be seconded by another Committee member within 48 hours of its proposal.
- b. The period of voting on any motion for an action without a meeting will be seven (7) days unless the Chair changes that time period. However, the period must be a minimum of two (2) days and a maximum of seven (7) days.

## V. Voting and Quorum

A majority of the voting members of the Committee shall constitute a quorum. Voting on Committee matters shall be on a one vote per member basis. When a quorum is present, the vote of a majority of the voting Committee members present shall constitute the action or decision of the Committee.

A report of the activities of the Committee shall be prepared and published semiannually.

## VI. Records of Proceedings

A preliminary report with respect to actions taken at each meeting (telephonic or in-person) of the Committee shall be recorded and distributed to committee members within two working days, and meeting minutes shall be posted promptly following approval by the Committee.

#### VII. Succession Plan

The Board Accountability Mechanisms Committee shall maintain a succession plan for the Committee which includes identifying the experience, competencies and personal characteristics required to meet the leadership needs of the Committee. The Committee shall annually review the succession plan to ensure that it meets the needs of the Committee.

#### VIII. Review

The Board Accountability Mechanisms Committee shall conduct a self-evaluation of its performance on an annual basis and share a report on such self-evaluation with the full Board and shall recommend to the full Board changes in membership, procedures, or responsibilities and authorities of the Committee if and when deemed appropriate. Performance of the Board Accountability Mechanisms Committee shall also be formally reviewed as part of the periodic independent review of the Board and its Committees.

# Proposed Amendments to Board Governance Committee Charter

## I. Purpose

The Board Governance Committee is responsible for:

- A. Assisting the Board to enhance its performance;
- B. Leading the Board in periodic review of its performance, including its relationship with ICANN's Chief Executive Officer;
- C. Creating and recommending to the full Board for approval a slate of nominees for Board Chair, Board Vice Chair, and chairmanship and membership of each Board Committee, including filling any vacancies which may occur in these positions during the year;
- D. Oversight of compliance with ICANN's Board of Directors' Code of Conduct;
- E. Administration of ICANN's Conflicts of Interest Policy;
- F. Recommending to the Board corporate governance guidelines applicable to ICANN as a global, private sector corporation serving in the public interest; and
- G. Recommending to the Board a nominee for the Chair of the Nominating Committee and a nominee for the Chair-Elect of the Nominating Committee.

## II. Scope of Responsibilities

- A. Assisting the Board to enhance its performance.
  - 1. The Committee will serve as a resource for Directors in developing their full and common understanding of their roles and responsibilities as Directors as well as the roles and responsibilities of ICANN. The Committee will provide guidance and assistance in orienting new Directors as the Board's membership evolves. It will help reinforce the Board's commitment to adhere to its Bylaws and Core Values.
  - 2. The Committee will encourage the development of effective tools, strategies, and styles for the Board's discussions.
  - 3. The Committee will work closely with the Chair and Vice-Chair of the Board and the Chief Executive Officer of ICANN.

- B. Leading the Board in its periodic review of its performance, including its relationship with the ICANN Chief Executive Officer.
  - 1. The Committee will develop a thoughtful process for the Board's self-analysis and evaluation of its own performance and undertake this process at least every two years.
  - 2. The Committee will develop a sound basis of common understanding of the appropriate relationship between the Board and the Chief Executive Officer under the Bylaws. From time to time it will review and advise on the effectiveness of that important relationship.
  - 3. The Committee will serve as a resource to Directors and the Chief Executive Officer by stimulating the examination and discussion of facts and analysis to complement anecdotal and other information acquired by individual directors from members of the community. In this way the Committee will assist the Board to distinguish among systemic problems, chronic problems, and isolated problems and will focus the Board's attention to both facts and perceptions.
- C. Creating and recommending to the full Board for approval a slate of nominees for Board Chair, Board Vice Chair, and chairmanship and membership of each Board Committee, including filling any vacancies which may occur in these positions during the year.
  - 1. In accordance with the Board Governance Committee Procedures for Board Nominations posted on the Committee webpage, the Committee will: (a) in advance of the Annual General Meeting (AGM) create for Board approval a new slate of nominees to serve on each committee for the upcoming year; (b) fill any vacancies that arise during the year; and (c) recommended to the Board committee appointments for Board members beginning their terms on a date other than at AGM.
  - 2. The Committee shall periodically review the charters of the Board Committees, including its own charter and work with the members of the Board Committees to develop recommendations to the Board for any charter adjustments deemed advisable.
  - 3. The Committee may serve as a resource for the Chief Executive Officer and Directors who are considering the establishment of new committees.
- D. Oversight of compliance with ICANN's Board of Directors' Code of Conduct.
  - 1. The Committee shall be responsible for oversight and enforcement with respect to the Board of Directors' Code of Conduct. In addition, at

least annually, the Committee will review the Code of Conduct and make any recommendations for changes to the Code to the Board.

2. The Committee shall provide an annual report to the full Board with respect to compliance with the Code of Conduct, including any breaches and corrective action taken by the Committee.
- E. Administration of ICANN's Conflicts of Interest Policy.
1. The Committee shall review the annual conflicts of interest forms required from each Directors and Liaisons and shall consider any and all conflicts of interest that may arise under the Conflicts of Interest Policy.
  2. The Committee shall periodically review the Conflicts of Interest Policy and consider whether any modifications should be made to the policy to improve its effectiveness.
- F. Recommending to the Board corporate governance guidelines applicable to the ICANN as a global, private sector corporation serving in the public interest
1. The Committee shall review the existing corporate governance guidelines developed by ICANN staff, be attentive to developments in corporate governance in the global context, and bring ideas and recommendations for adjustments in these guidelines to the Board for its consideration.
- G. Recommending to the Board a nominee for the Chair of the Nominating Committee and a nominee for the Chair-Elect of the Nominating Committee.
1. Annually the Committee shall identify, through informal and formal means, and recommend that the Board approve a nominee to serve as Chair of the Nominating Committee and a nominee to serve as the Chair-Elect of the Nominating Committee.

### III. Composition

The Committee shall be comprised of at least three but not more than seven Board members, as determined and appointed annually by the Board, each of whom shall comply with the Conflicts of Interest Policy (see <http://www.icann.org/en/committees/coi/coi-policy-04mar99.htm>.) The voting Directors on the Committee shall be the voting members of the Committee, and the majority of the Committee members must be voting Directors. The members of the Committee shall serve at the discretion of the Board.

Unless a Committee Chair is appointed by the full Board, the members of the Committee may designate its Chair from among the voting members of the Committee by majority vote of the full Committee membership.

The Committee may choose to organize itself into subcommittees to facilitate the accomplishment of its work. The Committee may seek approval and budget from the Board for the appointment of consultants and advisers to assist in its work as deemed necessary, and such appointees may attend the relevant parts of the Committee meetings.

#### IV. Meetings

##### A. Regularly Scheduled Meetings

The Board Governance Committee shall meet at least quarterly, or more frequently as it deems necessary to carry out its responsibilities. The Committee's meetings may be held by telephone and/or other remote meeting technologies. Meetings may be called upon no less than forty-eight (48) hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together, provided that regularly scheduled meetings generally shall be noticed at least one week in advance.

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##### C. Action Without a Meeting

###### i. Making a Motion:

The Committee may take an action without a meeting for an individual item by using electronic means such as email. An action without a meeting shall only be taken if a motion is proposed by a member of the Committee, and seconded by another voting member of the Committee. All voting members of the Committee must vote electronically and in favor of the motion for it to be considered approved. The members proposing and seconding the motion will be assumed to have voted in the affirmative. The action without a meeting and its results will be noted in the next regularly scheduled Committee meeting and will be included in the minutes of that meeting.

ii. Timing:

- a. Any motion for an action without a meeting must be seconded by another Committee member within 48 hours of its proposal.
- b. The period of voting on any motion for an action without a meeting will be seven (7) days unless the Chair changes that time period. However, the period must be a minimum of two (2) days and a maximum of seven (7) days.

V. Voting and Quorum

A majority of the voting members of the Committee shall constitute a quorum. Voting on Committee matters shall be on a one vote per member basis. When a quorum is present, the vote of a majority of the voting Committee members present shall constitute the action or decision of the Committee.

VI. Records of Proceedings

A preliminary report with respect to actions taken at each meeting (telephonic or in-person) of the Committee shall be recorded and distributed to committee members within two working days, and meeting minutes shall be posted promptly following approval by the Committee.

A report of the activities of the Committee shall be prepared and published semiannually.

VII. Succession Plan

The Board Governance Committee shall maintain a succession plan for the Committee, which should include identifying the experience, competencies and personal characteristics required to meet the leadership needs of the Committee. The Committee shall annually review the succession plan to ensure that it meets the needs of the Committee.

VIII. Review

The Board Governance Committee shall conduct a self-evaluation of its performance on an annual basis and share a report on such self-evaluation with the full Board and shall recommend to the full Board changes in membership, procedures, or responsibilities and authorities of the Committee if and when deemed appropriate. Performance of the Board Governance Committee shall also be formally reviewed as part of the periodic independent review of the Board and its Committees.

# Board Technical Committee Charter

As approved on 23 September 2017

## I. Purpose

The Technical Committee of the ICANN Board is responsible for supporting the ICANN Board with oversight of technical work necessary to meet ICANN's mission of ensuring the stable and secure operation of the Internet's unique identifier systems.

## II. Scope of Responsibilities

The following activities are set forth as a guide for fulfilling the Committee's responsibilities. The Committee is authorized to carry out these activities and other actions reasonably related to the Committee's Board-level strategic oversight of the following technical matters/ purposes, or as assigned by the Board from time to time:

- A. Ensure that ICANN organization has an appropriate technical roadmap, consistent with ICANN's strategy;
- B. Explore and make recommendations on technical issues that require Board intervention;
- C. Recommend resolutions to the Board along with sufficient background information and analysis to further the technical work of the ICANN organization;
- D. Provide input on specific items at the request of the Board or ICANN organization;
- E. Identify or evaluate opportunities to work with other standards or information organizations to facilitate the interoperability of the Internet's unique identifier systems;
- F. Facilitate the Board's gaining a deeper understanding of general technical issues impacting the security, stability and resiliency of the Internet's unique identifier systems;
- G. Coordinate the Board's review and response relating to advice from the Security and Stability Advisory Committee and the Root Server System Advisory Committee;
- H. Provide analysis to the Board on technical issues related to maintenance or harmonization that are raised by Board members,

Board committees, ICANN organization, the Technical Experts Group or other Advisory bodies;

- I. Ensure portfolio of technical programs and major projects as identified by the Board or ICANN organization (including community-driven initiatives) are in line with ICANN Strategy and the current updated technical roadmap by answering questions such as:
  - What major technical programs or initiatives should ICANN be doing or funding?
  - Does ICANN organization have the right number of technical programs/projects/teams (too many, too few)?
  - Are there major technical program/project/team initiatives that ICANN should be working on that it isn't?
  - Is the scope of each agreed major technical program and project initiative right?
  - Are there major technical programs/projects/products/teams that should be closed or discontinued?
- J. Lead and coordinate the Board's engagement with the Technical Experts Group; and
- K. Provide guidance on appropriate governance and standards development processes by answering questions such as:
  - What should be the process for approving a new major technical program or team?
  - What should be the process for (re-) prioritizing a major technical program/project/team?
- L. Periodically review IT tools made available to Board members for Board activities, and review recommendations for change based upon the evolution of both Board member needs and evolution of IT tools.

### **III. Composition**

The Committee shall be comprised of at least three Board members as determined and appointed annually by the Board, each of whom shall comply with the Conflicts of Interest Policy (see <http://www.icann.org/en/committees/coi/coi-policy-04mar99.htm>). The Committee will have no independent authority to take action and will make recommendations to the Board to consider and take action on, by

resolution of the Board. Accordingly, while the Committee may only include Board Directors and/or Liaisons, the Committee may be made up primarily of Liaisons and may be chaired by a Liaison. The members of the Committee shall serve at the discretion of the Board.

Where possible, Committee membership shall be made up of Board Directors and Liaisons that have specific knowledge and expertise on the matters within the Committee's scope, including, but not limited to: operational experience with the Internet's technical identifiers; membership in the SSAC or RSSAC; and/or those who have direct experience in defining, developing and/or leading the implementation of large-scale engineering projects.

Unless a Committee Chair is appointed by the full Board, the members of the Committee may designate its Chair from among the members of the Committee by majority of the full Committee membership.

The Committee may choose to organize itself into subcommittees to facilitate the accomplishment of its work. The Committee may seek approval and budget from the Board for the appointment of consultants and advisers to assist in its work as deemed necessary, and such appointees may attend the relevant parts of the Committee meetings.

#### **IV. Meetings**

##### **A. Regularly Scheduled Meetings.**

The Committee shall meet at least three times per year, or more frequently as it deems necessary to carry out its responsibilities. The schedule of these meetings will be established at the beginning of the calendar year. The Committee's meetings may be held by telephone and/or other remote meeting technologies. Regularly scheduled meetings shall be noticed at least one week in advance, unless impracticable, in which case the notice shall be as soon as practicable.

##### **B. Special/Extraordinary Meetings.**

Special/Extraordinary meetings may be called upon no less than forty-eight (48) hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together. The purpose of the meeting must be included with the call for the meeting.

##### **C. Action Without a Meeting**

i. Making a Motion:

The Committee may take an action without a meeting for an individual item by using electronic means such as email. An action without a meeting shall only be taken if a motion is proposed by a member of the Committee, and seconded by another voting member of the Committee. All voting members of the Committee must vote electronically and in favor of the motion for it to be considered approved. The members proposing and seconding the motion will be assumed to have voted in the affirmative. The action without a meeting and its results will be noted in the next regularly scheduled Committee meeting and will be included in the minutes of that meeting.

ii. Timing:

- a. Any motion for an action without a meeting must be seconded by another Committee member within 48 hours of its proposal.
- b. The period of voting on any motion for an action without a meeting will be seven days unless the Chair changes that time period. However, the period must be a minimum of two days and a maximum of seven days.

## **V. Voting and Quorum**

A majority of the voting members of the Committee shall constitute a quorum. Voting on Committee matters shall be on a one vote per voting member basis. When a quorum is present, the vote of a majority of the voting Committee members present shall constitute the action or decision of the Committee.

## **VI. Records of Proceedings**

A preliminary report with respect to actions taken at each meeting (telephonic or in-person) of the Committee shall be recorded and distributed to committee members within two working days, and meeting minutes shall be posted promptly following approval by the Committee.

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The performance of the Committee shall be reviewed annually and informally by the Board Governance Committee. The Board Governance Committee shall recommend to the full Board changes in membership, procedures, or responsibilities and authorities of the Committee if and when deemed appropriate. Performance of the Committee shall also be formally reviewed as part of the periodic independent review of the Board and its Committees.

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**REFERENCE MATERIALS – BOARD PAPER NO. 2017.09.23.1i**

**TITLE:** **Board Governance Committee Charter Revisions and the Inaugural Charters of the Board Accountability Mechanisms Committee and the Board Technical Committee**

**EXECUTIVE SUMMARY:**

The Board is being asked to consider the BGC’s recommendation to approve:

- (i) the inaugural charter of the Board Accountability Mechanisms Committee (BAMC);
- (ii) the revised Board Governance Committee (BGC) charter; and
- (iii) the inaugural charter of the Board Technical Committee.

**DOCUMENTS/RELEVANT LINKS**

The following attachments are relevant to the Board’s consideration of aforementioned matters.

Attachment A is the proposed inaugural charter of the BAMC.

Attachment B is the proposed revised charter of the BGC.

Attachment C is the proposed inaugural charter of the BTC.

Submitted By: Amy A. Stathos, Deputy General Counsel  
Date Noted: 29 August 2017  
Email: amy.stathos@icann.org

# DotMusic Reconsideration Request (“RR”)

## 1. Requester Information

Requester is represented by:

**Name:** Dechert LLP

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

Requester:

**Name:** DotMusic Limited (“DotMusic”)

**Address:** Contact Information Redacted

**Email:** Constantinos Roussos, Contact Information Redacted

**Counsel:** Arif Hyder Ali, Contact Information Redacted

## 2. Request for Reconsideration of:

**Board action/inaction**

**Staff action/inaction**

## 3. Description of specific action you are seeking to have reconsidered.

On September 17, 2016, the ICANN Board passed a Resolution requesting ICANN to conduct “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE

reports issued by the CPE provider.”<sup>1</sup> Further, on October 18, 2016, ICANN’s Board Governance Committee (“BGC”) requested it be provided “the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>2</sup> In so doing, the BGC became obligated to disclose these materials under its Bylaws, but has failed to do so.<sup>3</sup>

On January 30, 2017, DotMusic requested “an immediate update about the status of: (1) DotMusic’s Reconsideration Request 16-5 and the BGC’s best estimate of the time it requires to make a final recommendation on DotMusic’s Reconsideration Request; (2) the Independent Review; and (3) Request for Information from the CPE Provider.”<sup>4</sup> DotMusic received no response. On April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that DotMusic had not received any communication from the independent evaluator. ICANN had not provided any details as to how the evaluator was selected, what its remit was, what information had been provided, whether the evaluator will seek to consult with the affected parties, etc.<sup>5</sup>

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN BGC Chair Chris Disspain (“BGC Letter”) indicating that the Reconsideration Request 16-5 was “on hold” and *inter alia* that:

The BGC decided to request from the CPE provider the materials and research

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<sup>1</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a> (emphasis supplied).

<sup>2</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>3</sup> ICANN Bylaws Art. IV. § 2.13 “The Board Governance Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. ***Any information collected by ICANN from third parties shall be provided to the Requestor.***”

<sup>4</sup> Annex A, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, January 30, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>

<sup>5</sup> Annex B, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCCK).<sup>6</sup>

On May 5, 2017, Arif Ali, on behalf of DotMusic, submitted a DIDP Request 20170505-1 ("DIDP Request")<sup>7</sup> requesting, *inter alia*:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the

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<sup>6</sup> See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

<sup>7</sup> See Annex C, DIDP Request at <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

investigation; and

10. All materials provided to ICANN by the evaluator concerning the Review.

DotMusic concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”

On May 15, 2017, in a letter to DotMusic, Jeffrey LeVee, on behalf of ICANN, reiterated the statements of BGC Chairman Chris Disspain and stated that certain questions concerning the CPE Review “will be addressed as part of ICANN’s response to the DIDP in due course.”<sup>8</sup>

In response, on May 21, 2017, Arif Ali, on behalf of DotMusic, responded that DotMusic does “not consider ICANN’s delays justified” and that “[r]egrettably, ICANN continues to breach its transparency obligations, ignoring DotMusic’s information requests concerning the review process currently being conducted by an independent evaluator. Particularly, ICANN has ignored the basic safeguards that DotMusic has proposed, *inter alia*, that the identity of the evaluator be disclosed; that DotMusic be provided access to the materials being reviewed by the evaluator; and that DotMusic’s right to be heard during the evaluation process and comment on the evaluation results be given full effect.” Further, the letter stated that “[i]t is clear that the delays and secrecy are thus impairing ICANN’s Board from discharging their oversight responsibilities. Withholding materials concerning DotMusic’s CPE evaluation does not merely result in a denial of DotMusic’s right to be heard; it also hampers the efficiency of the investigation, by disabling us from being

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<sup>8</sup> Annex F, <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>

able to identify the flaws in the EIU's results. We urge ICANN to reconsider whether continuing a pattern of secrecy and neglect to the right of applicants to fair treatment serves either ICANN's or the global music community's best interests."<sup>9</sup>

On June 4, 2017, ICANN responded to the DIDP Request,<sup>10</sup> stating that:

As described in the Community Priority Evaluation Process Review Update, dated 2 June 2017, in November 2017 (*sic*), FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review... [T]he scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

Moreover, ICANN denied critical items requested. Specifically:

Items 1- 4 ... With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

Items 5-6 Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board (Item 6). As detailed in the Community Priority Evaluation Process Review Update, the review is being conducted in two parallel tracks. ***The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early***

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<sup>9</sup> Annex G, <https://www.icann.org/en/system/files/correspondence/ali-to-Levee-21may17-en.pdf>

<sup>10</sup> Annex D, ICANN DIDP Response, June 4, 2017, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>

**March 2017.** This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

[...]

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previously submitted by DotMusic Limited.

Item 8. Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

Item 10. Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors.
- ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

On June 10, 2017, Arif Ali, on behalf of DotMusic and dotgay, sent a joint letter to ICANN stating, *inter alia*, that:<sup>11</sup>

ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.” This is troubling for several reasons.

**First**, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

**Second**, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”

Accordingly, to ensure the integrity of FTI’s review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration

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<sup>11</sup> Annex H, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (10 June 2017).

- requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017, to date.

According to ICANN’s DIDP “*Defined Conditions of Nondisclosure:*”<sup>12</sup>

ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a **compelling** reason for confidentiality.

Information...may still be made public if ICANN determines, under the particular circumstances, that the **public interest** in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the **public interest** in disclosing the information.

ICANN’s default policy is to release all information requested unless there is a **compelling** reason not to do so. ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of **public interest** in terms of the DIDP Request.

ICANN signed an engagement letter with FTI to perform an ***independent*** review of the CPE Process based on the acceptance by ICANN’s Board of the systemic breaches of its Bylaws

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<sup>12</sup> See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en>

in the CPE Process identified by the *Despegar* and *Dot Registry* IRP Declarations.<sup>13</sup> It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI’s findings and conclusions. These materials critically include the items requested by DotMusic in its DIDP request that was denied by ICANN because ICANN “determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.” To prevent serious questions arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to DotMusic and the public to ensure full transparency, openness and fairness. This includes the items requested by DotMusic that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure and conflict check processes (Item 2), and the existence of the terms of appointment (Item 4) but also the underlying documents that substantiate ICANN’s claims.

ICANN’s assertion with regard to Item 5 that with the “exception of the correspondence between the ICANN organization and the CPE Provider regarding the evaluations, all materials provided to the evaluator are publicly available”<sup>14</sup> is undercut by ICANN’s admission of the existence of interviews conducted by FTI of ICANN staff, whose notes have not been disclosed in response to the DIDP request.<sup>15</sup>

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<sup>13</sup> See Dot Registry Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>. See also Despegar Declaration, <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

<sup>14</sup> See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en> at p.4

<sup>15</sup> See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en> at p.3 (“The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017.”).

Further, ICANN’s claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel of the close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.<sup>16</sup>

In fact, *this is a unique circumstance where the “public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”* In addition, ICANN has not disclosed any “compelling” reason for confidentiality for the requested items that were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including DotMusic’s Reconsideration Request 16-5. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency and credibility of the FTI investigation.

**4. Date of action/inaction:**

June 4, 2017

**5. On what date did you become aware of action or that action would not be taken?**

June 5, 2017

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<sup>16</sup> See Dot Registry Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> at paras.93-101.

**6. Describe how you believe you are materially affected by the action or inaction:**

ICANN's actions and inactions materially affect the delineated and organized music community defined in DotMusic's application that is supported by organizations with members representing over 95% of global music consumed (the "Music Community") and DotMusic. Not disclosing these documents has negatively impacted the timely, predictable and fair resolution of the .MUSIC string, while raising serious questions about the consistency, transparency and fairness of the CPE process. Without an effective policy to ensure openness, transparency and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency and openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

ICANN's action and inaction in denying the DIDP Request do not follow ICANN's Resolutions, its Bylaws or generally how ICANN claims to hold itself to high standards of accountability, transparency and openness. Such action and inaction raise additional questions as to the credibility, reliability and trustworthiness of the New gTLD Program's CPE process and its management by ICANN, especially in the case of the CPE Report and CPE process of DotMusic's application for the .MUSIC gTLD (Application ID: 1-1115-14110), which is subject to the CPE Reconsideration Request 16-5 ("CPE RR")<sup>17</sup> and is highly relevant to this Request.

A closed and opaque ICANN damages the credibility, accountability and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating

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<sup>17</sup> CPE RR 16-5, <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the DotMusic CPE RR. In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the Music Community that has supported the DotMusic community-based application for the .MUSIC string to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

The Reconsideration Request and Independent Review Process accountability mechanisms are the only recourse for applicants (or impacted requesters) in lieu of litigation. As such, ICANN must provide documents and Items in DIDP requests in which there is an appearance of gross negligence, conflicts of interest, multiple violations of established process, or even simply questions from the affected parties as to how a certain process was followed.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

See Answer to Question 6 above.

**8. Detail of Staff/Board Action/Inaction – Required Information**

See Answer to Question 6 above.

**9. What are you asking ICANN to do now?**

The Requester requests ICANN to disclose all the Items requested in the Request based on ICANN's Bylaws (including ICANN's guiding principles to ensure transparency, openness and accountability) to serve the global public interest.

Such disclosure will increase transparency and provide DotMusic and the BGC with additional information to assist in evaluating the CPE Report as well as the EIU's decision-making process in issuing the CPE Report. As outlined in Reconsideration Request 16-5 (and incorporated here by reference), ICANN engaged in numerous procedural and policy violations (including material omissions and oversights), which lead to inconsistencies and substantial flaws in its rationale methodology and scoring process.

The Requester requests that the BGC apply the Documentary Information Disclosure Policy to the DIDP Request in the manner it was intended to operate to “*ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.*” The Requester requests the BGC:

1. Review the ICANN Staff decision to withhold all the information requested, to ensure that each and every requested Item, documents and information request was considered and evaluated individually, and that the public interest test was applied to each individual item properly. The Requester requests that the Items and documents requested are disclosed;
2. To recognize and instruct Staff that ICANN's default policy is to release all information requested unless there is a compelling reason not to do so and, where such a compelling

reason for nondisclosure exists to inform the Requesters of the reason for nondisclosure pertaining to each individual item requested; and

3. Insofar as Items remain withheld, to inform the Requesters as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm. Withholding information under the principle of public interest needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN's Bylaws.

As indicated in the CPE Reconsideration Request 16-5, the promise of independence, nondiscrimination, transparency and accountability has been grossly violated in the .MUSIC CPE as the misguided and improper .MUSIC CPE Report shows. As such, the disclosure of the Items and documents requested will ensure that the BGC can perform due diligence and exercise independent judgement to make a well-informed decision pertaining to this DIDP RR (and subsequently the CPE Reconsideration Request 16-5).

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

DotMusic is a community applicant for .MUSIC, an application supported by organizations with members representing over 95% of music consumed. The justifications under which the Requester has standing and the right to assert this reconsideration request are:

- i. Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way.<sup>18</sup>
- ii. Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;
- iii. Conflict of interest issues;
- iv. Failure to consider evidence filed; and
- v. Violation of ICANN Articles of Incorporation/Bylaws:
  - a. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.<sup>19</sup>
  - b. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.<sup>20</sup>
  - c. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.<sup>21</sup>
  - d. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.<sup>22</sup>
  - e. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.<sup>23</sup>
  - f. Remaining accountable to the Internet community through mechanisms that

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<sup>18</sup> Final Issue Report on New gTLD Subsequent Procedures, <https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf>, at pp.23-24

<sup>19</sup> ICANN Bylaws, Art. I, § 2.6

<sup>20</sup> ICANN Bylaws, Art. I, § 2.1

<sup>21</sup> ICANN Bylaws, Art. I, § 2.7

<sup>22</sup> ICANN Bylaws, Art. I, § 2.8

<sup>23</sup> ICANN Bylaws, Art. I, § 2.9

enhance ICANN's effectiveness.<sup>24</sup>

- g. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.<sup>25</sup>
- h. Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>26</sup>
- i. Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>27</sup>

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? No**

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.**

**12. Do you have any documents you want to provide to ICANN? Yes.** See exhibits in Annexes.

#### **Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate,*

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<sup>24</sup> ICANN Bylaws, Art. I, § 2.10

<sup>25</sup> ICANN Bylaws, Art. I, § 2.11

<sup>26</sup> ICANN Bylaws, Art. II, § 3

<sup>27</sup> ICANN Bylaws, Art. III, § 1

*and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



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Arif Hyder Ali

June 18, 2017

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Date

# ANNEX A

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ARIF HYDER ALI



January 30, 2017

**VIA E-MAIL**

ICANN Board Governance Committee c/o Chris Disspain, ICANN BGC Chair 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094	Mr Göran Marby President and Chief Executive Officer ICANN 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094
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Dear President Marby and members of the BGC:

We are writing on behalf of our client, DotMusic Limited (“DotMusic”), to remind ICANN about the Board Governance Committee’s (the “BGC”) delay in making a final recommendation to the ICANN Board (the “Board”) regarding DotMusic’s Reconsideration Request 16-5 (“Reconsideration Request”). Over 11 months have passed since DotMusic submitted the Reconsideration Request to the BGC, however, the BGC has not made a final recommendation to the Board with respect to DotMusic’s Reconsideration Request. This is inconsistent with the BGC’s obligation under ICANN’s Bylaws to review a reconsideration request on a timely basis. Specifically,

- Under Section 4.2(q) of ICANN’s Bylaws (October 1, 2016): “The Board Governance Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within 30 days following its receipt of the Ombudsman’s evaluation (or **30 days** following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable), unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. In any event, the Board Governance Committee shall endeavor to produce its final recommendation to the Board within **90 days** of receipt of the Reconsideration Request.” (emphasis added); *see also* Section 4.2(q) of ICANN’s Bylaws (May 27, 2016) (same); and

- Under Article IV(2)(16) of ICANN’s Bylaws (February 11, 2016): “The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within *thirty days* following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final determination or recommendation.” (emphasis added); *see also* Article IV(2)(16), ICANN’s Bylaws (July 30, 2014) (same).

The BGC has been provided with substantial evidence for making a final recommendation on DotMusic’s Reconsideration Request: (1) DotMusic has submitted extensive materials to assist the BGC in assessing DotMusic’s Reconsideration Request, including multiple independent expert opinions prepared by renowned experts in the music industry, such as an independent joint expert opinion by Dr. Noah Askin and Dr. Joeri Mol and independent expert opinions by Honorary Professor Dr. Jorgen Blomqvist and Dr. Richard James Burgess; and (2) DotMusic made a lengthy telephonic presentation to the BGC on September 17, 2016, and gave the BGC ample opportunity to seek additional information or clarifications from DotMusic during the presentation.

Likewise, we understand that: (1) on September 17, 2016, the Board directed “the President and CEO, or his designee(s) to undertake an independent review of the process by which ICANN staff interacted with the CPE provider, both generally and specifically with respect to the CPE reports issued by the CPE provider” (“Independent Review”); and (2) on October 18, 2016, the BGC requested “from the CPE provider the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports” (“Request for Information from the CPE Provider”). DotMusic has not received *any* communication from ICANN regarding the status of the Independent Review or Request for Information from the CPE Provider. The BGC cannot (and should not) rely on these processes to delay DotMusic’s application.

Accordingly, we request an immediate update about the status of: (1) DotMusic’s Reconsideration Request 16-5 and the BGC’s best estimate of the time it requires to make a final recommendation on DotMusic’s Reconsideration Request; (2) the Independent Review; and (3) Request for Information from the CPE Provider.

We look forward to receiving a response from you.

DotMusic reserves all of its rights at law or in equity before any court, tribunal, or forum of competent jurisdiction.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arif Hyder Ali', with a long horizontal stroke extending to the right.

Arif Hyder Ali

# ANNEX B

ARIF HYDER ALI

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██████████  
██████████

28 April 2017

**VIA E-MAIL**

Mr. Göran Marby  
President and Chief Executive Officer  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

ICANN Board of Directors  
c/o Steve Crocker, Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Dot Music Reconsideration Request concerning .MUSIC**

Dear President Marby and Members of the Board:

We write on behalf of our client, DotMusic Limited (“DotMusic”), to inquire when the ICANN Board Governance Committee (the “BGC”) will issue its final decision on DotMusic’s Reconsideration Request 16-5 regarding the .MUSIC top-level domain (the “Reconsideration Request”).<sup>1</sup> We further write to protest ICANN’s lack of transparency in its treatment of DotMusic’s application and ICANN’s failure to provide any sort of response to DotMusic’s various inquiries about the status of its application.

DotMusic submitted its Reconsideration Request *more than one year ago* and *nearly seven months* have passed since DotMusic delivered a presentation to the BGC. As we noted in our most recent correspondence of 30 January 2017, we find ICANN’s protracted delays in reaching a decision on DotMusic’s Reconsideration Request and ICANN’s continued lack of responsiveness to DotMusic’s inquiries about the status of our request a clear

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<sup>1</sup> Reconsideration Request 16-5 (24 February 2016), <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

violation of ICANN's commitments to transparency enshrined in its governing documents.<sup>2</sup>

Further, it is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"<sup>3</sup> and that the BGC may have requested from the CPE provider "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports."<sup>4</sup>

DotMusic wrote three months ago to ICANN seeking the disclosure of the identity of the individual or organization conducting the independent review ("evaluator") and informing ICANN that it had not received any communication from the independent evaluator.<sup>5</sup> Both of these requests remain unaddressed.

ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Moreover ICANN Board Members have stated in public fora that the independent review "[ ] has been happening *for a little while. We don't have an actual date for completion yet.*"<sup>6</sup> While ICANN Board members have indicated that ICANN would post an update as to the status of the review following ICANN 58 in March 2017, no such

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<sup>2</sup> See letter from Arif Ali, to Göran Marby, ICANN President and CEO, and the ICANN Board of Directors (30 January 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>

<sup>3</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures (17 September 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>4</sup> Minutes of the Board Governance Committee (18 October 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>5</sup> Letter from Arif Ali to Göran Marby, ICANN President and CEO, and the ICANN Board of Directors (30 January 2017)

<sup>6</sup> ICANN Copenhagen Meeting 58, statement by Chris Dispain at p.91 [http://sched.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%20-en.pdf](http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf)

update has been provided. Further, ICANN's refusal to disclose the identity of the individual(s) carrying out the review raises the risk of conflicts of interest. Such a conflict would undermine ICANN's stated purpose of restoring trust and confidence to the CPE process, and call into question the validity of any resultant report to ICANN's Board. ICANN should therefore disclose the identity of the independent evaluator and its method of selection without further delay.

ICANN's refusal to disclose the scope of the review violates its Bylaw commitment to procedural fairness and transparency.<sup>7</sup> DotMusic has no assurance that the reviewer will take into account DotMusic's extensive submissions in any report prepared for ICANN's Board.

DotMusic's rights are thus being decided by a process about which it: (1) possesses minimal information; (2) carried out by an individual or organization whose identity ICANN is shielding; (3) whose mandate is secret; (4) whose methods are unknown; and (5) whose report may never be made public by ICANN's Board. The exclusion of directly affected parties from participation eerily reproduces the shortcomings of the EIU evaluations that are under scrutiny in the first place.

With this letter, we renew our request that ICANN extend DotMusic, and the global music community that has supported its community application, a response to its inquiries regarding the anticipated resolution of DotMusic's Reconsideration Request.

Further, we request disclosure of information about the nature of the independent review ICANN apparently has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

1. The identity of the individual or agency ("evaluator") undertaking the review.

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<sup>7</sup> ICANN Bylaw Art.I § 3 "*Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*" ICANN Bylaw Art.III § 3 "*ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.*"

2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment.
3. The date of appointment of the evaluator.
4. The terms of instructions provided to the evaluator.
5. The materials provided to the evaluator by the EIU.
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board.
7. The materials submitted by affected parties provided to the evaluator.
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.
9. The most recent estimates provided by the evaluator for the completion of the investigation.

ICANN must immediately ensure that the evaluator communicates with DotMusic as part of the evaluation process in order to afford DotMusic the fundamental due process right to be heard and treated fairly. We reserve the right to request further disclosure based on ICANN's prompt provision of the above information. We are unaware of any rule of law, administrative procedure or corporate governance that would justify ICANN's silence or withholding of information.

DotMusic reserves all of its rights at law or in equity before any court, tribunal, or forum of competent jurisdiction.

Sincerely,



Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)

# ANNEX C

ARIF HYDER ALI

Contact Information Redacted

5 May 2017

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning  
Community Priority Evaluation for .MUSIC Application ID 1-1115-14110<sup>1</sup>**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by DotMusic Limited ("DotMusic") in relation to ICANN's .MUSIC Community Priority Evaluation ("CPE"). The .MUSIC CPE Report<sup>2</sup> found that DotMusic's community-based Application should not prevail. DotMusic is investigating the numerous CPE process violations and the contravention of established procedures as set forth in DotMusic Reconsideration Request 16-5 ("RR").<sup>3</sup>

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless

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<sup>1</sup> DotMusic's .MUSIC community Application (ID 1-1115-14110), <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1392>; Also See [https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download application/1392?t:ac=1392](https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download%20application/1392?t:ac=1392)

<sup>2</sup> .MUSIC CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

<sup>3</sup> See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

there is a compelling reason for confidentiality.<sup>4</sup> In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*.<sup>5</sup> According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>6</sup> We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

#### **A. Context and Background**

DotMusic submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly seven months have passed since DotMusic delivered a presentation to the Board Governance Committee (the "BGC"). DotMusic has sent several correspondence to ICANN noting that ICANN's protracted delays in reaching a decision on DotMusic's RR and ICANN's continued lack of responsiveness to DotMusic's inquiries about the status of DotMusic's request represent a clear and blatant violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both

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<sup>4</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

<sup>5</sup> Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>6</sup> *Id.*

generally and specifically with respect to the CPE reports issued by the CPE provider”<sup>7</sup> and that the BGC may have requested from the CPE provider “the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>8</sup>

However, ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Thus, on April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.<sup>9</sup>

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:<sup>10</sup>

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded

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<sup>7</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

<sup>8</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>9</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

<sup>10</sup> Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

However, the BGC Letter does not transparently provide any meaningful information besides that there is a review underway and that the RR is on hold.

#### **B. Documentation Requested**

The documentation requested by DotMusic in this DIDP includes all of the “material currently being collected as part of the President and CEO’s review” that has been shared with ICANN and is “currently underway.”<sup>11</sup>

Further, DotMusic requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit’s handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;

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<sup>11</sup> Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

DotMusic reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

### **C. Conclusion**

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written in a cursive style.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

# ANNEX D

To: Arif Ali on behalf of DotMusic Limited

Date: 4 June 2017

Re: Request No. 20170505-1

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Thank you for your request for documentary information dated 5 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

### **Response**

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; see also, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and

Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (*See* Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (*See* <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the

ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of the week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

#### Items 1 – 4

Items 1 through 4 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 1), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 2), the date of appointment (Item 3), and the terms of instructions provided to the evaluator (Item 4). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN’s outside counsel, and all the parties that underwent CPE.

#### Items 5-6

Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board (Item 6). As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>

- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previously submitted by DotMusic Limited. Rather than repeating those here, see Response to DIDP Request No. 20160429-1, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic->

[response-supporting-docs-15may16-en.pdf](#). The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.

#### Item 7

Item 7 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application

#### Items 8

Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

#### Item 9

Item 9 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

#### Item 10

Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

## **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# ANNEX E



The Internet Corporation for Assigned Names and Numbers

26 April 2017

Re: Update on the Review of the New gTLD Community Priority Evaluation Process

Dear All Concerned:

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the Community Priority Evaluation (CPE) process. Recently, we discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board decided it would like to have some additional information related to how ICANN interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, we asked that the President and CEO, or his designee(s), undertake a review of the process by which ICANN has interacted with the CPE provider. ([Resolution 2016.09.17.01](#))

Further, during our 18 October 2016 meeting, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course.

The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests.



Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: [14-30](#) (.LLC), [14-32](#) (.INC), [14-33](#) (.LLP), [16-3](#) (.GAY), [16-5](#) (.MUSIC), [16-8](#) (.CPA), [16-11](#) (.HOTEL), and [16-12](#) (.MERCK).

For more information about CPE criteria, please see ICANN's [Applicant Guidebook](#), which serves as basis for how all applications in the New gTLD Program have been evaluated. For more information regarding Reconsideration Requests, please see ICANN's [Bylaws](#).

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Disspain". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Chris Disspain  
Chair, ICANN Board Governance Committee

# ANNEX F

# JONES DAY

555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071.2300

TELEPHONE: +1.213.489.3939 • FACSIMILE: +1.213.243.2539

DIRECT NUMBER: Contact n ormation Redacted  
Contact n ormation Redacted

May 15, 2017

## VIA E-MAIL

Arif H. Ali, Esq.  
Dechert LLP  
1900 K Street, NW  
Washington, DC 20006-1110

Re: DotMusic Limited

Dear Arif:

I write to provide you with a status update on Reconsideration Request 16-5 (Request 16-5) filed by DotMusic Limited (DotMusic) in response to the questions that you have raised to ICANN including in your correspondence to the ICANN Board, the Board Governance Committee (BGC), and/or the President and CEO of ICANN.<sup>1</sup>

Request 16-5 was filed on 24 February 2016, seeking reconsideration of the community priority evaluation (CPE) of DotMusic's application for the .music string. On 1 April 2016, DotMusic submitted a request for documentary information through ICANN's Documentary Information Disclosure Policy (DIDP) and requested that the BGC's consideration of Request 16-5 be continued pending ICANN's response to the DIDP request. On 15 May 2016, ICANN responded to DotMusic's DIDP request.<sup>2</sup> On 30 May 2016, DotMusic filed a separate reconsideration request (Request 16-7) regarding ICANN's response to DotMusic's DIDP Request.<sup>3</sup> On 26 June 2016, the BGC denied Request 16-7.<sup>4</sup> On 17 September 2016, DotMusic conducted a telephonic presentation to the BGC regarding Request 16-5. Between September

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<sup>1</sup> See letter from A. Ali to ICANN Board and Göran Marby, 30 Jan. 2017, *available at* <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf> and letter from A. Ali to BGC and Göran Marby, 28 Apr. 2017, *available at* <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>.

<sup>2</sup> See <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

<sup>3</sup> See <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-request-redacted-30may16-en.pdf>.

<sup>4</sup> See <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>.

Arif H. Ali, Esq.  
May 15, 2017  
Page 2

and December 2016, DotMusic submitted five supplemental materials in support of Request 16-5.<sup>5</sup>

The Board has recently discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board has directed the President and CEO to undertake a review of various aspects of the CPE process.<sup>6</sup> The details of this review are discussed in the 26 April 2017 letter from Chris Disspain, Chair of the BGC, to DotMusic, among others.<sup>7</sup> A copy of Mr. Disspain's letter has been published on the ICANN correspondence page<sup>8</sup> and on the Reconsideration page under Request 16-5.<sup>9</sup> As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-5 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its evaluation of Request 16-5, and will take into consideration all relevant materials.

Your letter of 30 January 2017 references the timing requirements for the Board's consideration of Reconsideration Requests prescribed by the Bylaws and posits that the Board's consideration of Request 16-5 has been delayed past the prescribed time. The Bylaws in effect at that time that Request 16-5 was filed provides that "[t]he Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website."<sup>10</sup> The circumstances that have delayed the Board's consideration of Request 16-5, which are described above, have been identified and posted on ICANN's website and on the

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<sup>5</sup> See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-19sep16-en.pdf>, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>, and <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf>.

<sup>6</sup> See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>7</sup> See letter from Chris Disspain to All Concerned, 26 Apr. 2017, *available at* <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>8</sup> See *id.*

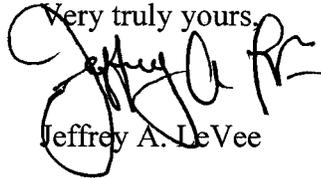
<sup>9</sup> See <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

<sup>10</sup> ICANN Bylaws, Art. IV, Section 2.17, effective 11 Feb. 2016, *available at* <https://www.icann.org/resources/pages/bylaws-2016-02-16-en#IV>.

Arif H. Ali, Esq.  
May 15, 2017  
Page 3

Reconsideration page under Request 16-5.<sup>11</sup> As stated in Mr. Disspain's 26 April letter, the Board will resume its consideration as soon as feasible once the CPE review is complete.<sup>12</sup>

With respect to the questions that you pose on pages 3-4 of your 28 April 2017 letter regarding the CPE review, we note that the same questions were submitted to ICANN's DIDP by DotMusic on 5 May 2017 and will be addressed as part of ICANN's response to the DIDP in due course.

Very truly yours,  
  
Jeffrey A. LeVee

cc: John O. Jeffrey  
General Counsel and Secretary  
ICANN

NAI-1502709505v1

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<sup>11</sup>See letter from Chris Disspain to All Concerned, 26 Apr. 2017, available at <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; and <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

<sup>12</sup>See letter from Chris Disspain to All Concerned, 26 Apr. 2017, available at <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.

# ANNEX G

**ARIF HYDER ALI**

Contact Information Redacted

21 May 2017

**VIA E-MAIL**

Jeffrey A. LeVee, Esq.  
Jones Day  
555 South Flower Street  
Los Angeles, CA 90071 2300

**Re: ICANN 15 May 2017 Letter Concerning DotMusic**

Dear Jeffrey A. LeVee:

I write on behalf of DotMusic Limited (DotMusic), in response to your 15 May 2017 letter. Your letter claims that the “circumstances that have delayed the Board’s consideration of Request 16-5 . . . have been identified and posted on ICANN’s website and on the Reconsideration page under Request 16-5.”<sup>1</sup> We do not consider ICANN’s delays justified.

In addition, while we appreciate your assurance that ICANN will consider the entirety of DotMusic’s submissions and reports, we note that your letter fails to provide any information that was not already public. Regrettably, ICANN continues to breach its transparency obligations, ignoring DotMusic’s information requests concerning the review process currently being conducted by an independent evaluator. Particularly, ICANN has ignored the basic safeguards that DotMusic has proposed, *inter alia*, that the identity of the evaluator be disclosed; that DotMusic be provided access to the materials being reviewed by the evaluator; and that DotMusic’s right to be heard during the evaluation process and comment on the evaluation results be given full effect.<sup>2</sup>

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<sup>1</sup> ICANN’s Letter to DotMusic of 15 May 2017, <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>, p.2.

<sup>2</sup> See DotMusic’s Letter to ICANN of 28 April 2017, for a full list of DotMusic’s proposed safeguards, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>, pp.4-5

Mr. Roussos of DotMusic also raised these questions at the recent Madrid GDD summit and learned that ICANN's leadership was unaware of the identity of the external evaluator except that it was a law firm.<sup>3</sup> Mr. Disspain also disclosed that the completion of the evaluation had been delayed beyond ICANN's estimates and ICANN does not have a scheduled date for completion. It is clear that the delays and secrecy are thus impairing ICANN's Board from discharging their oversight responsibilities. Withholding materials concerning DotMusic's CPE evaluation does not merely result in a denial of DotMusic's right to be heard; it also hampers the efficiency of the investigation, by disabling us from being able to identify the flaws in the EIU's results.

We urge ICANN to reconsider whether continuing a pattern of secrecy and neglect to the right of applicants to fair treatment serves either ICANN's or the global music community's best interests. ICANN should provide a full and prompt response to our letters of 30 January and 28 April 2017.

Sincerely,



Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)

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<sup>3</sup> ICANN Madrid GDD Summit, May 9, 2017 at <https://participate.icann.org/p4icilv7esy/?launcher=false&fcsContent=true&pbMode=normal>, between 46:50 and 53:10.

# ANNEX H

ARIF HYDER ALI

Contact Information Redacted

10 June 2017

**VIA E-MAIL**

Chris Disspain  
Chair, ICANN Board Governance  
Committee  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

Jeffrey A. LeVee, Esq.  
Jones Day  
555 South Flower Street  
Los Angeles, CA 90071 2300

**Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update**

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited (“DotMusic”) and dotgay LLC (“dotgay”), regarding ICANN’s 2 June 2017 Community Priority Evaluation Process Review Update (“CPE Process Review Update”).

Our review of ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.<sup>1</sup> As you are aware, after the ICANN Board announced in September 2016 that it is conducting “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider,”<sup>2</sup> we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization’s remit, the information it had been provided,

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<sup>1</sup> See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 (“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”); Art. I, Section 2 (8) (“Make decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

<sup>2</sup> Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

whether the evaluator will seek to consult with the affected parties, etc.<sup>3</sup> In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.<sup>4</sup> At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Waye. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic's formal complaint with the Ombudsman that, *inter alia*, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain's 28 April 2017 letter and Mr. LeVee's 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—*after* DotMusic and dotgay filed their requests for documentary information<sup>5</sup> and *two weeks* before the investigator's final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection."<sup>6</sup>

This is troubling for several reasons. *First*, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

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<sup>3</sup> See *e.g.*, Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

<sup>4</sup> ICANN Madrid GDD Summit, May 9, 2017.

<sup>5</sup> See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

<sup>6</sup> 2 June 2017 CPE Process Review Update.

Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. **Second**, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in *very deeply* and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process," and that (ii) "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a *full look* at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."<sup>7</sup>

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

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<sup>7</sup> ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. [http://schr.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%20-en.pdf](http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf), pp. 10 – 14.

We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written in a cursive style.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Wayne, ICANN Ombudsman (ombudsman@icann.org)

# Annex A

## DotMusic Limited

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### Key Documents

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	Description
1.	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
2.	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
3.	Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

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### Other Relevant Documents

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	Description
1.	Letter from Constantine Roussos to Christine Willet (12 July 2013)
2.	Letter from Christine Willet to Constantine Roussos (14 August 2013)
3.	Letter from Constantine Roussos to Christine Willet (8 October 2013)
4.	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	<b>Description</b>
<b>5.</b>	Reconsideration Request 14-8 (4 March 2014)
<b>6.</b>	Revised Reconsideration Request 14-8 (5 March 2014)
<b>7.</b>	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
<b>8.</b>	Reconsideration Request 14-28 (7 June 2014)
<b>9.</b>	Letter from Constantine Roussos to ICANN (13 June 2014)
<b>10.</b>	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
<b>11.</b>	Letter from Constantine Roussos to ICANN (1 July 2014)
<b>12.</b>	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
<b>13.</b>	Letter from Rich Bengloff to ICANN (7 March 2015)
<b>14.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
<b>15.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
<b>16.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
<b>17.</b>	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
<b>18.</b>	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	<b>Description</b>
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	<b>Description</b>
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	<b>Description</b>
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	<b>Description</b>
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	<b>Description</b>
77.	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
78.	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
79.	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
80.	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
81.	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
82.	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
83.	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
84.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
85.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
86.	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	<b>Description</b>
<b>87.</b>	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
<b>88.</b>	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
<b>89.</b>	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
<b>90.</b>	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

**Subject:** Re: [reconsider] Reconsideration Request 17-2  
**Date:** Monday, July 10, 2017 at 9:18:34 AM Pacific Daylight Time  
**From:** Herb Waye (sent by reconsider-bounces@icann.org <reconsider-bounces@icann.org>)  
**To:** Reconsideration  
**CC:** ombudsman

Reconsideration Request 17-2

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 17.2.

Best regards,

Herb Waye  
ICANN Ombudsman

[https://www.icann.org/ombudsman\[icann.org\]](https://www.icann.org/ombudsman[icann.org])  
[https://www.facebook.com/ICANNOmbudsman\[facebook.com\]](https://www.facebook.com/ICANNOmbudsman[facebook.com])  
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

[https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf\[icann.org\]](https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf[icann.org])

Community Anti-Harassment Policy

[https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en\[icann.org\]](https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en[icann.org])

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

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**From:** Reconsideration <Reconsideration@icann.org>  
**Date:** Sunday, July 9, 2017 at 4:03 AM  
**To:** Herb Waye <herb.waye@icann.org>  
**Cc:** Reconsideration <Reconsideration@icann.org>  
**Subject:** Reconsideration Request 17-2

Dear Herb,

ICANN recently received the attached reconsideration request (Request 17-2), which was submitted on 18 June 2017 by Dot Music Limited seeking reconsideration of ICANN's response to the Requestor's DIDP. The Requestor's DIDP sought the disclosure of documents relating to the Community Priority Evaluation Process Review. The Board Governance Committee (BGC) has determined that Request 17-2 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BGC to determine if the request is sufficiently stated. Specifically, [Section 4.2 \(l\) \[icann.org\]](#) states:

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Governance Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Governance Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Governance Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 17-2 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Request 17-2 for evaluation, please note that your substantive evaluation must be provided to the BGC within 15 days of receipt of Request 17-2.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 17-2  
23 AUGUST 2017**

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The Requestor, DotMusic Limited, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN organization violated its Core Values and policies established in the Bylaws concerning non-discriminatory treatment and transparency.<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. The Requestor was invited to, and did, participate in CPE, but did not prevail. On 24 February 2016, the Requestor sought reconsideration of the CPE determination (Request 16-5).<sup>3</sup>

On 17 September 2016, the ICANN Board directed the President and CEO, or his designees, to undertake the CPE Process Review to review the process by which ICANN organization interacted with the CPE provider. On 18 October 2016, the Board Governance Committee (BGC) decided that the CPE Process Review should include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation of

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<sup>1</sup> Request 17-2, § 3, at Pg. 5 (incorrectly marked page 4).

<sup>2</sup> Request 17-2, § 10, at Pg. 16 (marked 15).

<sup>3</sup> Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending Requests for Reconsideration concerning CPE.<sup>4</sup> The BGC also placed the eight pending reconsideration requests relating to CPE on hold, including Request 16-5, pending completion of the CPE Process Review.

On 5 May 2017, the Requestor submitted the DIDP Request. The Requestor sought ten categories of documents and information relating to the CPE Process Review, some of which the Requestor had already requested in a prior DIDP request. On 4 June 2017, ICANN organization responded to the DIDP Request (DIDP Response) and explained that, with the exception of certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all the remaining documents responsive to nine (Items No. 1-9) of the ten categories have already been published. The DIDP Response further explained that all the documents responsive to Item No. 10 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure. Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.

The Requestor thereafter filed the instant Reconsideration Request 17-2 (Request 17-2), which challenges certain portions of the DIDP Response. The Requestor claims that ICANN organization violated ICANN's Core Values and policies established in the DIDP and Bylaws

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<sup>4</sup> Prior to 22 July 2017, the Board Governance Committee was designated by the ICANN Board to review and consider Reconsideration Requests pursuant to Article 4, Section 4.2 of the Bylaws. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Pursuant to the amended Bylaws effective 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is designated to review and consider Reconsideration Requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

concerning non-discriminatory treatment and transparency by: (1) providing information rather than documents in response to Items No. 2 and 4; (2) determining not to produce certain documents responsive to Items No. 5, 6, and 8, and (3) determining not to produce any documents responsive to Item No. 10.<sup>5</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN organization transmitted Request 17-2 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>6</sup>

The BAMC has considered Request 17-2 and all relevant materials and recommends that the Board deny Request 17-2 because ICANN organization adhered to established policies and procedures in its response to the DIDP Request.

## **II. Facts.**

### **A. Background Facts.**

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. On 29 July 2015, the Requestor's Application was invited to participate in CPE.<sup>7</sup> The Requestor elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE provider, for evaluation.<sup>8</sup>

On 10 February 2016, the CPE panel issued a CPE Report, concluding that the Application earned 10 out of 16 possible points on the CPE criteria.<sup>9</sup> Because a minimum of 14

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<sup>5</sup> Request 17-2, § 10, at Pg. 16 (marked 15).

<sup>6</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Request 17-2, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-ombudsman-action-10jul17-en.pdf>.

<sup>7</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>8</sup> *See id.*

<sup>9</sup> *Id.*; *see also* CPE Report at 1, <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

points are required to prevail in CPE, the CPE Report concluded that the Application did not qualify for community priority.<sup>10</sup>

On 24 February 2016, the Requestor filed Request 16-5, seeking reconsideration of the CPE determination and approval of the Requestor's community application.<sup>11</sup>

On 29 April 2016, the Requestor submitted a DIDP request seeking documents relating to the CPE Report (2016 DIDP Request).<sup>12</sup> On 15 May 2016, ICANN organization responded to the 2016 DIDP Request.<sup>13</sup> ICANN organization provided links to all the responsive, publicly available documents, furnished an email not previously publicly available,<sup>14</sup> explained that it did not possess documents responsive to several of the requests, and explained that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.<sup>15</sup> The Requestor thereafter filed Request 16-7 challenging ICANN organization's response to the 2016 DIDP Request. On 26 June 2016, the BGC denied Request 16-7.<sup>16</sup>

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Specifically, the Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by the Requestor on 17 September 2016 during its presentation to the BGC regarding Request 16-5, as well as issues that were identified in the Final Declaration from the Independent Review

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<sup>10</sup> See CPE Report at 1.

<sup>11</sup> Request 16-5.

<sup>12</sup> See 2016 DIDP Request, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf>.

<sup>13</sup> 2016 DIDP Response, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

<sup>14</sup> 2016 DIDP Response at 3, 12, Attachment.

<sup>15</sup> *Id.*, Pgs. 1-7, 11-12.

<sup>16</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>. The Requestor has now filed three reconsideration requests: Request 16-5 (challenging the CPE determination), Request 16-7 (challenging the response to the 2016 DIDP Request), and the instant request, Request 17-2 (challenging the response to the Requestor's 2017 DIDP Request).

Process (IRP) proceeding initiated by Dot Registry, LLC.<sup>17</sup> As a result, on 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake the CPE Process Review, regarding the process by which ICANN organization interacted with the CPE provider.

On 18 October 2016, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in their evaluations of the community applications.<sup>18</sup> The BGC placed on hold the following reconsideration requests pending completion of the CPE Process Review: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>19</sup>

On 5 May 2017, the Requestor submitted the DIDP Request seeking the disclosure of the following categories of documentary information relating to the CPE Process Review:<sup>20</sup>

1. The identity of the individual or firm undertaking the CPE Process Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;

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<sup>17</sup> Dot Registry IRP Final Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>18</sup> 18 October 2016 Minutes of BGC Meeting, at Item 2, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>; 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>19</sup> 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>20</sup> DIDP Request at Pg. 4, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

6. The materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the CPE Process Review.<sup>21</sup>

On 2 June 2017, ICANN organization published a status update on the CPE Process Review (Status Update).<sup>22</sup> The Status Update noted, among other things, that FTI Consulting Inc.'s Global Risk and Investigations Practice and Technology Practice (FTI) is conducting the CPE Process Review.<sup>23</sup> The Status Update explained that the CPE Process Review is occurring on two parallel tracks – the first track focuses on gathering information and materials from ICANN organization, including interviews and document collection, and was completed in March 2017; and the second track focuses on gathering information and materials from the CPE provider, and is ongoing.<sup>24</sup>

On 4 June 2017, ICANN organization responded to the DIDP Request.<sup>25</sup> As discussed below, the DIDP Response explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to nine (Items No. 1-9) of the ten categories have already been published. The DIDP Response identified and provided hyperlinks to those publicly available responsive documents.<sup>26</sup> The DIDP Response

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<sup>21</sup> *Id.* at Pg. 4-5.

<sup>22</sup> Status Update, <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> DIDP Response, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>26</sup> *See generally id.*

further explained that all the documents responsive to Item No. 10 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure.<sup>27</sup> Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>28</sup>

On 18 June 2017, the Requestor filed Request 17-2, seeking reconsideration of ICANN organization's response to Items No. 2 and 4, and its determination not to produce certain documents responsive to Items No. 5, 6, 8, and 10 because they were subject to Nondisclosure Conditions. The Requestor asserts that withholding the materials "has negatively impacted the timely, predictable[,] and fair resolution of the .MUSIC string, while raising serious questions about the consistency, transparency[,] and fairness of the CPE process." The Requestor also argues that denial of the DIDP is inappropriate because it is one of only two recourses "for applicants . . . in lieu of litigation," and the other recourse, IRP, is "expensive and time-consuming."<sup>29</sup>

On 7 July 2017, the BGC concluded that Request 17-2 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.<sup>30</sup>

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<sup>27</sup> *Id.* at Pg. 5-6.

<sup>28</sup> DIDP Response at Pg. 6.

<sup>29</sup> Request 17-2, § 6, at Pg. 12 (marked 11).

<sup>30</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii). As noted in footnote 4, ICANN's Bylaws were amended while Request 17-2 was pending. The BGC was tasked with reviewing Request 17-2 to determine if it was sufficiently stated, and it did so on 7 July 2017. Since that time, the BAMC is responsible for reviewing reconsideration requests, including Request 17-2.

On 9 July 2017, ICANN organization transmitted Request 17-2 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. The Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN's Bylaws.<sup>31</sup> Accordingly, the BAMC reviews Request 17-2 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

### **B. Relief Requested**

The Requestor asks the BAMC to: (1) “[r]eview the ICANN Staff decision to withhold” information requested in the DIDP, “to ensure that each and every requested Item . . . was considered and evaluated individually, and that the public interest test was applied to each individual item properly”; (2) disclose the materials that ICANN staff withheld in response to the DIDP Request; (3) “instruct Staff that ICANN’s default policy is to release all information requested unless there is a compelling reason not to”; and (4) for any items that the Board decides to withhold, “inform the Requestor[] as to the specific formula used to justify the nondisclosure.”<sup>32</sup>

### **III. Issue.**

The issues are as follows:

1. Whether ICANN organization complied with established ICANN policies in responding to the DIDP Request.
2. Whether ICANN organization was required by the DIDP or established policies to provide the Requestor with “the specific formula used to justify the nondisclosure.”
3. Whether ICANN organization complied with its Core Values, Mission, and Commitments.<sup>33</sup>

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<sup>31</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-2, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-ombudsman-action-10jul17-en.pdf>.

<sup>32</sup> Request 17-2, § 9, at Pg. 13-14 (marked 12-13).

<sup>33</sup> Request 17-2, § 9, at Pg. 14 (marked 13).

The BAMC notes that the Requestor indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-2 seeks reconsideration of staff and Board action or inaction.<sup>34</sup> The only subsequent discussion of Board action is the Requestor’s passing reference to its view that, in requesting materials from CPE panels for use in its evaluation of pending reconsideration requests, “the BGC became obligated to disclose these materials under its Bylaws, but has failed to do so.”<sup>35</sup> The Requestor makes no further arguments concerning the BGC’s actions or inactions, and does not ask ICANN organization to take any action concerning this issue. Rather, the Requestor focuses on the “ICANN staff” response to the Requestor’s DIDP request.<sup>36</sup> Accordingly, the BAMC understands Request 17-2 to seek reconsideration of ICANN organization’s response to the Requestor’s DIDP Request, and *not* reconsideration of BGC action or inaction.<sup>37</sup>

#### **IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.**

##### **A. Reconsideration Requests**

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or

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<sup>34</sup> Request 17-2, § 2, at Pg. 1.

<sup>35</sup> Request 17-2, § 3, at Pg. 2 (marked 1).

<sup>36</sup> Request 17-2, § at Pg. 13 (marked 12).

<sup>37</sup> Further, we note that the BAMC has not completed its consideration of Request 16-5, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.<sup>38</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws that were in effect when Request 17-2 was filed, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>39</sup> That substantive provision did not change when ICANN's Bylaws were amended effective 22 July 2017, although the determination as to whether a reconsideration request is sufficiently stated now falls to the BAMC. Pursuant to the current Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>40</sup> Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>41</sup>

On 9 July 2017, the BGC determined that Request 17-2 is sufficiently stated and sent Request 17-2 to the Ombudsman for review and consideration.<sup>42</sup> The Ombudsman thereafter recused himself from this matter.<sup>43</sup> Accordingly, the BAMC has reviewed Request 17-2 and issues this Recommendation.

## **B. Documentary Information Disclosure Policy**

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and

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<sup>38</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

<sup>39</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l).

<sup>40</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>41</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>42</sup> Response from Ombudsman Regarding Request 17-2, Pg. 1-2.

<sup>43</sup> Response from Ombudsman Regarding Request 17-2, Pg. 1.

that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization’s approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization’s operational activities. In that regard, ICANN organization publishes many categories of documents on its website as a matter of due course.<sup>44</sup> In addition to ICANN organization’s practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN organization make public documentary information “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control,” that is not already publicly available.<sup>45</sup> The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization’s operational activities, and within ICANN organization’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.<sup>46</sup>

In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the “Process For Responding To ICANN’s Documentary Information

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<sup>44</sup> See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

Disclosure Policy (DIDP) Requests” (DIDP Response Process).<sup>47</sup> The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization’s website].”<sup>48</sup>

Pursuant to the DIDP, ICANN organization reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others:

- (i) Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors’ Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- (ii) Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;
- (iii) Confidential business information and/or internal policies and procedures; and
- (iv) Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>49</sup>

Notwithstanding the above, information that falls within any of the Nondisclosure Conditions *may* still be made public if ICANN organization determines, under the particular

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<sup>47</sup> See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>48</sup> *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>49</sup> DIDP.

circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>50</sup>

**V. Analysis and Rationale.**

**A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The DIDP Request.**

**1. The DIDP Response Complies With Applicable Policies And Procedures.**

The DIDP Response identified documentary information responsive to all 10 items. For Items No. 1 through 9, ICANN organization determined that most of the responsive documentary information had already been published on ICANN's website.<sup>51</sup> Although the DIDP does not require ICANN organization to respond to requests seeking information that is already publicly available,<sup>52</sup> ICANN organization identified and provided the hyperlinks to 21 publicly available categories of documents that contain information responsive to Items No. 1 through 9.<sup>53</sup>

The DIDP Response also explained that some of the documents responsive to Items No. 6 and 8, as well as all documents responsive to Item 10, were subject to certain identified Nondisclosure Conditions. The DIDP Response further explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>54</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *See generally* DIDP Response.

<sup>52</sup> DIDP <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>53</sup> DIDP Response at Pg. 3-4.

<sup>54</sup> DIDP Response at Pg. 6.

The Requestor claims that ICANN organization's responses to Items No. 2, 4, 5, 6, 8 and 10 violated established policies and procedures.<sup>55</sup> However, the Requestor provides nothing to demonstrate that ICANN organization violated any established policy or procedure.<sup>56</sup> As demonstrated below, ICANN organization's responses to Items No. 2, 4, 5, 6, 8 and 10 adhered to established policies and procedures.

The DIDP Response Process provides that “[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested . . . , interviews . . . the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request.”<sup>57</sup> Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions.<sup>58</sup> If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.<sup>59</sup>

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<sup>55</sup> The BAMC notes that the ten categories of documents and information relating to the CPE Review Process that the Requestor requested in its DIDP Request (i.e., Item Nos. 1-10) are identical to the requests set forth in a subsequent DIDP Request submitted by dotgay LLC (i.e., Item Nos. 4-13). While dotgay LLC, which is represented by the same counsel as the Requestor here (who also filed the DIDP requests on behalf of the Requestor and dotgay LLC), has sought reconsideration of portions of ICANN's response to its DIDP Request (Reconsideration Request 17-3), dotgay LLC has not sought reconsideration of ICANN's response to dotgay LLC's Items No. 5, 7, and 11, which are identical to Items No. 2, 4, and 8 here.

<sup>56</sup> Request 17-2, § 10, Pg. 15 (marked 14).

<sup>57</sup> DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

**a. ICANN organization’s response to Item No. 2 adhered to established policies and procedures.**

Item No. 2 requested information regarding “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment.”<sup>60</sup> In its response, and consistent with the DIDP Response Process, ICANN organization identified and provided the hyperlink to the Status Update, which described the selection process for the company conducting the CPE Process Review.<sup>61</sup> The response to Item No. 2 further explained that “[w]ith respect to the disclosures and conflict checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN’s outside counsel, and all the parties that underwent CPE.”<sup>62</sup>

The Requestor argues that ICANN organization was required to “disclose not only the existence of selection, disclosure, and conflict check processes . . . but also the underlying documents that substantiate ICANN’s claims.”<sup>63</sup> The Requestor’s claim is unsupported. The Requestor asked for information relating to “the selection process, disclosures, and conflicts checks undertaken in relation to the appointment of FTI.”<sup>64</sup> Notwithstanding that Item No. 2 requested information rather than documents, and as noted above, the DIDP Response identified and provided the hyperlink to the Status Update, which substantiated the narrative in the DIDP Response.<sup>65</sup> Even if Item No. 2 were to be interpreted as a request for documents, the DIDP Response adhered to the DIDP Response Process, because ICANN organization published and provided hyperlinks to all documents in its possession that are appropriate for disclosure.<sup>66</sup> The

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<sup>60</sup> DIDP Request at Pg. 4.

<sup>61</sup> DIDP Response at Pg. 3.

<sup>62</sup> DIDP Response at Pg. 3.

<sup>63</sup> Request 17-2 § 3, Pg. 9 (marked 8).

<sup>64</sup> See DIDP Request at Pg. 4.

<sup>65</sup> DIDP Response at Pg. 3.

<sup>66</sup> DIDP Response Process; DIDP Response at Pg. 3.

only other documents in ICANN’s possession relating to the selection process and conflicts check are communications with ICANN organization’s outside counsel. Those documents are not appropriate for disclosure because they comprise:

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>67</sup>

The Requestor does not claim that ICANN organization’s response to Item 2 is contrary to the DIDP Response Process, nor does the Requestor provide any evidence demonstrating how this response violates ICANN’s Mission, Commitments, or Core Values.<sup>68</sup> Reconsideration is not warranted on these grounds.

**b. ICANN organization’s response to Item No. 4 adhered to established policies and procedures.**

Item No. 4 requested the “terms of instructions provided to the evaluator.”<sup>69</sup> Like Item No. 2, this was a request for information. Nevertheless, ICANN organization identified and provided the hyperlink to the Status Update, which contained information regarding the scope of the Review. The Status Update states:

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

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<sup>67</sup> DIDP.

<sup>68</sup> The Requestor claims that ICANN organization asserted certain Nondisclosure Conditions in response to Items No. 1-4. *See* Request 17-2, § 3, Pg. 5 (marked 4). The Requestor is mistaken. ICANN did not determine that Nondisclosure Conditions prevented the disclosure of documents responsive to Items No. 1-4. *See* DIDP Response, at Pg. 3. Therefore, reconsideration is not warranted on those grounds. As noted in footnote 55 above, dotgay LLC has not sought reconsideration of ICANN’s response to dotgay LLC’s Item No. 5, which is identical to Item No. 2 here.

<sup>69</sup> DIDP Request at Pg. 5.

The review is being conducted in two parallel tracks . . . . The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. . . . The second track focuses on gathering information and materials from the CPE provider.<sup>70</sup>

The Requestor argues that the DIDP required ICANN organization to “disclose not only . . . the existence of the terms of appointment . . . but also the underlying documents that substantiate ICANN’s claims.”<sup>71</sup>

As with Item No. 2, and notwithstanding that the Requestor sought information rather than documents in this DIDP Request, the DIDP Response to Item No. 4 adhered to the DIDP Response Process, because it identified responsive documents and provided a hyperlink to the responsive document that was appropriate for disclosure.<sup>72</sup> ICANN organization possesses only one other document potentially responsive to Item No. 4: the letter engaging FTI to undertake the CPE Process Review. That document is not appropriate for disclosure because it comprises:

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>73</sup>

Accordingly, reconsideration is not warranted for the same reasons that reconsideration of the DIDP Response to Item No. 2 is not warranted.

**c. ICANN organization’s responses to Items No. 5, 6, and 8 adhered to established policies and procedures.**

Items No. 5 and 6 sought the disclosure of the “materials provided to the evaluator by [the CPE provider]” (Item No. 5) and “materials provided to the evaluator by ICANN staff/legal,

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<sup>70</sup> Status Update.

<sup>71</sup> Request 17-2 § 3, Pg. 9 (marked 8). Again, and as noted in footnote 55 above, dotgay LLC has not sought reconsideration of ICANN’s response to dotgay LLC’s Item No. 7, which is identical to Item No. 4 here.

<sup>72</sup> DIDP Response Process; DIDP Response at Pg. 3.

<sup>73</sup> DIDP.

outside counsel or ICANN’s Board or any subcommittee of the Board” (Item No. 6).<sup>74</sup> Item No. 8 sought the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator,” which overlaps with Items No. 5 and 6.<sup>75</sup>

With respect to Item No. 5, ICANN organization responded as follows:

The second track of the review focuses on gathering information and materials from the CPE provider. As noted Community Priority Evaluation Process Review Update of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.<sup>76</sup>

As noted in the Status Update, and referenced in the DIDP Response, the CPE provider had not provided the requested materials at the time ICANN organization responded to the DIDP Request.<sup>77</sup> Accordingly, ICANN organization did not possess any documents responsive to Item No. 5 to provide to the Requestor, even if disclosure under the DIDP was appropriate, which is not yet clear.<sup>78</sup>

In response to Item No. 6, the DIDP Response identified 16 categories of documents that ICANN organization provided to the evaluator. All but one of those categories had already been published. The DIDP Response provided the hyperlinks to the publicly available documents. The DIDP Response also disclosed that ICANN organization provided the evaluator with the correspondence between ICANN organization and the CPE provider regarding the evaluations; however, said correspondence were subject to certain Nondisclosure Conditions and were not appropriate for the same reasons identified in ICANN organization’s response to the 2016 DIDP

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<sup>74</sup> Request 17-2, § 3, at Pg. 9 (marked 8).

<sup>75</sup> DIDP Request at Pg. 5.

<sup>76</sup> DIDP Response at Pg. 4-5.

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

<sup>78</sup> *See* DIDP (DIDP applies to “documents . . . within ICANN’s possession, custody, or control”).

Request, which sought the same documentary information.<sup>79</sup> The BGC previously denied the Requestor’s Request 16-7, which challenged ICANN organization’s response to the 2016 DIDP Request.<sup>80</sup>

The Requestor argues that ICANN organization’s statement that it provided all materials responsive to Item No. 6<sup>81</sup> except the correspondence between ICANN organization and the CPE provider “is undercut by ICANN organization’s admission of the existence of interviews conducted by FTI of ICANN staff, whose notes have not been disclosed in response to the DIDP [R]equest.”<sup>82</sup> This complaint is misplaced. Item No. 6 sought materials provided to FTI.<sup>83</sup> The Requestor does not assert that interview notes—if any exist and are in ICANN organization’s possession—were provided to FTI.<sup>84</sup> Even if ICANN organization possessed copies of interview notes and provided those materials to FTI, the materials would fall under three Nondisclosure Conditions: (i) “[d]rafts of . . . documents . . . or any other forms of communication”; (ii) “[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents[ and] memoranda”; and (iii) “[i]nformation subject to the attorney-client, attorney work product privilege, or any other applicable privilege [ . . . ].”<sup>85</sup> The Requestor raises the same arguments for ICANN organization’s response to Item

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<sup>79</sup> DIDP Response at Pg. 3-4.

<sup>80</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>.

<sup>81</sup> The Requestor identified Item No. 5 in its argument on this issue, but it appears from the context that the Requestor intended to reference Item No. 6, materials provided to the evaluator by ICANN.

<sup>82</sup> Request 17-2, § 3, at Pg. 9 (marked 8).

<sup>83</sup> DIDP Request at Pg. 5.

<sup>84</sup> *See id.*

<sup>85</sup> DIDP.

No. 8 as raised with respect to Item No. 6, and the BAMC rejects those arguments as outlined above.

**d. ICANN organization’s response to Item No. 10 adhered to established policies and procedures.**

Item No. 10 requested “[a]ll materials provided to ICANN by the evaluator concerning the [CPE] Review.”<sup>86</sup> The DIDP Response stated:

[T]he review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure....

Consistent with the DIDP Response Process, ICANN organization searched for and identified documents responsive to Item No. 10—“requests for documents and information to ICANN and the CPE provider”—then reviewed those materials and determined that they were subject to certain Nondisclosure Conditions discussed below.<sup>87</sup> Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.<sup>88</sup>

**2. ICANN Organization Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.**

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.<sup>89</sup> Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the

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<sup>86</sup> DIDP Request at Pg. 5.

<sup>87</sup> DIDP Response Process.

<sup>88</sup> DIDP Response at Pg. 6.

<sup>89</sup> DIDP.

public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN organization must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.<sup>90</sup> In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the DIDP Response.

In response to Items No. 6 and 8, ICANN organization determined that the correspondence between ICANN organization and the CPE provider regarding the evaluations were not appropriate for disclosure because they comprised:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;
- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement;
- Confidential business information and/or internal policies and procedures; or
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.<sup>91</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> DIDP Response at Pg. 4-5, citing 2016 DIDP Response at Pg. 5, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

It is easy to see why these Nondisclosure Conditions apply to the materials responsive to Items No. 6 and 8. Those items request correspondence between ICANN organization and the CPE Provider.<sup>92</sup> The Requestor previously challenged ICANN organization's determination that the correspondence between ICANN and the CPE provider were not appropriate for disclosure for the same reasons in Request 16-7 without success.<sup>93</sup> The BAMC recommends that Request 17-2 be similarly denied. Equally important, the DIDP specifically carves out documents containing proprietary information and confidential information as exempt from disclosure pursuant to the Nondisclosure Conditions because the potential harm of disclosing that private information outweighs any potential benefit of disclosure.

Item No. 10 seeks materials that FTI provided to ICANN organization concerning the CPE Process Review. In response to Item No. 10, ICANN organization noted that it was in possession of the requests for documents and information prepared by the evaluator to ICANN organization and the CPE provider, but that these documents were not appropriate for disclosure because they comprised:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;

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<sup>92</sup> DIDP Request at Pg. 5.

<sup>93</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation;
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.<sup>94</sup>

These materials certainly comprise information that may “compromise the integrity of” ICANN organization’s and FTI’s “deliberative and decision-making process” with respect to the CPE Process Review.

The Requestor argues that the determinations as to the applicability of the specified Nondisclosure Conditions warrant reconsideration because “ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of public interest in terms of the DIDP Request.”<sup>95</sup> The Requestor’s arguments fail because ICANN organization *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.<sup>96</sup> There is no policy or procedure requiring that ICANN organization provide *additional* justification for nondisclosure.

The Requestor asks the Board to “inform the Request[or] as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm.”<sup>97</sup> Neither the DIDP nor the DIDP Response Process require ICANN organization to use or provide a “formula” for determining whether materials that are subject to Nondisclosure Conditions may nonetheless be disclosed.<sup>98</sup>

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<sup>94</sup> DIDP Response at Pg. 5-6; *see also* ICANN Defined Conditions for Nondisclosure. <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>95</sup> Request 17-2, § 3, at Pg. 8 (marked 7).

<sup>96</sup> DIDP Response at Pg. 4-6; 2016 DIDP Response at Pg. 4-7.

<sup>97</sup> Request 17-2, § 9, Pg. 14 (marked 13) (emphasis in original).

<sup>98</sup> *See* DIDP; DIDP Response Process.

The Requestor also asserts that nondisclosure “needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN’s Bylaws.”<sup>99</sup> However, the DIDP provides the procedural fairness that the Requestor seeks. Here, ICANN organization applied the DIDP, determined that certain of the requested materials were subject to Nondisclosure Conditions, considered whether the materials should nonetheless be made public, determined that the public interest in disclosing the information did not outweigh the harm of disclosure, and explained that determination to the Requestor.<sup>100</sup> Therefore, reconsideration is not warranted on this ground.

**3. ICANN Organization Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public’s Interest In Disclosing The Information.**

The DIDP states that documents subject to the Nondisclosure Conditions “may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”<sup>101</sup> In accordance with the DIDP Response Process, ICANN organization conducted a review of the responsive documents that fell within the Nondisclosure Conditions and determined that the potential harm outweighed the public interest in the disclosure of those documents.<sup>102</sup>

The Requestor previously acknowledged that under the DIDP Response Process, it is “within ICANN’s sole discretion to determine whether or not the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the

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<sup>99</sup> Request 17-2, § 9, Pg. 14 (marked 13).

<sup>100</sup> *See generally* DIDP Response.

<sup>101</sup> *See id.*

<sup>102</sup> DIDP Response at Pg. 6; 2016 DIDP Response at Pg. 2.

harm that may be caused by such disclosure.”<sup>103</sup> Nevertheless, the Requestor claims reconsideration is warranted because the Dot Registry IRP Final Declaration gave rise to a “unique circumstance where the ‘pubic interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.’”<sup>104</sup> However, the Dot Registry IRP Final Declaration is not an established ICANN policy or procedure, and the Board’s acceptance of aspects of the Final Declaration does not make it so. Moreover, the Dot Registry IRP Final Declaration did not establish that the public interest in disclosure outweighs the potential harm for each and every document in ICANN organization’s possession related to the CPE Process Review.<sup>105</sup> Accordingly, the argument does not support reconsideration.

**B. The Reconsideration Process is Not A Mechanism for “Instructing” ICANN Staff on General Policies Where No Violation of ICANN Policies or Procedure Has Been Found.**

The Requestor asks the Board to “recognize and instruct Staff that ICANN’s default policy is to release all information requested unless there is a compelling reason not to do so.”<sup>106</sup> The Requestor is correct insofar as, under the DIDP Response Process, documents “concerning ICANN’s operational activities, and within ICANN organization’s possession, custody, or control, [are] made available to the public unless there is a compelling reason for confidentiality.”<sup>107</sup> However, the reconsideration request process is not an avenue for “instruct[ing]” ICANN staff concerning ICANN’s policies in general, where no violation of ICANN policies or procedures has been found. Because the BAMC concludes that ICANN

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<sup>103</sup> Request 16-7, § 3, Pg. 4.

<sup>104</sup> Request 17-2 § 3, Pg. 10 (marked 9).

<sup>105</sup> See ICANN Board Resolution 2016.08.09.11, <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.g>.

<sup>106</sup> Request 17-2, § 9, Pg. 13-14 (marked 12-13).

<sup>107</sup> DIDP.

organization adhered to established ICANN policies in responding to the DIDP Request, the BAMC does not recommend that the Board “instruct” ICANN staff as the Requestor asks.

Further, to the extent the Requestor is challenging the DIDP Response Process or the DIDP itself, the time to do so has passed.<sup>108</sup>

**C. The Requestor’s Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration of the DIDP Response.**

The Requestor cites a litany of ICANN’s Commitments and Core Values, which the Requestor believes ICANN organization violated in the DIDP Response:<sup>109</sup>

- Introducing and promoting competition in the registration of domain names where practical and beneficial to the public interest.<sup>110</sup>
- Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.<sup>111</sup>
- Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.<sup>112</sup>
- Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.<sup>113</sup>
- Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.<sup>114</sup>

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<sup>108</sup> ICANN Bylaws, 1 October 2016, Art. 4 Section 4.2(g)(i).

<sup>109</sup> Request 17-2, § 10, at Pg. 15-16 (marked 14-15). The Requestor cites the version of the Bylaws effective from 11 February 2016 until 30 September 2016. The version of the Bylaws effective on 18 June 2017, when the Requestor submitted Request 17-2, govern this Request. The substance of the Bylaws cited are not different from the current version of the Bylaws, except where otherwise noted.

<sup>110</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(iv) (emphasis in original).

<sup>111</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(i) (emphasis in original).

<sup>112</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(iv) (emphasis in original).

<sup>113</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(v) (emphasis in original).

<sup>114</sup> ICANN Bylaws, 11 February 2016, Art. I, Section 2.9 (emphasis in original). The current version of the Bylaws does not include the same language. The Bylaws now state: “Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN’s other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community.” ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(v).

- Remaining accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.<sup>115</sup>
- While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.<sup>116</sup>
- Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>117</sup>
- Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>118</sup>

However, the Requestor provides no explanation for how these Commitments and Core Values relate to the DIDP Response at issue in Request 17-2 or how ICANN organization has violated these Commitments and Core Values.<sup>119</sup> Many of them, such as ICANN’s Core Value of accounting for the public policy advice of governments and public authorities, have no clear relation to the DIDP Response. The Requestor has not established grounds for reconsideration through its list of Commitments and Core Values.

The Requestor states in passing that it has “standing and the right to assert this reconsideration request” as a result of “[f]ailure to consider evidence filed,” but does not identify any evidence that it believes ICANN organization failed to consider in responding to the DIDP Request.<sup>120</sup> The Requestor similarly references “[c]onflict of interest issues,” “Breach of Fundamental Fairness,” and the need for “[p]redictability in the introduction of gTLDs” without explaining how those principles provide grounds for reconsideration here.

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<sup>115</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(vi) (emphasis in original).

<sup>116</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(vi) (emphasis in original).

<sup>117</sup> ICANN Bylaws, 1 October 2016, Art. 2 Section 2.3 (emphasis in original).

<sup>118</sup> ICANN Bylaws, 1 October 2016, Art. 3 Section 3.1 (emphasis in original).

<sup>119</sup> *See generally* Request 17-2, § 10, Pg. 13-14.

<sup>120</sup> Request 17-2, § 10, Pg. 13-14.

## **VI. Recommendation**

The BAMC has considered the merits of Request 17-2, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-2.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. Request 17-2 was submitted on 19 June 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 18 July 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-2 is 23 August 2017, which is within the requisite 90 days of receiving Request 17-2.<sup>121</sup>

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<sup>121</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

ARIF HYDER ALI

Contact Information Redacted

5 May 2017

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning  
Community Priority Evaluation for .MUSIC Application ID 1-1115-14110<sup>1</sup>**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by DotMusic Limited ("DotMusic") in relation to ICANN's .MUSIC Community Priority Evaluation ("CPE"). The .MUSIC CPE Report<sup>2</sup> found that DotMusic's community-based Application should not prevail. DotMusic is investigating the numerous CPE process violations and the contravention of established procedures as set forth in DotMusic Reconsideration Request 16-5 ("RR").<sup>3</sup>

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless

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<sup>1</sup> DotMusic's .MUSIC community Application (ID 1-1115-14110), <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1392>; Also See [https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download application/1392?t:ac=1392](https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download%20application/1392?t:ac=1392)

<sup>2</sup> .MUSIC CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

<sup>3</sup> See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

there is a compelling reason for confidentiality.<sup>4</sup> In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*.<sup>5</sup> According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>6</sup> We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

#### **A. Context and Background**

DotMusic submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly seven months have passed since DotMusic delivered a presentation to the Board Governance Committee (the "BGC"). DotMusic has sent several correspondence to ICANN noting that ICANN's protracted delays in reaching a decision on DotMusic's RR and ICANN's continued lack of responsiveness to DotMusic's inquiries about the status of DotMusic's request represent a clear and blatant violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both

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<sup>4</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

<sup>5</sup> Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>6</sup> *Id.*

generally and specifically with respect to the CPE reports issued by the CPE provider”<sup>7</sup> and that the BGC may have requested from the CPE provider “the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>8</sup>

However, ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Thus, on April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.<sup>9</sup>

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:<sup>10</sup>

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded

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<sup>7</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

<sup>8</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>9</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

<sup>10</sup> Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

However, the BGC Letter does not transparently provide any meaningful information besides that there is a review underway and that the RR is on hold.

#### **B. Documentation Requested**

The documentation requested by DotMusic in this DIDP includes all of the “material currently being collected as part of the President and CEO’s review” that has been shared with ICANN and is “currently underway.”<sup>11</sup>

Further, DotMusic requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit’s handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;

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<sup>11</sup> Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

DotMusic reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

### **C. Conclusion**

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', with a long horizontal line extending to the right.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

To: Arif Ali on behalf of DotMusic Limited

Date: 4 June 2017

Re: Request No. 20170505-1

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Thank you for your request for documentary information dated 5 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

### **Response**

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and

Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (*See* Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (*See* <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the

ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of the week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

#### Items 1 – 4

Items 1 through 4 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 1), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 2), the date of appointment (Item 3), and the terms of instructions provided to the evaluator (Item 4). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN’s outside counsel, and all the parties that underwent CPE.

#### Items 5-6

Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board (Item 6). As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>

- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previously submitted by DotMusic Limited. Rather than repeating those here, see Response to DIDP Request No. 20160429-1, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic->

[response-supporting-docs-15may16-en.pdf](#). The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.

#### Item 7

Item 7 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application

#### Items 8

Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

#### Item 9

Item 9 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

#### Item 10

Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

## Rebuttal to the BAMC’s Recommendation on Reconsideration Request 17-2

DotMusic<sup>1</sup> submits this Rebuttal to the Board Accountability Mechanisms Committee’s (“BAMC”) Recommendation on Reconsideration Request 17-2 (the “Recommendation”).<sup>2</sup> The Recommendation concerns DotMusic’s request that ICANN reconsider its refusal to disclose the documents requested in DotMusic’s DIDP Request.<sup>3</sup> The denied document requests all involve the disclosure of pre-existing documents and, despite the Recommendation’s claims, are not “unfettered information requests” or requests “to create or compile summaries of any documented information.”<sup>4</sup> Specifically, DotMusic asked ICANN to disclose, *inter alia*, the following documents, which have not been disclosed:

- Request 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- Request 4. The terms of instructions provided to the evaluator;
- Request 5. The materials provided to the evaluator by the EIU;
- Request 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
- Request 7. The materials submitted by affected parties provided to the evaluator;
- Request 8. Any further information, instructions, or suggestions provided by ICANN and/or its staff or counsel to the evaluator; and

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<sup>1</sup> This rebuttal adopts the same exhibits and terms as in DotMusic’s Reconsideration Request 17-2. *See* Annex I, DotMusic Reconsideration Request 17-2 (June 18, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> *See* Annex C, DotMusic DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

<sup>4</sup> *See* Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 11 <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

Request 10. All materials provided to ICANN by the evaluator concerning the Review.<sup>5</sup>

As explained in Request 17-2,<sup>6</sup> ICANN refused to disclose these documents to DotMusic. This DIDP Response is clearly improper because (1) ICANN’s assertion that the responsive documents fall under the Defined Conditions of Nondisclosure are conclusory and unsupported by any evidence, (2) the public interest outweighs any Nondisclosure Condition, and (3) ICANN’s decision violates its Commitments and Core Values. The BAMC’s Recommendation now attempts to further justify ICANN’s improper decision.

Moreover, the Recommendation improperly implies that several Commitments and Core Values are not implicated in the DIDP Response, that DotMusic made unsupported references to these policies, and that these policies do not support reconsideration of the DIDP Response.<sup>7</sup> These claims are unfounded. To provide further clarity for both the BAMC and the ICANN Board regarding the significance of both ICANN’s Commitments and Core Values, DotMusic will now further clarify its position in this Rebuttal to the Recommendation.

#### **1. The DIDP Response Must Adhere to ICANN’s Commitments and Core Values**

ICANN must comply with its Commitments and Core Values, even when issuing a DIDP response, or it will violate its own Bylaws. ICANN is required to “act in a manner consistent with [its] Bylaws”<sup>8</sup> and “in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values”<sup>9</sup> in performing its mission “to ensure the stable and secure

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<sup>5</sup> Annex I, DotMusic Reconsideration Request 17-2 (June 18, 2017), p. 4, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

<sup>6</sup> *See generally id.*

<sup>7</sup> Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), pp. 26-7 <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

<sup>8</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>9</sup> *Id.* at Art. 1, §1.2.

operation of the Internet’s unique identifier systems.”<sup>10</sup> There is no exception carved out for the DIDP<sup>11</sup> and neither ICANN nor the BAMC has contested that the DIDP process is not governed by these Commitments and Core Values, simply that they do not relate to the DIDP Response for DotMusic’s DIDP Request.<sup>12</sup> In fact, the BAMC even explained in the Recommendation that the DIDP is the direct result of ICANN’s Commitment to transparency:

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization’s approach to transparency and information disclosure is the commitment to make publically available a comprehensive set of materials covering ICANN organization’s operational activities.<sup>13</sup>

ICANN’s refusal to disclose the requested documents is in direct contravention of this stated Commitment to transparency, as well as ICANN’s other Commitments and Core Values.

## **2. ICANN Must Disclose the Requested Documents in Accordance with Its Commitments to Transparency and Openness**

ICANN’s DIDP is “[a] principal element of ICANN’s approach to transparency and information disclosure.”<sup>14</sup> This principle of transparency “is one of the essential principles in ICANN’s creation documents, and its name reverberate[s] through its Articles and Bylaws.”<sup>15</sup> ICANN’s Articles of Incorporation commit it to “operate in a manner consistent with [its] Articles and Bylaws for the benefit of the Internet community as a whole . . . through open and transparent

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<sup>10</sup> *Id.* at Art. 1, § 1.1(a).

<sup>11</sup> *See id.*; *see also* ICANN Articles of Incorporation.

<sup>12</sup> Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), pp. 26-7 <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

<sup>13</sup> *Id.* at pp. 10-11.

<sup>14</sup> ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>15</sup> *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 101, <https://www.icann.org/en/system/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

processes.”<sup>16</sup> ICANN’s Bylaws reaffirm the same Commitment, explicitly stating that “ICANN must operate in a manner consistent with [its] Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes.”<sup>17</sup> And, in addition to dedicating an entire Article on transparency,<sup>18</sup> the Bylaws further reaffirm that the processes for policy development, such as the use and evaluation of a CPE provider, must be “accountable and transparent.”<sup>19</sup>

However, ICANN did not adhere to its Commitment to openness and transparency when it denied DotMusic’s requests for further documents about the ongoing review of the CPE process. The CPE has affected several gTLD applicants through its inconsistent application of the CPE criteria,<sup>20</sup> drawing criticism from legal experts<sup>21</sup> and even the Council of Europe.<sup>22</sup> According to the BAMC, “the [ICANN] Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by” DotMusic and identified in the *Dot Registry v. ICANN* proceeding; this discussion resulted in ICANN’s decision to initiate an independent review of the CPE process.<sup>23</sup>

Yet, the actual content and scope of the review has been mired in secrecy, leaving applicants in the dark regarding ICANN’s planned processes for addressing their concerns. This lack of transparency is evident through DotMusic’s community application process for the

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<sup>16</sup> ICANN Articles of Incorporation, § 2.III.

<sup>17</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>18</sup> See *id.* at Art. 3 (“TRANSPARENCY”). Article 3 concerns ICANN’s Commitment to “operate to the maximum extent feasible in an open and transparent manner.” *Id.* at Art. 3, § 3.1.

<sup>19</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>20</sup> See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>21</sup> See Annex A, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board (Jan. 30, 2017), p. 2), <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>.

<sup>22</sup> See Council of Europe Report, *Application to ICANN for Community-Based New Generic Top Level Domains (gTLDs), Opportunities and challenges from a human rights perspective*: <https://rm.coe.int/16806b5a14>.

<sup>23</sup> Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 4 <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

.MUSIC gTLD. In February 2016, DotMusic discovered that it did not prevail as the community applicant for the .MUSIC gTLD. In response, and with the support of numerous community applications, DotMusic filed Reconsideration Request 16-5.<sup>24</sup> DotMusic subsequently waited for *over a year* for the BGC to respond to the Reconsideration Request with a Recommendation. And, when ICANN did finally provide DotMusic with a response to Reconsideration Request 16-5, it provided no closure; rather, in April 2017, DotMusic learned that its application was “on hold” as the BGC reviewed the CPE process.<sup>25</sup> Despite requests, no other substantive information about the independent review was disclosed to DotMusic for another *two months*, when ICANN released name of the independent evaluator conducting the review.<sup>26</sup>

ICANN, despite its Commitments to transparency and openness, still has not disclosed relevant information held in documents in its possession about the independent review. For instance, DotMusic and the other applicants do not know (1) critical information regarding the independent review process that would be available through documents in ICANN’s possession, such as the selection process for the independent evaluator; (2) the terms and scope of FTI’s work for ICANN; and (3) the documents relied on by the EIU during the CPE that are currently under review by FTI. The DIDP remains the only mechanism for applicants to obtain this information from ICANN by obtaining the relevant documents. In rejecting the DIDP Request, ICANN has closed-off this possibility in clear contradiction of its own stated Commitments and Core Values.

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<sup>24</sup> CPE RR 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>25</sup> See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>26</sup> Annex D, ICANN DIDP Response (June 4, 2017), p. 2, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>

The BAMC Recommendation suggests that DotMusic has not sufficiently identified Board conduct implicated in the denial of its DIDP request.<sup>27</sup> In fact, ICANN's Board and the BGC remain in ultimate control of any review process initiated by ICANN staff and make the decisions as to the information and documents that are to be released in response to justified requests for documents from affected applicants such as DotMusic. Accordingly, contrary to the BAMC's understanding, DotMusic does in fact ask for the reconsideration of BGC's actions in denying its requests for information and its inaction in refusing to disclose or direct the disclosure of the requested categories of information.

### **3. ICANN Must Disclose the Requested Documents Because of its Commitment to Fairness, Which Shows that the Public Interest Outweighs Nondisclosure**

The independent review is significant not only to DotMusic but also to other gTLD applicants. Its results may change how ICANN evaluates community applications for the foreseeable future, and many gTLD applicants currently have pending reconsideration requests concerning the CPE process.<sup>28</sup> This evaluation process has clearly disproportionately treated community gTLD applicants by inconsistently and unfairly applying criteria between applicants. And, yet, ICANN summarily accepted the CPE determinations, and is only now reconsidering the CPE process through a secretive review process in violation of the principle of transparency.

ICANN's refusal to disclose relevant documents through its DIDP also violates the principle of fairness. ICANN specifically stated that:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent

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<sup>27</sup> Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 9, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

<sup>28</sup> See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) (identifying seven other gTLD strings with pending reconsideration requests), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).<sup>29</sup>

It further committed itself to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”<sup>30</sup>

ICANN’s DIDP Response is in clear violation of this Commitment. There is an undeniable problem with the consistency and fairness of the CPE process, evident by ICANN’s own investigation of the CPE process and by the CPE Provider’s lack of cooperation with the investigation. Clearly, the CPE Provider may be seeking to intentionally obscure the defects in its review, perhaps aided and abetted by ICANN staff.<sup>31</sup> This problem not only affects all of the community gTLD applicants but also the entire Internet community, which will benefit from certain community gTLDs, such as .MUSIC.

Despite the clear public interest in maintaining a fair CPE process, ICANN continues to unfairly exclude community applicants and the Internet community from the independent review process, even though the applicants will be and are affected by the improperly administered CPE, have continuously raised this issue before ICANN, and have contributed to the dialogue regarding

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<sup>29</sup> ICANN Bylaws, Art. 3, § 3.1.

<sup>30</sup> *Id.* at Art. 1, § 1.2(a)(v).

<sup>31</sup> *See* Exhibit K, Minutes of BGC Meeting (Aug. 1, 2017), <https://www.icann.org/resources/board-material/minutes-bgc-2017-08-01-en>. “This is in large part because, despite repeated requests from ICANN beginning in March 2017, the CPE provider failed to produce a single document until just very recently – four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced.” *Id.*

the problem. Instead of welcoming their contributions to the review of an important gTLD process, ICANN has instead restricted their access to information regarding the independent review in blatantly unfair decisions that keep affected applicants uninformed and endangers the integrity of the independent review itself.

ICANN’s failure to provide the requested documents raises questions as to its credibility, reliability, and trustworthiness. It implies that details about the independent review and CPE must be kept hidden because of improper behavior by the reviewer or the CPE panel. While trying to allay such concerns and defend its reluctance to disclose documents, ICANN has argued that the requested documents are covered by its Nondisclosure Conditions. However, while ICANN claims that they analyzed whether “each Item” was covered by a Nondisclosure Condition, neither ICANN nor the BAMC identify or apply the specific Nondisclosure Condition for each category of document included within DotMusic’s request, much less to individual documents that have been requested.<sup>32</sup> Instead, both have simply made conclusory statements that the requested categories of documents are covered by certain Nondisclosure Conditions based on this analysis, expecting DotMusic to understand how these conditions apply to unknown documents.<sup>33</sup>

ICANN’s actions are therefore in contravention of its commitments to transparency, openness, and its dedication to neutrality, objectiveness, integrity, and fairness. In all fairness, given the import of the review to the public, ICANN should disclose the documents to the public; it is clear that the public interest outweighs any nondisclosure policies.

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<sup>32</sup> Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 21  
<https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

<sup>33</sup> *Id.* at pp. 16-20.

#### **4. ICANN Must Disclose the Requested Documents to Remain Accountable to the Internet Community and Maintain its Effectiveness**

ICANN's refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community for a clearly flawed evaluation process in violation of its Commitments and Core Values. ICANN has committed itself to "[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN's effectiveness."<sup>34</sup> ICANN is also committed to two Core Values: (1) "[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;"<sup>35</sup> and (2) "[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community."<sup>36</sup>

The DIDP Response and the Recommendation support a decision that contradicts these Commitments and Core Values. ICANN has kept secret details regarding the review process, prohibiting informed participation in the independent review by the Internet Community and avoiding all possibility of accountability for its actions during the review. In addition to violating its Bylaws, ICANN's attempts to avoid accountability will prevent it from operating in a fully effective manner as it prevents a large community from offering advice and solutions for resolving the problems with the CPE process, and forces community applicants to continually seek information from ICANN that should have already been disclosed to the public.

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<sup>34</sup> ICANN Bylaws, Art. 1, § 1.2(a)(vi).

<sup>35</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>36</sup> *Id.* at Art. 1, § 1.2(b)(v).

## 5. Conclusion

Therefore, it is clear that ICANN has failed to uphold its Commitments and Core Values in denying the DIDP Request. The BAMC has only further perpetuated this violation by recommending that the Board deny Request 17-2. In addition to the reasons stated in the Request 17-2,<sup>37</sup> then, the Board should grant Request 17-2 and produce the requested documents regarding the CPE independent review.



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Arif Hyder Ali

September 12, 2017

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Date

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<sup>37</sup> Annex I, DotMusic Reconsideration Request 17-2 (June 18, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

# **Annex I**

# DotMusic Reconsideration Request (“RR”)

## 1. Requester Information

Requester is represented by:

**Name:** Dechert LLP

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

Requester:

**Name:** DotMusic Limited (“DotMusic”)

**Address:** Contact Information Redacted

**Email:** Constantinos Roussos, Contact Information Redacted

**Counsel:** Arif Hyder Ali, Contact Information Redacted

## 2. Request for Reconsideration of:

**Board action/inaction**

**Staff action/inaction**

## 3. Description of specific action you are seeking to have reconsidered.

On September 17, 2016, the ICANN Board passed a Resolution requesting ICANN to conduct “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE

reports issued by the CPE provider.”<sup>1</sup> Further, on October 18, 2016, ICANN’s Board Governance Committee (“BGC”) requested it be provided “the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>2</sup> In so doing, the BGC became obligated to disclose these materials under its Bylaws, but has failed to do so.<sup>3</sup>

On January 30, 2017, DotMusic requested “an immediate update about the status of: (1) DotMusic’s Reconsideration Request 16-5 and the BGC’s best estimate of the time it requires to make a final recommendation on DotMusic’s Reconsideration Request; (2) the Independent Review; and (3) Request for Information from the CPE Provider.”<sup>4</sup> DotMusic received no response. On April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that DotMusic had not received any communication from the independent evaluator. ICANN had not provided any details as to how the evaluator was selected, what its remit was, what information had been provided, whether the evaluator will seek to consult with the affected parties, etc.<sup>5</sup>

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN BGC Chair Chris Disspain (“BGC Letter”) indicating that the Reconsideration Request 16-5 was “on hold” and *inter alia* that:

The BGC decided to request from the CPE provider the materials and research

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<sup>1</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a> (emphasis supplied).

<sup>2</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>3</sup> ICANN Bylaws Art. IV. § 2.13 “The Board Governance Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. ***Any information collected by ICANN from third parties shall be provided to the Requestor.***”

<sup>4</sup> Annex A, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, January 30, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>

<sup>5</sup> Annex B, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCCK).<sup>6</sup>

On May 5, 2017, Arif Ali, on behalf of DotMusic, submitted a DIDP Request 20170505-1 ("DIDP Request")<sup>7</sup> requesting, *inter alia*:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the

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<sup>6</sup> See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

<sup>7</sup> See Annex C, DIDP Request at <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

investigation; and

10. All materials provided to ICANN by the evaluator concerning the Review.

DotMusic concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”

On May 15, 2017, in a letter to DotMusic, Jeffrey LeVee, on behalf of ICANN, reiterated the statements of BGC Chairman Chris Disspain and stated that certain questions concerning the CPE Review “will be addressed as part of ICANN’s response to the DIDP in due course.”<sup>8</sup>

In response, on May 21, 2017, Arif Ali, on behalf of DotMusic, responded that DotMusic does “not consider ICANN’s delays justified” and that “[r]egrettably, ICANN continues to breach its transparency obligations, ignoring DotMusic’s information requests concerning the review process currently being conducted by an independent evaluator. Particularly, ICANN has ignored the basic safeguards that DotMusic has proposed, *inter alia*, that the identity of the evaluator be disclosed; that DotMusic be provided access to the materials being reviewed by the evaluator; and that DotMusic’s right to be heard during the evaluation process and comment on the evaluation results be given full effect.” Further, the letter stated that “[i]t is clear that the delays and secrecy are thus impairing ICANN’s Board from discharging their oversight responsibilities. Withholding materials concerning DotMusic’s CPE evaluation does not merely result in a denial of DotMusic’s right to be heard; it also hampers the efficiency of the investigation, by disabling us from being

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<sup>8</sup> Annex F, <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>

able to identify the flaws in the EIU's results. We urge ICANN to reconsider whether continuing a pattern of secrecy and neglect to the right of applicants to fair treatment serves either ICANN's or the global music community's best interests."<sup>9</sup>

On June 4, 2017, ICANN responded to the DIDP Request,<sup>10</sup> stating that:

As described in the Community Priority Evaluation Process Review Update, dated 2 June 2017, in November 2017 (*sic*), FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review... [T]he scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

Moreover, ICANN denied critical items requested. Specifically:

Items 1- 4 ... With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

Items 5-6 Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board (Item 6). As detailed in the Community Priority Evaluation Process Review Update, the review is being conducted in two parallel tracks. ***The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early***

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<sup>9</sup> Annex G, <https://www.icann.org/en/system/files/correspondence/ali-to-Levee-21may17-en.pdf>

<sup>10</sup> Annex D, ICANN DIDP Response, June 4, 2017, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>

**March 2017.** This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

[...]

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previously submitted by DotMusic Limited.

Item 8. Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

Item 10. Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors.
- ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

On June 10, 2017, Arif Ali, on behalf of DotMusic and dotgay, sent a joint letter to ICANN stating, *inter alia*, that:<sup>11</sup>

ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.” This is troubling for several reasons.

**First**, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

**Second**, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”

Accordingly, to ensure the integrity of FTI’s review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration

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<sup>11</sup> Annex H, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (10 June 2017).

- requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017, to date.

According to ICANN’s DIDP “*Defined Conditions of Nondisclosure:*”<sup>12</sup>

ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a **compelling** reason for confidentiality.

Information...may still be made public if ICANN determines, under the particular circumstances, that the **public interest** in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the **public interest** in disclosing the information.

ICANN’s default policy is to release all information requested unless there is a **compelling** reason not to do so. ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of **public interest** in terms of the DIDP Request.

ICANN signed an engagement letter with FTI to perform an ***independent*** review of the CPE Process based on the acceptance by ICANN’s Board of the systemic breaches of its Bylaws

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<sup>12</sup> See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en>

in the CPE Process identified by the *Despegar* and *Dot Registry* IRP Declarations.<sup>13</sup> It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI’s findings and conclusions. These materials critically include the items requested by DotMusic in its DIDP request that was denied by ICANN because ICANN “determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.” To prevent serious questions arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to DotMusic and the public to ensure full transparency, openness and fairness. This includes the items requested by DotMusic that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure and conflict check processes (Item 2), and the existence of the terms of appointment (Item 4) but also the underlying documents that substantiate ICANN’s claims.

ICANN’s assertion with regard to Item 5 that with the “exception of the correspondence between the ICANN organization and the CPE Provider regarding the evaluations, all materials provided to the evaluator are publicly available”<sup>14</sup> is undercut by ICANN’s admission of the existence of interviews conducted by FTI of ICANN staff, whose notes have not been disclosed in response to the DIDP request.<sup>15</sup>

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<sup>13</sup> See Dot Registry Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>. See also Despegar Declaration, <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

<sup>14</sup> See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en> at p.4

<sup>15</sup> See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en> at p.3 (“The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017.”).

Further, ICANN’s claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel of the close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.<sup>16</sup>

In fact, *this is a unique circumstance where the “public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”* In addition, ICANN has not disclosed any “compelling” reason for confidentiality for the requested items that were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including DotMusic’s Reconsideration Request 16-5. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency and credibility of the FTI investigation.

**4. Date of action/inaction:**

June 4, 2017

**5. On what date did you become aware of action or that action would not be taken?**

June 5, 2017

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<sup>16</sup> See Dot Registry Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> at paras.93-101.

**6. Describe how you believe you are materially affected by the action or inaction:**

ICANN's actions and inactions materially affect the delineated and organized music community defined in DotMusic's application that is supported by organizations with members representing over 95% of global music consumed (the "Music Community") and DotMusic. Not disclosing these documents has negatively impacted the timely, predictable and fair resolution of the .MUSIC string, while raising serious questions about the consistency, transparency and fairness of the CPE process. Without an effective policy to ensure openness, transparency and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency and openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

ICANN's action and inaction in denying the DIDP Request do not follow ICANN's Resolutions, its Bylaws or generally how ICANN claims to hold itself to high standards of accountability, transparency and openness. Such action and inaction raise additional questions as to the credibility, reliability and trustworthiness of the New gTLD Program's CPE process and its management by ICANN, especially in the case of the CPE Report and CPE process of DotMusic's application for the .MUSIC gTLD (Application ID: 1-1115-14110), which is subject to the CPE Reconsideration Request 16-5 ("CPE RR")<sup>17</sup> and is highly relevant to this Request.

A closed and opaque ICANN damages the credibility, accountability and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating

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<sup>17</sup> CPE RR 16-5, <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the DotMusic CPE RR. In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the Music Community that has supported the DotMusic community-based application for the .MUSIC string to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

The Reconsideration Request and Independent Review Process accountability mechanisms are the only recourse for applicants (or impacted requesters) in lieu of litigation. As such, ICANN must provide documents and Items in DIDP requests in which there is an appearance of gross negligence, conflicts of interest, multiple violations of established process, or even simply questions from the affected parties as to how a certain process was followed.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

See Answer to Question 6 above.

**8. Detail of Staff/Board Action/Inaction – Required Information**

See Answer to Question 6 above.

**9. What are you asking ICANN to do now?**

The Requester requests ICANN to disclose all the Items requested in the Request based on ICANN's Bylaws (including ICANN's guiding principles to ensure transparency, openness and accountability) to serve the global public interest.

Such disclosure will increase transparency and provide DotMusic and the BGC with additional information to assist in evaluating the CPE Report as well as the EIU's decision-making process in issuing the CPE Report. As outlined in Reconsideration Request 16-5 (and incorporated here by reference), ICANN engaged in numerous procedural and policy violations (including material omissions and oversights), which lead to inconsistencies and substantial flaws in its rationale methodology and scoring process.

The Requester requests that the BGC apply the Documentary Information Disclosure Policy to the DIDP Request in the manner it was intended to operate to “*ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.*” The Requester requests the BGC:

1. Review the ICANN Staff decision to withhold all the information requested, to ensure that each and every requested Item, documents and information request was considered and evaluated individually, and that the public interest test was applied to each individual item properly. The Requester requests that the Items and documents requested are disclosed;
2. To recognize and instruct Staff that ICANN's default policy is to release all information requested unless there is a compelling reason not to do so and, where such a compelling

reason for nondisclosure exists to inform the Requesters of the reason for nondisclosure pertaining to each individual item requested; and

3. Insofar as Items remain withheld, to inform the Requesters as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm. Withholding information under the principle of public interest needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN's Bylaws.

As indicated in the CPE Reconsideration Request 16-5, the promise of independence, nondiscrimination, transparency and accountability has been grossly violated in the .MUSIC CPE as the misguided and improper .MUSIC CPE Report shows. As such, the disclosure of the Items and documents requested will ensure that the BGC can perform due diligence and exercise independent judgement to make a well-informed decision pertaining to this DIDP RR (and subsequently the CPE Reconsideration Request 16-5).

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

DotMusic is a community applicant for .MUSIC, an application supported by organizations with members representing over 95% of music consumed. The justifications under which the Requester has standing and the right to assert this reconsideration request are:

- i. Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way.<sup>18</sup>
- ii. Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;
- iii. Conflict of interest issues;
- iv. Failure to consider evidence filed; and
- v. Violation of ICANN Articles of Incorporation/Bylaws:
  - a. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.<sup>19</sup>
  - b. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.<sup>20</sup>
  - c. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.<sup>21</sup>
  - d. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.<sup>22</sup>
  - e. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.<sup>23</sup>
  - f. Remaining accountable to the Internet community through mechanisms that

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<sup>18</sup> Final Issue Report on New gTLD Subsequent Procedures, <https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf>, at pp.23-24

<sup>19</sup> ICANN Bylaws, Art. I, § 2.6

<sup>20</sup> ICANN Bylaws, Art. I, § 2.1

<sup>21</sup> ICANN Bylaws, Art. I, § 2.7

<sup>22</sup> ICANN Bylaws, Art. I, § 2.8

<sup>23</sup> ICANN Bylaws, Art. I, § 2.9

enhance ICANN's effectiveness.<sup>24</sup>

- g. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.<sup>25</sup>
- h. Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>26</sup>
- i. Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>27</sup>

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? No**

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.**

**12. Do you have any documents you want to provide to ICANN? Yes.** See exhibits in Annexes.

#### **Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate,*

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<sup>24</sup> ICANN Bylaws, Art. I, § 2.10

<sup>25</sup> ICANN Bylaws, Art. I, § 2.11

<sup>26</sup> ICANN Bylaws, Art. II, § 3

<sup>27</sup> ICANN Bylaws, Art. III, § 1

*and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



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Arif Hyder Ali

June 18, 2017

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Date

# **Annex J**

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 17-2  
23 AUGUST 2017**

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The Requestor, DotMusic Limited, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN organization violated its Core Values and policies established in the Bylaws concerning non-discriminatory treatment and transparency.<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. The Requestor was invited to, and did, participate in CPE, but did not prevail. On 24 February 2016, the Requestor sought reconsideration of the CPE determination (Request 16-5).<sup>3</sup>

On 17 September 2016, the ICANN Board directed the President and CEO, or his designees, to undertake the CPE Process Review to review the process by which ICANN organization interacted with the CPE provider. On 18 October 2016, the Board Governance Committee (BGC) decided that the CPE Process Review should include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation of

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<sup>1</sup> Request 17-2, § 3, at Pg. 5 (incorrectly marked page 4).

<sup>2</sup> Request 17-2, § 10, at Pg. 16 (marked 15).

<sup>3</sup> Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending Requests for Reconsideration concerning CPE.<sup>4</sup> The BGC also placed the eight pending reconsideration requests relating to CPE on hold, including Request 16-5, pending completion of the CPE Process Review.

On 5 May 2017, the Requestor submitted the DIDP Request. The Requestor sought ten categories of documents and information relating to the CPE Process Review, some of which the Requestor had already requested in a prior DIDP request. On 4 June 2017, ICANN organization responded to the DIDP Request (DIDP Response) and explained that, with the exception of certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all the remaining documents responsive to nine (Items No. 1-9) of the ten categories have already been published. The DIDP Response further explained that all the documents responsive to Item No. 10 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure. Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.

The Requestor thereafter filed the instant Reconsideration Request 17-2 (Request 17-2), which challenges certain portions of the DIDP Response. The Requestor claims that ICANN organization violated ICANN's Core Values and policies established in the DIDP and Bylaws

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<sup>4</sup> Prior to 22 July 2017, the Board Governance Committee was designated by the ICANN Board to review and consider Reconsideration Requests pursuant to Article 4, Section 4.2 of the Bylaws. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Pursuant to the amended Bylaws effective 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is designated to review and consider Reconsideration Requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

concerning non-discriminatory treatment and transparency by: (1) providing information rather than documents in response to Items No. 2 and 4; (2) determining not to produce certain documents responsive to Items No. 5, 6, and 8, and (3) determining not to produce any documents responsive to Item No. 10.<sup>5</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN organization transmitted Request 17-2 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>6</sup>

The BAMC has considered Request 17-2 and all relevant materials and recommends that the Board deny Request 17-2 because ICANN organization adhered to established policies and procedures in its response to the DIDP Request.

## **II. Facts.**

### **A. Background Facts.**

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. On 29 July 2015, the Requestor's Application was invited to participate in CPE.<sup>7</sup> The Requestor elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE provider, for evaluation.<sup>8</sup>

On 10 February 2016, the CPE panel issued a CPE Report, concluding that the Application earned 10 out of 16 possible points on the CPE criteria.<sup>9</sup> Because a minimum of 14

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<sup>5</sup> Request 17-2, § 10, at Pg. 16 (marked 15).

<sup>6</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Request 17-2, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-ombudsman-action-10jul17-en.pdf>.

<sup>7</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>8</sup> *See id.*

<sup>9</sup> *Id.*; *see also* CPE Report at 1, <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

points are required to prevail in CPE, the CPE Report concluded that the Application did not qualify for community priority.<sup>10</sup>

On 24 February 2016, the Requestor filed Request 16-5, seeking reconsideration of the CPE determination and approval of the Requestor's community application.<sup>11</sup>

On 29 April 2016, the Requestor submitted a DIDP request seeking documents relating to the CPE Report (2016 DIDP Request).<sup>12</sup> On 15 May 2016, ICANN organization responded to the 2016 DIDP Request.<sup>13</sup> ICANN organization provided links to all the responsive, publicly available documents, furnished an email not previously publicly available,<sup>14</sup> explained that it did not possess documents responsive to several of the requests, and explained that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.<sup>15</sup> The Requestor thereafter filed Request 16-7 challenging ICANN organization's response to the 2016 DIDP Request. On 26 June 2016, the BGC denied Request 16-7.<sup>16</sup>

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Specifically, the Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by the Requestor on 17 September 2016 during its presentation to the BGC regarding Request 16-5, as well as issues that were identified in the Final Declaration from the Independent Review

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<sup>10</sup> See CPE Report at 1.

<sup>11</sup> Request 16-5.

<sup>12</sup> See 2016 DIDP Request, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf>.

<sup>13</sup> 2016 DIDP Response, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

<sup>14</sup> 2016 DIDP Response at 3, 12, Attachment.

<sup>15</sup> *Id.*, Pgs. 1-7, 11-12.

<sup>16</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>. The Requestor has now filed three reconsideration requests: Request 16-5 (challenging the CPE determination), Request 16-7 (challenging the response to the 2016 DIDP Request), and the instant request, Request 17-2 (challenging the response to the Requestor's 2017 DIDP Request).

Process (IRP) proceeding initiated by Dot Registry, LLC.<sup>17</sup> As a result, on 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake the CPE Process Review, regarding the process by which ICANN organization interacted with the CPE provider.

On 18 October 2016, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in their evaluations of the community applications.<sup>18</sup> The BGC placed on hold the following reconsideration requests pending completion of the CPE Process Review: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>19</sup>

On 5 May 2017, the Requestor submitted the DIDP Request seeking the disclosure of the following categories of documentary information relating to the CPE Process Review:<sup>20</sup>

1. The identity of the individual or firm undertaking the CPE Process Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;

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<sup>17</sup> Dot Registry IRP Final Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>18</sup> 18 October 2016 Minutes of BGC Meeting, at Item 2, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>; 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>19</sup> 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>20</sup> DIDP Request at Pg. 4, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

6. The materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the CPE Process Review.<sup>21</sup>

On 2 June 2017, ICANN organization published a status update on the CPE Process Review (Status Update).<sup>22</sup> The Status Update noted, among other things, that FTI Consulting Inc.'s Global Risk and Investigations Practice and Technology Practice (FTI) is conducting the CPE Process Review.<sup>23</sup> The Status Update explained that the CPE Process Review is occurring on two parallel tracks – the first track focuses on gathering information and materials from ICANN organization, including interviews and document collection, and was completed in March 2017; and the second track focuses on gathering information and materials from the CPE provider, and is ongoing.<sup>24</sup>

On 4 June 2017, ICANN organization responded to the DIDP Request.<sup>25</sup> As discussed below, the DIDP Response explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to nine (Items No. 1-9) of the ten categories have already been published. The DIDP Response identified and provided hyperlinks to those publicly available responsive documents.<sup>26</sup> The DIDP Response

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<sup>21</sup> *Id.* at Pg. 4-5.

<sup>22</sup> Status Update, <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> DIDP Response, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>26</sup> *See generally id.*

further explained that all the documents responsive to Item No. 10 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure.<sup>27</sup> Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>28</sup>

On 18 June 2017, the Requestor filed Request 17-2, seeking reconsideration of ICANN organization's response to Items No. 2 and 4, and its determination not to produce certain documents responsive to Items No. 5, 6, 8, and 10 because they were subject to Nondisclosure Conditions. The Requestor asserts that withholding the materials "has negatively impacted the timely, predictable[,] and fair resolution of the .MUSIC string, while raising serious questions about the consistency, transparency[,] and fairness of the CPE process." The Requestor also argues that denial of the DIDP is inappropriate because it is one of only two recourses "for applicants . . . in lieu of litigation," and the other recourse, IRP, is "expensive and time-consuming."<sup>29</sup>

On 7 July 2017, the BGC concluded that Request 17-2 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.<sup>30</sup>

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<sup>27</sup> *Id.* at Pg. 5-6.

<sup>28</sup> DIDP Response at Pg. 6.

<sup>29</sup> Request 17-2, § 6, at Pg. 12 (marked 11).

<sup>30</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii). As noted in footnote 4, ICANN's Bylaws were amended while Request 17-2 was pending. The BGC was tasked with reviewing Request 17-2 to determine if it was sufficiently stated, and it did so on 7 July 2017. Since that time, the BAMC is responsible for reviewing reconsideration requests, including Request 17-2.

On 9 July 2017, ICANN organization transmitted Request 17-2 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. The Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN's Bylaws.<sup>31</sup> Accordingly, the BAMC reviews Request 17-2 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

### **B. Relief Requested**

The Requestor asks the BAMC to: (1) “[r]eview the ICANN Staff decision to withhold” information requested in the DIDP, “to ensure that each and every requested Item . . . was considered and evaluated individually, and that the public interest test was applied to each individual item properly”; (2) disclose the materials that ICANN staff withheld in response to the DIDP Request; (3) “instruct Staff that ICANN’s default policy is to release all information requested unless there is a compelling reason not to”; and (4) for any items that the Board decides to withhold, “inform the Requestor[] as to the specific formula used to justify the nondisclosure.”<sup>32</sup>

### **III. Issue.**

The issues are as follows:

1. Whether ICANN organization complied with established ICANN policies in responding to the DIDP Request.
2. Whether ICANN organization was required by the DIDP or established policies to provide the Requestor with “the specific formula used to justify the nondisclosure.”
3. Whether ICANN organization complied with its Core Values, Mission, and Commitments.<sup>33</sup>

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<sup>31</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-2, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-ombudsman-action-10jul17-en.pdf>.

<sup>32</sup> Request 17-2, § 9, at Pg. 13-14 (marked 12-13).

<sup>33</sup> Request 17-2, § 9, at Pg. 14 (marked 13).

The BAMC notes that the Requestor indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-2 seeks reconsideration of staff and Board action or inaction.<sup>34</sup> The only subsequent discussion of Board action is the Requestor’s passing reference to its view that, in requesting materials from CPE panels for use in its evaluation of pending reconsideration requests, “the BGC became obligated to disclose these materials under its Bylaws, but has failed to do so.”<sup>35</sup> The Requestor makes no further arguments concerning the BGC’s actions or inactions, and does not ask ICANN organization to take any action concerning this issue. Rather, the Requestor focuses on the “ICANN staff” response to the Requestor’s DIDP request.<sup>36</sup> Accordingly, the BAMC understands Request 17-2 to seek reconsideration of ICANN organization’s response to the Requestor’s DIDP Request, and *not* reconsideration of BGC action or inaction.<sup>37</sup>

#### **IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.**

##### **A. Reconsideration Requests**

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or

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<sup>34</sup> Request 17-2, § 2, at Pg. 1.

<sup>35</sup> Request 17-2, § 3, at Pg. 2 (marked 1).

<sup>36</sup> Request 17-2, § at Pg. 13 (marked 12).

<sup>37</sup> Further, we note that the BAMC has not completed its consideration of Request 16-5, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.<sup>38</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws that were in effect when Request 17-2 was filed, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>39</sup> That substantive provision did not change when ICANN's Bylaws were amended effective 22 July 2017, although the determination as to whether a reconsideration request is sufficiently stated now falls to the BAMC. Pursuant to the current Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>40</sup> Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>41</sup>

On 9 July 2017, the BGC determined that Request 17-2 is sufficiently stated and sent Request 17-2 to the Ombudsman for review and consideration.<sup>42</sup> The Ombudsman thereafter recused himself from this matter.<sup>43</sup> Accordingly, the BAMC has reviewed Request 17-2 and issues this Recommendation.

## **B. Documentary Information Disclosure Policy**

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and

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<sup>38</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

<sup>39</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l).

<sup>40</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>41</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>42</sup> Response from Ombudsman Regarding Request 17-2, Pg. 1-2.

<sup>43</sup> Response from Ombudsman Regarding Request 17-2, Pg. 1.

that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization's operational activities. In that regard, ICANN organization publishes many categories of documents on its website as a matter of due course.<sup>44</sup> In addition to ICANN organization's practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN organization make public documentary information "concerning ICANN's operational activities, and within ICANN's possession, custody, or control," that is not already publicly available.<sup>45</sup> The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization's operational activities, and within ICANN organization's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.<sup>46</sup>

In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the "Process For Responding To ICANN's Documentary Information

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<sup>44</sup> See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

Disclosure Policy (DIDP) Requests” (DIDP Response Process).<sup>47</sup> The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization’s website].”<sup>48</sup>

Pursuant to the DIDP, ICANN organization reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others:

- (i) Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors’ Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- (ii) Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;
- (iii) Confidential business information and/or internal policies and procedures; and
- (iv) Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>49</sup>

Notwithstanding the above, information that falls within any of the Nondisclosure Conditions *may* still be made public if ICANN organization determines, under the particular

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<sup>47</sup> See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>48</sup> *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>49</sup> DIDP.

circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>50</sup>

**V. Analysis and Rationale.**

**A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The DIDP Request.**

**1. The DIDP Response Complies With Applicable Policies And Procedures.**

The DIDP Response identified documentary information responsive to all 10 items. For Items No. 1 through 9, ICANN organization determined that most of the responsive documentary information had already been published on ICANN's website.<sup>51</sup> Although the DIDP does not require ICANN organization to respond to requests seeking information that is already publicly available,<sup>52</sup> ICANN organization identified and provided the hyperlinks to 21 publicly available categories of documents that contain information responsive to Items No. 1 through 9.<sup>53</sup>

The DIDP Response also explained that some of the documents responsive to Items No. 6 and 8, as well as all documents responsive to Item 10, were subject to certain identified Nondisclosure Conditions. The DIDP Response further explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>54</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *See generally* DIDP Response.

<sup>52</sup> DIDP <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>53</sup> DIDP Response at Pg. 3-4.

<sup>54</sup> DIDP Response at Pg. 6.

The Requestor claims that ICANN organization's responses to Items No. 2, 4, 5, 6, 8 and 10 violated established policies and procedures.<sup>55</sup> However, the Requestor provides nothing to demonstrate that ICANN organization violated any established policy or procedure.<sup>56</sup> As demonstrated below, ICANN organization's responses to Items No. 2, 4, 5, 6, 8 and 10 adhered to established policies and procedures.

The DIDP Response Process provides that “[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested . . . , interviews . . . the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request.”<sup>57</sup> Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions.<sup>58</sup> If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.<sup>59</sup>

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<sup>55</sup> The BAMC notes that the ten categories of documents and information relating to the CPE Review Process that the Requestor requested in its DIDP Request (i.e., Item Nos. 1-10) are identical to the requests set forth in a subsequent DIDP Request submitted by dotgay LLC (i.e., Item Nos. 4-13). While dotgay LLC, which is represented by the same counsel as the Requestor here (who also filed the DIDP requests on behalf of the Requestor and dotgay LLC), has sought reconsideration of portions of ICANN's response to its DIDP Request (Reconsideration Request 17-3), dotgay LLC has not sought reconsideration of ICANN's response to dotgay LLC's Items No. 5, 7, and 11, which are identical to Items No. 2, 4, and 8 here.

<sup>56</sup> Request 17-2, § 10, Pg. 15 (marked 14).

<sup>57</sup> DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

**a. ICANN organization’s response to Item No. 2 adhered to established policies and procedures.**

Item No. 2 requested information regarding “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment.”<sup>60</sup> In its response, and consistent with the DIDP Response Process, ICANN organization identified and provided the hyperlink to the Status Update, which described the selection process for the company conducting the CPE Process Review.<sup>61</sup> The response to Item No. 2 further explained that “[w]ith respect to the disclosures and conflict checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN’s outside counsel, and all the parties that underwent CPE.”<sup>62</sup>

The Requestor argues that ICANN organization was required to “disclose not only the existence of selection, disclosure, and conflict check processes . . . but also the underlying documents that substantiate ICANN’s claims.”<sup>63</sup> The Requestor’s claim is unsupported. The Requestor asked for information relating to “the selection process, disclosures, and conflicts checks undertaken in relation to the appointment of FTI.”<sup>64</sup> Notwithstanding that Item No. 2 requested information rather than documents, and as noted above, the DIDP Response identified and provided the hyperlink to the Status Update, which substantiated the narrative in the DIDP Response.<sup>65</sup> Even if Item No. 2 were to be interpreted as a request for documents, the DIDP Response adhered to the DIDP Response Process, because ICANN organization published and provided hyperlinks to all documents in its possession that are appropriate for disclosure.<sup>66</sup> The

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<sup>60</sup> DIDP Request at Pg. 4.

<sup>61</sup> DIDP Response at Pg. 3.

<sup>62</sup> DIDP Response at Pg. 3.

<sup>63</sup> Request 17-2 § 3, Pg. 9 (marked 8).

<sup>64</sup> See DIDP Request at Pg. 4.

<sup>65</sup> DIDP Response at Pg. 3.

<sup>66</sup> DIDP Response Process; DIDP Response at Pg. 3.

only other documents in ICANN’s possession relating to the selection process and conflicts check are communications with ICANN organization’s outside counsel. Those documents are not appropriate for disclosure because they comprise:

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>67</sup>

The Requestor does not claim that ICANN organization’s response to Item 2 is contrary to the DIDP Response Process, nor does the Requestor provide any evidence demonstrating how this response violates ICANN’s Mission, Commitments, or Core Values.<sup>68</sup> Reconsideration is not warranted on these grounds.

**b. ICANN organization’s response to Item No. 4 adhered to established policies and procedures.**

Item No. 4 requested the “terms of instructions provided to the evaluator.”<sup>69</sup> Like Item No. 2, this was a request for information. Nevertheless, ICANN organization identified and provided the hyperlink to the Status Update, which contained information regarding the scope of the Review. The Status Update states:

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

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<sup>67</sup> DIDP.

<sup>68</sup> The Requestor claims that ICANN organization asserted certain Nondisclosure Conditions in response to Items No. 1-4. *See* Request 17-2, § 3, Pg. 5 (marked 4). The Requestor is mistaken. ICANN did not determine that Nondisclosure Conditions prevented the disclosure of documents responsive to Items No. 1-4. *See* DIDP Response, at Pg. 3. Therefore, reconsideration is not warranted on those grounds. As noted in footnote 55 above, dotgay LLC has not sought reconsideration of ICANN’s response to dotgay LLC’s Item No. 5, which is identical to Item No. 2 here.

<sup>69</sup> DIDP Request at Pg. 5.

The review is being conducted in two parallel tracks . . . . The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. . . . The second track focuses on gathering information and materials from the CPE provider.<sup>70</sup>

The Requestor argues that the DIDP required ICANN organization to “disclose not only . . . the existence of the terms of appointment . . . but also the underlying documents that substantiate ICANN’s claims.”<sup>71</sup>

As with Item No. 2, and notwithstanding that the Requestor sought information rather than documents in this DIDP Request, the DIDP Response to Item No. 4 adhered to the DIDP Response Process, because it identified responsive documents and provided a hyperlink to the responsive document that was appropriate for disclosure.<sup>72</sup> ICANN organization possesses only one other document potentially responsive to Item No. 4: the letter engaging FTI to undertake the CPE Process Review. That document is not appropriate for disclosure because it comprises:

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>73</sup>

Accordingly, reconsideration is not warranted for the same reasons that reconsideration of the DIDP Response to Item No. 2 is not warranted.

**c. ICANN organization’s responses to Items No. 5, 6, and 8 adhered to established policies and procedures.**

Items No. 5 and 6 sought the disclosure of the “materials provided to the evaluator by [the CPE provider]” (Item No. 5) and “materials provided to the evaluator by ICANN staff/legal,

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<sup>70</sup> Status Update.

<sup>71</sup> Request 17-2 § 3, Pg. 9 (marked 8). Again, and as noted in footnote 55 above, dotgay LLC has not sought reconsideration of ICANN’s response to dotgay LLC’s Item No. 7, which is identical to Item No. 4 here.

<sup>72</sup> DIDP Response Process; DIDP Response at Pg. 3.

<sup>73</sup> DIDP.

outside counsel or ICANN’s Board or any subcommittee of the Board” (Item No. 6).<sup>74</sup> Item No. 8 sought the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator,” which overlaps with Items No. 5 and 6.<sup>75</sup>

With respect to Item No. 5, ICANN organization responded as follows:

The second track of the review focuses on gathering information and materials from the CPE provider. As noted Community Priority Evaluation Process Review Update of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.<sup>76</sup>

As noted in the Status Update, and referenced in the DIDP Response, the CPE provider had not provided the requested materials at the time ICANN organization responded to the DIDP Request.<sup>77</sup> Accordingly, ICANN organization did not possess any documents responsive to Item No. 5 to provide to the Requestor, even if disclosure under the DIDP was appropriate, which is not yet clear.<sup>78</sup>

In response to Item No. 6, the DIDP Response identified 16 categories of documents that ICANN organization provided to the evaluator. All but one of those categories had already been published. The DIDP Response provided the hyperlinks to the publicly available documents. The DIDP Response also disclosed that ICANN organization provided the evaluator with the correspondence between ICANN organization and the CPE provider regarding the evaluations; however, said correspondence were subject to certain Nondisclosure Conditions and were not appropriate for the same reasons identified in ICANN organization’s response to the 2016 DIDP

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<sup>74</sup> Request 17-2, § 3, at Pg. 9 (marked 8).

<sup>75</sup> DIDP Request at Pg. 5.

<sup>76</sup> DIDP Response at Pg. 4-5.

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

<sup>78</sup> *See* DIDP (DIDP applies to “documents . . . within ICANN’s possession, custody, or control”).

Request, which sought the same documentary information.<sup>79</sup> The BGC previously denied the Requestor’s Request 16-7, which challenged ICANN organization’s response to the 2016 DIDP Request.<sup>80</sup>

The Requestor argues that ICANN organization’s statement that it provided all materials responsive to Item No. 6<sup>81</sup> except the correspondence between ICANN organization and the CPE provider “is undercut by ICANN organization’s admission of the existence of interviews conducted by FTI of ICANN staff, whose notes have not been disclosed in response to the DIDP [R]equest.”<sup>82</sup> This complaint is misplaced. Item No. 6 sought materials provided to FTI.<sup>83</sup> The Requestor does not assert that interview notes—if any exist and are in ICANN organization’s possession—were provided to FTI.<sup>84</sup> Even if ICANN organization possessed copies of interview notes and provided those materials to FTI, the materials would fall under three Nondisclosure Conditions: (i) “[d]rafts of . . . documents . . . or any other forms of communication”; (ii) “[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents[ and] memoranda”; and (iii) “[i]nformation subject to the attorney-client, attorney work product privilege, or any other applicable privilege [...]”.<sup>85</sup> The Requestor raises the same arguments for ICANN organization’s response to Item

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<sup>79</sup> DIDP Response at Pg. 3-4.

<sup>80</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>.

<sup>81</sup> The Requestor identified Item No. 5 in its argument on this issue, but it appears from the context that the Requestor intended to reference Item No. 6, materials provided to the evaluator by ICANN.

<sup>82</sup> Request 17-2, § 3, at Pg. 9 (marked 8).

<sup>83</sup> DIDP Request at Pg. 5.

<sup>84</sup> *See id.*

<sup>85</sup> DIDP.

No. 8 as raised with respect to Item No. 6, and the BAMC rejects those arguments as outlined above.

**d. ICANN organization’s response to Item No. 10 adhered to established policies and procedures.**

Item No. 10 requested “[a]ll materials provided to ICANN by the evaluator concerning the [CPE] Review.”<sup>86</sup> The DIDP Response stated:

[T]he review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure....

Consistent with the DIDP Response Process, ICANN organization searched for and identified documents responsive to Item No. 10—“requests for documents and information to ICANN and the CPE provider”—then reviewed those materials and determined that they were subject to certain Nondisclosure Conditions discussed below.<sup>87</sup> Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.<sup>88</sup>

**2. ICANN Organization Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.**

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.<sup>89</sup> Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the

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<sup>86</sup> DIDP Request at Pg. 5.

<sup>87</sup> DIDP Response Process.

<sup>88</sup> DIDP Response at Pg. 6.

<sup>89</sup> DIDP.

public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN organization must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.<sup>90</sup> In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the DIDP Response.

In response to Items No. 6 and 8, ICANN organization determined that the correspondence between ICANN organization and the CPE provider regarding the evaluations were not appropriate for disclosure because they comprised:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;
- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement;
- Confidential business information and/or internal policies and procedures; or
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.<sup>91</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> DIDP Response at Pg. 4-5, citing 2016 DIDP Response at Pg. 5, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

It is easy to see why these Nondisclosure Conditions apply to the materials responsive to Items No. 6 and 8. Those items request correspondence between ICANN organization and the CPE Provider.<sup>92</sup> The Requestor previously challenged ICANN organization's determination that the correspondence between ICANN and the CPE provider were not appropriate for disclosure for the same reasons in Request 16-7 without success.<sup>93</sup> The BAMC recommends that Request 17-2 be similarly denied. Equally important, the DIDP specifically carves out documents containing proprietary information and confidential information as exempt from disclosure pursuant to the Nondisclosure Conditions because the potential harm of disclosing that private information outweighs any potential benefit of disclosure.

Item No. 10 seeks materials that FTI provided to ICANN organization concerning the CPE Process Review. In response to Item No. 10, ICANN organization noted that it was in possession of the requests for documents and information prepared by the evaluator to ICANN organization and the CPE provider, but that these documents were not appropriate for disclosure because they comprised:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;

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<sup>92</sup> DIDP Request at Pg. 5.

<sup>93</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation;
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.<sup>94</sup>

These materials certainly comprise information that may “compromise the integrity of” ICANN organization’s and FTI’s “deliberative and decision-making process” with respect to the CPE Process Review.

The Requestor argues that the determinations as to the applicability of the specified Nondisclosure Conditions warrant reconsideration because “ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of public interest in terms of the DIDP Request.”<sup>95</sup> The Requestor’s arguments fail because ICANN organization *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.<sup>96</sup> There is no policy or procedure requiring that ICANN organization provide *additional* justification for nondisclosure.

The Requestor asks the Board to “inform the Request[or] as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm.”<sup>97</sup> Neither the DIDP nor the DIDP Response Process require ICANN organization to use or provide a “formula” for determining whether materials that are subject to Nondisclosure Conditions may nonetheless be disclosed.<sup>98</sup>

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<sup>94</sup> DIDP Response at Pg. 5-6; *see also* ICANN Defined Conditions for Nondisclosure. <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>95</sup> Request 17-2, § 3, at Pg. 8 (marked 7).

<sup>96</sup> DIDP Response at Pg. 4-6; 2016 DIDP Response at Pg. 4-7.

<sup>97</sup> Request 17-2, § 9, Pg. 14 (marked 13) (emphasis in original).

<sup>98</sup> *See* DIDP; DIDP Response Process.

The Requestor also asserts that nondisclosure “needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN’s Bylaws.”<sup>99</sup> However, the DIDP provides the procedural fairness that the Requestor seeks. Here, ICANN organization applied the DIDP, determined that certain of the requested materials were subject to Nondisclosure Conditions, considered whether the materials should nonetheless be made public, determined that the public interest in disclosing the information did not outweigh the harm of disclosure, and explained that determination to the Requestor.<sup>100</sup> Therefore, reconsideration is not warranted on this ground.

**3. ICANN Organization Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public’s Interest In Disclosing The Information.**

The DIDP states that documents subject to the Nondisclosure Conditions “may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”<sup>101</sup> In accordance with the DIDP Response Process, ICANN organization conducted a review of the responsive documents that fell within the Nondisclosure Conditions and determined that the potential harm outweighed the public interest in the disclosure of those documents.<sup>102</sup>

The Requestor previously acknowledged that under the DIDP Response Process, it is “within ICANN’s sole discretion to determine whether or not the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the

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<sup>99</sup> Request 17-2, § 9, Pg. 14 (marked 13).

<sup>100</sup> *See generally* DIDP Response.

<sup>101</sup> *See id.*

<sup>102</sup> DIDP Response at Pg. 6; 2016 DIDP Response at Pg. 2.

harm that may be caused by such disclosure.”<sup>103</sup> Nevertheless, the Requestor claims reconsideration is warranted because the Dot Registry IRP Final Declaration gave rise to a “unique circumstance where the ‘pubic interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.’”<sup>104</sup> However, the Dot Registry IRP Final Declaration is not an established ICANN policy or procedure, and the Board’s acceptance of aspects of the Final Declaration does not make it so. Moreover, the Dot Registry IRP Final Declaration did not establish that the public interest in disclosure outweighs the potential harm for each and every document in ICANN organization’s possession related to the CPE Process Review.<sup>105</sup> Accordingly, the argument does not support reconsideration.

**B. The Reconsideration Process is Not A Mechanism for “Instructing” ICANN Staff on General Policies Where No Violation of ICANN Policies or Procedure Has Been Found.**

The Requestor asks the Board to “recognize and instruct Staff that ICANN’s default policy is to release all information requested unless there is a compelling reason not to do so.”<sup>106</sup> The Requestor is correct insofar as, under the DIDP Response Process, documents “concerning ICANN’s operational activities, and within ICANN organization’s possession, custody, or control, [are] made available to the public unless there is a compelling reason for confidentiality.”<sup>107</sup> However, the reconsideration request process is not an avenue for “instruct[ing]” ICANN staff concerning ICANN’s policies in general, where no violation of ICANN policies or procedures has been found. Because the BAMC concludes that ICANN

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<sup>103</sup> Request 16-7, § 3, Pg. 4.

<sup>104</sup> Request 17-2 § 3, Pg. 10 (marked 9).

<sup>105</sup> See ICANN Board Resolution 2016.08.09.11, <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.g>.

<sup>106</sup> Request 17-2, § 9, Pg. 13-14 (marked 12-13).

<sup>107</sup> DIDP.

organization adhered to established ICANN policies in responding to the DIDP Request, the BAMC does not recommend that the Board “instruct” ICANN staff as the Requestor asks.

Further, to the extent the Requestor is challenging the DIDP Response Process or the DIDP itself, the time to do so has passed.<sup>108</sup>

**C. The Requestor’s Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration of the DIDP Response.**

The Requestor cites a litany of ICANN’s Commitments and Core Values, which the Requestor believes ICANN organization violated in the DIDP Response:<sup>109</sup>

- Introducing and promoting competition in the registration of domain names where practical and beneficial to the public interest.<sup>110</sup>
- Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.<sup>111</sup>
- Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.<sup>112</sup>
- Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.<sup>113</sup>
- Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.<sup>114</sup>

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<sup>108</sup> ICANN Bylaws, 1 October 2016, Art. 4 Section 4.2(g)(i).

<sup>109</sup> Request 17-2, § 10, at Pg. 15-16 (marked 14-15). The Requestor cites the version of the Bylaws effective from 11 February 2016 until 30 September 2016. The version of the Bylaws effective on 18 June 2017, when the Requestor submitted Request 17-2, govern this Request. The substance of the Bylaws cited are not different from the current version of the Bylaws, except where otherwise noted.

<sup>110</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(iv) (emphasis in original).

<sup>111</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(i) (emphasis in original).

<sup>112</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(iv) (emphasis in original).

<sup>113</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(v) (emphasis in original).

<sup>114</sup> ICANN Bylaws, 11 February 2016, Art. I, Section 2.9 (emphasis in original). The current version of the Bylaws does not include the same language. The Bylaws now state: “Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN’s other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community.” ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(v).

- Remaining accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.<sup>115</sup>
- While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.<sup>116</sup>
- Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>117</sup>
- Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>118</sup>

However, the Requestor provides no explanation for how these Commitments and Core Values relate to the DIDP Response at issue in Request 17-2 or how ICANN organization has violated these Commitments and Core Values.<sup>119</sup> Many of them, such as ICANN’s Core Value of accounting for the public policy advice of governments and public authorities, have no clear relation to the DIDP Response. The Requestor has not established grounds for reconsideration through its list of Commitments and Core Values.

The Requestor states in passing that it has “standing and the right to assert this reconsideration request” as a result of “[f]ailure to consider evidence filed,” but does not identify any evidence that it believes ICANN organization failed to consider in responding to the DIDP Request.<sup>120</sup> The Requestor similarly references “[c]onflict of interest issues,” “Breach of Fundamental Fairness,” and the need for “[p]redictability in the introduction of gTLDs” without explaining how those principles provide grounds for reconsideration here.

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<sup>115</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(vi) (emphasis in original).

<sup>116</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(vi) (emphasis in original).

<sup>117</sup> ICANN Bylaws, 1 October 2016, Art. 2 Section 2.3 (emphasis in original).

<sup>118</sup> ICANN Bylaws, 1 October 2016, Art. 3 Section 3.1 (emphasis in original).

<sup>119</sup> *See generally* Request 17-2, § 10, Pg. 13-14.

<sup>120</sup> Request 17-2, § 10, Pg. 13-14.

## **VI. Recommendation**

The BAMC has considered the merits of Request 17-2, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-2.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. Request 17-2 was submitted on 19 June 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 18 July 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-2 is 23 August 2017, which is within the requisite 90 days of receiving Request 17-2.<sup>121</sup>

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<sup>121</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

# **Annex K**

# Minutes | Board Governance Committee (BGC) Meeting

01 Aug 2017

BGC Attendees: Cherine Chalaby, Chris Disspain (Chair), Markus Kummer, Ram Mohan, and Mike Silber

BGC Member Apologies: Rinalia Abdul Rahim and Asha Hemrajani

Other Board Member Attendees: Becky Burr, Steve Crocker, and Ron da Silva

ICANN (Internet Corporation for Assigned Names and Numbers) Organization Attendees: Michelle Bright (Board Content Senior Manager), John Jeffrey (General Counsel and Secretary), Vinciane Koenigsfeld (Board Training & Content Senior Manager), Elizabeth Le (Associate General Counsel), Wendy Profit (Manager, Board Operations), and Amy Stathos (Deputy General Counsel)

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The following is a summary of discussions, actions taken, and actions identified:

- **Update on Community Priority Evaluation Process Review (Review)** - The BGC received a briefing on the status of the CPE process review. The second track of the Review, which focuses on gathering information and materials from the CPE provider, is still ongoing. This is in large part because, despite repeated requests from ICANN (Internet Corporation for Assigned Names and Numbers) beginning in March 2017, the CPE provider failed to produce a single document until just very recently –

four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced. FTI is in the process of reviewing the documents that have been produced. The BGC discussed the importance of bring the work on the second track to a closure within a definitive time period so that the FTI can conclude their work.

- Action:

- ICANN (Internet Corporation for Assigned Names and Numbers) organization to follow up with FTI on what documents are outstanding from the CPE provider in response to FTI's document request.
- ICANN (Internet Corporation for Assigned Names and Numbers) organization to continue providing the BGC with updates on the status of the review, and publish update(s) as appropriate.

- **Board Committee and Leadership Selection**

**Procedures** - The BGC reviewed and discussed proposed revisions to the Board Committee and Leadership Selection Procedures (Procedures). The BGC agreed that Committee members should review revisions and provide further edits, if any, by the next BGC meeting, whereupon the Committee will revisit the issue.

- Action:

- BGC members to provide comments and further edits to the Procedures via email by the next BGC meeting.

- **Discussion of Board Committees and Working**

**Groups Slate** – The BGC discussed the Board Committees and Working Group slates based upon the preferences indicated by the Board members. The BGC also discussed standardizing the Committee

charters to specify a minimum and maximum number of Committee members but allow flexibility for the composition of Committee within that range.

- Action:
  - ICANN (Internet Corporation for Assigned Names and Numbers) organization to revise the Committee charters in accordance with the discussion regarding composition of the Committees for consideration by the BGC at its next meeting.
  
- **Any Other Business**
  - Nominating Committee (NomCom) 2018 Chair and Chair-Elect Leadership– The BGC noted that it is anticipated that the interview process for the NomCom 2018 Chair and Chair-Elect Leadership will be completed by the next BGC meeting and that the BGC will discuss its recommendations at the meeting.

Published on 24 August 2017.

## REFERENCE MATERIALS – BOARD PAPER NO. 2017.09.23.2a

**TITLE:** **Consideration of Reconsideration Request 17-2**

### **Document/Background Links**

The following attachments are relevant to the Board's consideration of Reconsideration Request 17-2.

Attachment A is [Reconsideration Request 17-2](#), submitted on 18 June 2017.

Attachment B are [Annexes A to H](#) in support of Reconsideration Request 17-2, submitted on 18 June 2017.

Attachment C is the [Ombudsman Action on Request 17-2](#), dated 10 July 2017.

Attachment D is the [BAMC Recommendation on Request 17-2](#), issued 23 August 2017.

Attachment E is the [request](#) submitted by DotMusic Limited pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), dated 5 May 2017.

Attachment F is the [response](#) to DotMusic Limited's DIDP request, dated 4 June 2017.

Attachment G is the [Rebuttal](#) and accompanying [Annexes I to K](#) in support of Request 17-2, submitted on 12 September 2017.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 13 September 2017

Email: amy.stathos@icann.org

## **dotgay LLC Reconsideration Request (“RR”)**

### **1. Requester Information**

Requester:

**Name:** dotgay LLC (“dotgay”)

**Address:** Contact Information Redacted

**Email:** Jamie Baxter, Contact Information Redacted

Requester is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, Contact Information Redacted

**Email:** Contact Information Redacted

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

dotgay LLC (the “Requester”) seeks reconsideration of ICANN’s response to its DIDP Request, which denied the disclosure of certain categories of documents requested pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

On May 18, 2017, the Requester submitted a DIDP request seeking disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”)

review of the Community Priority Evaluation (“CPE”) process (the “DIDP Request”).<sup>1</sup>  
Specifically, the Requester submitted 13 document requests as follows:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

Request No. 4: The identity of the individual or firm (“the evaluator”) undertaking the Review;

Request No. 5: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

Request No. 7: The terms of instructions provided to the evaluator;

Request No. 8: The materials provided to the evaluator by the EIU;

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

Request No. 10: The materials submitted by affected parties provided to the evaluator;

Request No. 11: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

Request No. 12: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the

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<sup>1</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

Review.<sup>2</sup>

Subsequently, on June 18, 2017, ICANN responded to the Requester's DIDP Request by denying the Requester's (1) five document requests (Request Nos. 1-3, 8 and 13) in whole, and (2) one document request (Request No. 9) in part. ICANN reasoned that (1) the documents under Request Nos. 1-3, 8 and 13 are not appropriate for disclosure "based on . . . [the] DIDP Defined Conditions of Non-Disclosure;" and (2) the documents under Request No. 9 concerning "the correspondence between the ICANN organization and the CPE provider regarding the evaluations" are not appropriate for disclosure for "the same reasons identified in ICANN's response to the DIDP previous[ly] submitted by dotgay."<sup>3</sup>

**4. Date of action/inaction:**

ICANN acted on June 18, 2017 by issuing its response to the DIDP Request.

**5. On what date did you become aware of action or that action would not be taken?**

The Requester became aware of the action on June 18, 2017, when it received ICANN's response to the DIDP Request.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requester is materially affected by ICANN's refusal to disclose certain categories of documents concerning the BGC's review of the CPE process at issue in the DIDP Request.

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<sup>2</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>3</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>; *see* Exhibit 3, Request No. 20151022-1, ICANN DIDP Response (Oct. 21, 2015), <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

By way of background, the Requester filed a community-based generic Top-Level Domain (“gTLD”) application for the string “.GAY.” However, the CPE report, authored by the Economist Intelligence Unit (the “EIU”), recommended that ICANN reject the Requester’s application for the .GAY gTLD. As evident from the Requester’s submissions, including an independent expert report by Prof. William Eskridge of Yale Law School, the CPE report is fundamentally erroneous based on (1) interpretive errors created by misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (2) errors of inconsistency derived from the EIU’s failure to follow its own guidelines; (3) errors of discrimination, namely the EIU’s discriminatory treatment of dotgay’s application compared with other applications; and (4) errors of fact, as the EIU made several misstatements of the empirical evidence and demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States.<sup>4</sup>

In January 2017, ICANN retained an independent reviewer, FTI Consulting, Inc. (“FTI”), to review the CPE process and “the consistency in which the CPE criteria were applied” by the CPE provider. As part of the review, FTI is collecting information and materials from ICANN and the CPE provider. FTI will submit its findings to ICANN based on this underlying information.

FTI’s findings relating to “the consistency in which the CPE criteria were applied” will directly affect the outcome of the Requester’s Reconsideration Request 16-3 (“Request 16-3”), which is currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain’s April 26, 2017 letter to the Requester, which stated that FTI’s review “will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration

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<sup>4</sup> Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>

Requests related to CPE.” Thus, the Requester filed the DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process. In submitting this DIDP Request, the Requester expected ICANN to “operate in a manner consistent with [its] Bylaws” and “through open and transparent processes.”<sup>5</sup> ICANN failed to do so.

Specifically, according to Article 4 of ICANN’s Bylaws, “[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor.”<sup>6</sup> The Bylaws require that ICANN (1) “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;”<sup>7</sup> (2) “employ[ ] open and transparent policy development mechanisms;”<sup>8</sup> (3) “apply[ ] documented policies neutrally and objectively, with integrity and fairness;”<sup>9</sup> and (4) “[r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”<sup>10</sup>

The Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.<sup>11</sup> ICANN’s failure to provide complete responses to the Requester’s DIDP Request and failure to adhere to its own Bylaws raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for the Requester’s .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.<sup>12</sup>

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<sup>5</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>6</sup> *Id.*, Art. 4, § 4.2(o).

<sup>7</sup> *Id.*, Art. 1, § 1.2(a).

<sup>8</sup> *Id.*, Art. 3, § 3.1.

<sup>9</sup> *Id.*, Art. 1, § 1.2(v).

<sup>10</sup> *Id.*, Art. 1, § 1.2(vi).

<sup>11</sup> *See id.*, Arts. 1, 3-4.

<sup>12</sup> Exhibit 4, CPE Reconsideration Request 16-3 (Feb. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain categories of documents in the DIDP Request. Indeed, ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.<sup>13</sup> It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI’s findings and conclusions.

To prevent serious questions from arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to the Requester and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by the Requester that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure, and conflict check processes (Request No. 2) but also the underlying documents that substantiate ICANN’s claims.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN’s action materially affects the global gay community represented by the Requester. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and insecure operation of the identifiers managed by ICANN. Accountability, transparency, and

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<sup>13</sup> ICANN’s Documentary Information Disclosure Policy (last visited June 29, 2017) (“If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.”), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed and opaque ICANN damages the credibility, accountability, and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the Requester's BGC presentation and accompanying materials.<sup>14</sup> In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requester's community-based application for the .GAY string, in order to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.<sup>15</sup> This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>16</sup> ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that

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<sup>14</sup> See Exhibit 18, dotgay's Presentation to the Board Governance Committee (May 15, 2016), pp.2-3 <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

<sup>15</sup> See Exhibit 6, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>16</sup> ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. "), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including Request 16-3. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

## **8. Detail of Staff/Board Action/Inaction – Required Information**

### **8.1 Background**

The Requester elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant later that year – having only received 10 points.<sup>17</sup> In response, the Requester, supported by multiple community organizations, filed a Reconsideration Request with the BGC. The BGC granted the request, determining that the EIU did not follow procedure during the CPE process. As a result, the Requester’s application was sent to be re-evaluated by the EIU. However, the second CPE process produced the exact same results based on the same arguments.<sup>18</sup>

When this issue was brought before the BGC via another Reconsideration Request, though, the BGC excused the discriminatory conduct and the EIU’s policy and process violations. It refused to reconsider the CPE a second time. The Requester therefore filed a third Reconsideration Request, Request 16-3, on February 17, 2016 in response to the BGC’s non-response on many of

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<sup>17</sup> Exhibit 7, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>18</sup> See Exhibit 8, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

the issues highlighted in the second Reconsideration Request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.<sup>19</sup>

Almost a year later, and after numerous letters to ICANN,<sup>20</sup> on April 26, 2017, ICANN finally updated the Requester on the status of Request 16-3. The Requester received a letter from ICANN BGC Chair Chris Disspain indicating that Request 16-3 was “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>21</sup>

## 8.2 The DIDP Request

In response to this new information regarding the delay, on May 18, 2017, Arif Ali, on behalf of the Requester, filed the DIDP Request, in relation to the .GAY CPE.<sup>22</sup> The reason for

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<sup>19</sup> See Exhibit 9, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>20</sup> See Exhibit 10, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; Exhibit 12, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 14, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 13, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

<sup>21</sup> See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>22</sup> Exhibit 15, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

this request is twofold. *First*, the Requester sought to “ensure that information contained in documents concerning ICANN’s operational activities, within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>23</sup> *Second*, the Requester, like other gTLD applications, sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”<sup>24</sup> The Requester sought this information because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”<sup>25</sup>

As a result of this dearth of information from ICANN, the Requester made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, which are identified in **Question 3** above. The Requester concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”<sup>26</sup>

Prior to issuing its response to the DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to the DIDP Request.<sup>27</sup> ICANN explained that:

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

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

<sup>27</sup> Exhibit 16, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.<sup>28</sup>

No other information was provided to the Requester regarding the CPE Review Process at issue in its Request until ICANN issued its formal response to the DIDP Request on June 18, 2017.<sup>29</sup>

In response to ICANN's update on the CPE Review Process, and the lack of any additional information, the Requester sent ICANN a joint letter with DotMusic on June 10, 2017. The letter stated, *inter alia*, that:<sup>30</sup>

ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection." This is troubling for several reasons.

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<sup>28</sup> *Id.*

<sup>29</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>30</sup> Exhibit 17, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-leeve-10jun17-en.pdf>.

*First*, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

*Second*, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”

Accordingly, to ensure the integrity of FTI’s review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017.

### **8.3 ICANN’s Response to the Request**

However, on June 18, 2017, ICANN responded to the DIDP Request. ICANN issued a

response that provided the same information that had already been given to the Requester regarding the BGC's decision to review the CPE Process and to hire FTI in order to conduct an independent review.<sup>31</sup> ICANN further denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN's responses to these requests are as follows:

Request No. 1: All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"

*As stated in ICANN's Response to DIDP Request 20170505-1 that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:*

- *Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.*
- *Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.*
- *Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.*

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<sup>31</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

- *Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.*<sup>32</sup>

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

*ICANN provided the same response as for Item 1.*<sup>33</sup>

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

*ICANN provided the same response as for Item 1.*<sup>34</sup>

Request No. 8: The materials provided to the evaluator by the EIU;

*ICANN provided the same response as for Item 1.*<sup>35</sup>

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

*While ICANN provided a list of materials that it provided FTI, but also determined that the internal “documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previous submitted by dotgay.”*<sup>36</sup>

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.<sup>37</sup>

*ICANN provided the same response as for Item 1.*<sup>38</sup>

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

<sup>33</sup> *Id.*

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

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>38</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy as described in **Question 6** above.

**9. What are you asking ICANN to do now?**

The Requester asks ICANN to disclose the documents requested under Request Nos. 1-3, 8, 9, and 13.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, the Requester is a community applicant for .GAY and the organization that issued the DIDP Request to ICANN. It is materially affected by ICANN's decision to deny its Request for documents, especially since its gTLD application is at issue in the underling Request. And, further, the community it represents – the gay community – is materially affected by ICANN's failure to disclose the requested documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

This is not applicable.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



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Arif Hyder Ali

June 30, 2017

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Date

# **Exhibit 1**

To: Arif Ali on behalf of dotgay LLC

Date: 18 June 2017

Re: Request No. 20170518-1

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Thank you for your request for documentary information dated 18 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (dotgay). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the Review):

1. All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports," and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm ("the evaluator") undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
12. The most recent estimates provided by the evaluator for the completion of the investigation; and

13. All materials provided to ICANN by the evaluator concerning the Review

## Response

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (See *id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (See Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. (See Letter from Chris Disspain to Concerned Parties, 26 April 2017,

<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; see also, Minutes of BGC 18 October 2016 Meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en.>)

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, ICANN undertook the process to find the most qualified evaluator for the review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

#### Items 1, 2, 3, 8, and 13

Items 1, 2, 3, 8, 9, and 13 seek the disclosure of overlapping categories of documents relating to the Review. Specifically, these items request the following:

- Documents relating to "ICANN's request to the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports" (Item 1);
- "[D]ocuments from the EIU provider to ICANN including but not limited to: (a) ICANN's request for 'the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,' and

(b) all communications between the EIU and ICANN regarding the request” (Item 2);

- “[D]ocuments relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation” (Item 3);
- Materials provided to the evaluator by the EIU (Item 8); and
- Materials provided to ICANN by the evaluator concerning the Review (Item 13).

As stated in ICANN’s [Response to DIDP Request 20170505-1](#) that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

#### Items 4, 5, 6, 7

Items 4 through 7 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 4), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 5), the date of appointment (Item 6), and the terms of instructions provided to the evaluator (Item 7). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive

conflicts check related to the ICANN organization, the CPE provider, ICANN's outside counsel, and all the parties that underwent CPE.

#### Item 9

Item 9 seeks the disclosure of "materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board." As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>
- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previously submitted by dotguy. Rather than repeating those here, see Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>. The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing.

#### Item 10

Item 10 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application.

#### Items 11

Item 11 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 7 and 9. The information responsive to the overlapping items has been provided in response to Items 7 and 9 above.

#### Item 12

Item 12 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

#### **About DIDP**

ICANN’s DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# **Exhibit 2**

ARIF HYDER ALI

Contact Information Redacted

18 May 2017

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning  
Community Priority Evaluation for .GAY Application ID 1-1713-23699**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by dotgay LLC ("dotgay") in relation to ICANN's .GAY Community Priority Evaluation ("CPE"). The .GAY CPE Report<sup>1</sup> found that dotgay's community-based Application should not prevail. Dotgay has provided ICANN with numerous independent reports identifying dotgay's compliance with the CPE criteria, as well as the human rights concerns with ICANN's denial of dotgay's application.<sup>2</sup>

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.<sup>3</sup> In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's*

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<sup>1</sup> .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>

<sup>2</sup> See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>

<sup>3</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

*Documentary Information Disclosure Policy (DIDP) Requests.*<sup>4</sup> According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>5</sup> We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

### A. Context and Background

Dotgay submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly a year has passed since dotgay delivered a presentation to the Board Governance Committee (the "BGC").<sup>6</sup> Dotgay has sent several letters to ICANN noting that ICANN's protracted delays in reaching a decision and ICANN's continued lack of responsiveness to dotgay's inquiries about the status of dotgay's request represent a violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"<sup>7</sup> and that the BGC may have requested from the CPE provider "the materials and research

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<sup>4</sup> Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>5</sup> *Id.*

<sup>6</sup> <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf>; See also *dotgay's* powerpoint presentation:

<sup>7</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>8</sup>

However, ICANN has not provided *any* details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Other community applicants have specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.<sup>9</sup> Dotgay endorses and shares those concerns which equally affect dotgay, and has already requested a full explanation.<sup>10</sup>

Dotgay has received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:<sup>11</sup>

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but

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<sup>8</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>9</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

<sup>10</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, 12 March 2017, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>

<sup>11</sup> Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Similarly, we received a letter from ICANN's attorney, Jeffrey A. LeVee, on 15 May 2017 purporting to provide a "status update on Reconsideration Request 16-3. . . ." <sup>12</sup> According to Mr. LeVee's letter:

As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials.

Accordingly, both the BGC Letter and Mr. LeVee's letter fail to provide *any* meaningful information besides that there is a review underway and that the RR is on hold.

## **B. Documentation Requested**

The documentation requested by dotgay in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway."<sup>13</sup> Further, dotgay requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

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<sup>12</sup> Letter to Arif H. Ali from Jeffrey A. LeVee, dated May 15, 2017

<sup>13</sup> Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

1. All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”<sup>14</sup>
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm (“the evaluator”) undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

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<sup>14</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>15</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

12. The most recent estimates provided by the evaluator for the completion of the investigation; and

13. All materials provided to ICANN by the evaluator concerning the Review

dotgay reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

### **C. Conclusion**

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,



Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

# **Exhibit 3**

## Response to Documentary Information Disclosure Policy Request

To: Bart Lieben on behalf of dotgay LLC

Date: 21 October 2015

Re: Request No. 20151022-1

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Thank you for your Request for Information dated 22 October 2015 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers' (ICANN's) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (Requester). For reference, a copy of your Request is attached to the email forwarding this Response.

### **Items Requested**

Your Request seeks documentary information relating to the second Community Priority Evaluation (CPE) of dotgay LLC's application for the .GAY gTLD (Application ID: 1-1713-23699), which was completed and for which a CPE Report was issued on 8 October 2015. Specifically, you request the disclosure of:

- 1) policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered "policy" under ICANN by-laws;
- 2) internal reports, notes, (weekly) meeting minutes drawn up by or on behalf of ICANN, the Community Priority Panels, and other individuals or organizations involved in the Community Priority Evaluation in relation to the Application;
- 3) detailed information on the evaluation panels that have reviewed Requester's Application during the first CPE that was conducted in 2014, as well as the evaluation panels that have conducted the second CPE in 2015, including the names and respective positions of the members of the evaluation panels;
- 4) detailed information in relation to (i) the information reviewed, (ii) criteria and standards used, (iii) arguments exchanged, (iv) information disregarded or considered irrelevant, and (v) scores given by each individual Community Priority Evaluation panel member in view of each of the criteria set out in the Applicant Guidebook, and more in particular:

#### **I. In relation to the criterion "Nexus"**

- 5) which information, apart from the information contained in the Application, has been used by the CPE Panel in order to determine that the word "gay" "does not identify or match the name of the community as defined in the Application,

nor is it a well-known short-form or abbreviation of the community”, notwithstanding the fact that public references to this “catch-all” or “umbrella” term made by reputable organizations prove otherwise;

6) whether, in considering that individuals who qualify as transgenders, intersex or “allies” are not deemed to be members of the community as defined by the Application, whereas various national, international and supranational organizations such as Parents, Families, and Friends of Lesbians and Gays (PFLAG) and Children of Lesbians and Gays Everywhere (COLAGE), both of which are also endorsing the Requester’s Application for the .GAY gTLD,<sup>3</sup> are clearly being recognized as supporting the same causes and endorsing the same values as expressed by the “inner circle” of members of this community, especially since they are closely linked to the thematic remit the community has;

7) based on the CPE Report, it seems that the EIU assumed that an “ally” necessarily would be an individual, notwithstanding various statements Requester has made to the contrary, for instance in the context of its initial Reconsideration Request. Therefore, Requester would like to obtain insights into the definition or concept used by the EIU in order to determine what an “ally” is;

8) in relation to the above: which information, statistics, etc. and criteria to evaluate and weigh the importance of such information have been used in determining that transgenders, intersex, or “allies” would be “substantially” overreaching the term “gay”;

9) why, considering the fact that the CPE Panel did not provide passing scores in relation to Requester’s answers in relation to the “Nexus between Proposed String and Community” and “Community Endorsement” aspects of the Application, the CPE Panel or ICANN has not reached out to the Requester in the form of Clarifying Questions.

## **II. In relation to the criterion “Community Endorsement”:**

10) which letters of endorsement and/or support have been considered and verified by the CPE Panel in making its Determination, bearing in mind the fact that the BGC has determined that the EIU has made a process error in the context of the first CPE that was performed in 2014. The information provided in the second CPE Report does not allow Requester to distinguish the letters that have been provided by Requester in the context of the Application from the letters that have been published on ICANN’s correspondence page or through other means since the publication of the first CPE Report;

11) which criteria and/or standards have been used by the CPE Panel in order to determine which group is “of relevance” in relation to the organizations, companies and individuals that have provided letters of endorsement and/or support in relation to the Application;

12) why, although the CPE Panel has recognized that Requester “possesses documented support from many groups with relevance”, only the support of “one group of relevance” has been taken into consideration by the CPE Panel;

13) what were the criteria and standards that have been used by the Panel in making such distinction and coming to such determination;

14) bearing in mind the previous question, why the CPE Panel has come to a different assessment in relation to the standing of ILGA expressed by the Expert Determination provided by the ICDR, which has been acknowledged and endorsed by ICANN in dismissing an official complaint lodged before the ICDR by Metroplex Republicans of Dallas, in which the Requester prevailed;

15) which scores or evaluations have been given to the organizations, companies and individuals that have provided letters of endorsement and/or support in relation to the Application against such criteria and/or standards for each of the organizations, companies and groups referred to in the Application and the CPE Report;

16) if no particular additional criteria and/or standards have been utilized by the CPE Panel, apart from the ones published in the Applicant Guidebook and the Guidelines published by the CPE Panel, a detailed overview of the arguments that have been brought forward and have been adopted or acknowledged by the CPE Panel for not considering the letters of support and/or endorsement from other groups, organizations, companies and individuals;

17) which independent research has been performed by the CPE Panel and how the results of such research have been taken into account by the CPE Panel in the scoring they have applied. Considering the wide endorsement obtained from various umbrella organizations, national and supranational groups, the Determination makes it clear that only one letter of endorsement from one group considered “relevant” by the CPE Panel has been taken into account.

### **III. In relation to the criterion “Opposition”:**

18) the name, address, and standing of the anonymous organization considered by the CPE Panel;

19) an overview of the staff members, including their names, roles and responsibilities of such organization;

20) the events and activities organized by such organization;

21) which standards and criteria have been used by the CPE Panel in order to determine that such activities had a “substantial” following;

22) the metrics used by ICANN and the Community Priority Evaluation Panels in performing the evaluation; and

23) whether any of the information provided by the Requester to ICANN in relation to potential spurious or unsubstantiated claims made by certain organizations have been taken into account, and – in such event – the reasons for not taking into account such information;

24) in particular, Requester would like to know whether the Community Priority Panel has considered the letter of the Q Center of April 1st, 2015 in which the latter requested the opposition letter of the Q Center to be voided

## Response

The standards governing CPE are set forth in Module 4.2 of the New gTLD Applicant Guidebook (Guidebook), and are available at <http://newgtlds.icann.org/en/applicants/agb>. CPE will occur only if a community-based applicant in contention selects CPE, and after all applications in the contention set have completed all previous stages of the gTLD evaluation process. (*See* Guidebook, § 4.2.) CPEs are performed by independent CPE panels that are coordinated by the Economist Intelligence Unit (EIU), an independent, third-party provider, which contracts with ICANN to perform that coordination role. (*See id.*; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) The CPE panel's role is to determine whether a community-based application meets the community priority criteria. (*See id.*) The Guidebook, the CPE Panel Process Document, and the CPE Guidelines (all of which can be accessed at <http://newgtlds.icann.org/en/applicants/cpe>) set forth the guidelines, procedures, standards and criteria applied to CPEs, and make clear that the EIU and its designated panelists are the only persons or entities involved in the performance of CPEs.

As part of the evaluation process, the CPE panels review and score a community application submitted to CPE against the following four criteria: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement. An application must score at least 14 out of a possible 16 points to prevail in CPE; a high bar because awarding priority eliminates all non-community applications in the contention set as well as any other non-prevailing community applications. (*See* Guidebook at § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.)

To provide transparency of the CPE process, ICANN has established a CPE webpage on the new gTLD microsite, at <http://newgtlds.icann.org/en/applicants/cpe>, which provides detailed information about CPEs. In particular, the following information can be accessed through the CPE webpage:

- CPE results, including information regarding the Application ID, string, contention set number, applicant name, CPE invitation date, whether the

applicant elected to participate in CPE, and the CPE status.  
(<http://newgtlds.icann.org/en/applicants/cpe#invitations>).

- CPE Panel Process Document  
(<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).
- EIU Contract and Statement of Work Information (SOW)  
(<http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>).
- CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).
- Draft CPE Guidelines  
(<http://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf>).
- Community Feedback on Draft CPE Guidelines  
(<http://newgtlds.icann.org/en/applicants/cpe#invitations>).
- Updated CPE Frequently Asked Questions  
(<http://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>).
- CPE Processing Timeline  
(<http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>).

#### Preliminary Statement regarding Request No. 20151022-1

As a preliminary matter, many of the items in the Request do not specify whether the request relates to the first CPE of the Application that was performed in 2014 or the re-evaluation that was performed in 2015. Because you have previously filed a similar DIDP Request on 22 October 2014 seeking documents related to the first CPE, for purposes of this Response, we will interpret the Request to relate to the second CPE, unless otherwise specified in the request.

#### Item No. 1

Item No. 1 seeks “policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process.” This request was previously made and responded to in Request No. 20141022-2. (See Response to Request No. 20141022-2, Item No. 3, *available at* <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.) As noted therein, ICANN has published documentary information responsive to this item on the CPE webpage, including, the CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>), the CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>), Module 4.2 of the Guidebook ([5](http://newgtlds.icann.org/en/applicants/agb/string-</a></p></div><div data-bbox=)

[contention-procedures-04jun12-en.pdf](#)), and CPE Processing Timeline (<http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>). Additionally, since ICANN responded to Request No. 20141022-2, it has published the EIU Contract and SOW (<http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>). Additionally, in response to this DIDP Request, ICANN will provide the email notifications to the EIU with instructions to begin the CPE of dotgay LLC's application for the .GAY TLD that was provided to the EIU in 2014 relating to dotgay's application and the email notification to begin re-evaluation in 2015 that was initiated pursuant to the Board Governance Committee's Determination on Reconsideration Request 14-44.

#### Item Nos. 2, 3, 4

Item Nos. 2, 3 and 4 seek extensive, detailed information regarding CPE Panels, the materials reviewed, the analysis conducted by the CPE Panel during the first CPE conducted in 2014 as well as the re-evaluation in 2015, as well any internal reports, notes, or meeting minutes by ICANN, the CPE Panels and "other individuals or organizations involved in the CPE in relation to the Application." (Request at pg. 2.) To help assure independence of the process, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. The coordination of the CPE Panel, as explained above and in the CPE Panel Process Document, is entirely within the work of the EIU's team. As stated in the CPE Process Document, "[t]he Panel Firm's Project Manager is notified by ICANN that an application is ready for CPE, and the application ID and public comment delivered to the EIU. The EIU is responsible for gathering the application materials and other documentation, including letter(s) of support and relevant correspondence, from the public ICANN website." (See CPE Panel Process Document, Pg. 2, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>.) Thus, except for the notices of commencement of CPE and the public comments submitted on the Application Comments page relating to the, ICANN is not responsible for gathering the materials to be considered by the CPE Panel. As such, ICANN does not have, nor does it collect or maintain, the work papers of the individual CPE panels that may contain the information sought through these items. The end result of the CPE Panel's analysis is the CPE Report, which explains the CPE Panel's determination and scoring, and is available at <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf> and <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

With respect to your request in Item No. 2 for "internal reports, notes, (weekly) meeting minutes drawn up by or on behalf of ICANN, the Community Priority Panels, and other individuals or organizations involved in the Community Priority Evaluation in relation to the Application", this request is vague. It is unclear whether you are seeking internal reports, notes, and weekly meeting minutes relating to the CPEs of the Application or all reports, notes, meeting minutes about the Application in general. To the extent that you are requesting that later, the request is subject to the following DIDP Defined Condition of Nondisclosure:

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; and (iii) complying with which is not feasible.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney client privilege, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

To the extent that you are requesting these document as it relates to the CPEs, ICANN does not maintain internal notes and meeting minutes in the regular course of business and therefore, ICANN has no documents responsive to this request. As for your request for internal ICANN reports, notes, or meeting minutes relating to the CPEs of the Application, such documents are subject to the following DIDP Defined Condition of Nondisclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information subject to the attorney client privilege, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

With respect to Item No. 3, seeking detailed information on the CPE Panels, to help assure independence of the process and evaluation of CPEs, ICANN does not maintain any information on the identity of the CPE Panelists. ICANN (either Board or staff) is not involved with the selection of a CPE panel's individual evaluators who perform the

scoring in each CPE process, nor is ICANN provided with information about who the evaluators on any individual panel may be. ICANN therefore does not have any documentation responsive to this item. The coordination of a CPE panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU's team. (See CPE Process Documents, Pgs. 2 and 4, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>.) The CPE Panel Process Document provides a detailed description of the EIU's experience level, qualifications, EIU evaluators and core team. Specifically, the CPE Panel Process Document states:

The Economist Intelligence Unit (EIU) was selected as a Panel Firm for the gTLD evaluation process. The EIU is the business information arm of The Economist Group, publisher of The Economist. Through a global network of more than 500 analysts and contributors, the EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world's leading provider of country intelligence, the EIU helps executives, governments, and institutions by providing timely, reliable, and impartial analysis.

The evaluation process respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination. Consistency of approach in scoring applications is of particular importance. In this regard, the Economist Intelligence Unit has more than six decades of experience building evaluative frameworks and benchmarking models for its clients, including governments, corporations, academic institutions and NGOs. Applying scoring systems to complex questions is a core competence.

#### **EIU evaluators and core team**

The Community Priority Evaluation panel comprises a core team, in addition to several independent 1 evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit's Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.

The following principles characterize the EIU evaluation process for gTLD applications:

- All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.
- All EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures.
- EIU evaluators are highly qualified, they speak several languages and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.
- Language skills and knowledge of specific regions are also considered in the selection of evaluators and the assignment of specific applications.

(CPE Panel Process Document, Pgs. 1-2,  
<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>.)

Item Nos. 5 through 24

Item Nos. 5 through 24 seek the disclosure of information related to the CPE Panel’s evaluation of criteria, scoring decisions, or underlying analyses. Specifically, Item Nos. 5 through 9 request information related to the Panel’s consideration of the “nexus” criterion. Item Nos. 10 through 17 request information related to the Panel’s consideration of the “community endorsement” criterion. Item Nos. 17 through 24 request information related to the Panel’s consideration of the “opposition” criterion.

As a preliminary matter, the majority of the requests seek information relating to the CPE Panel’s evaluation. It is not clear from these items what documents are being requested, if any. The DIDP is intended to ensure that information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there are compelling grounds for maintaining confidentiality. As these items do not appear to request documents, as written they are not appropriate under the DIDP. Should the Requester wish to amend these items to clarify what documents they are seeking, ICANN will endeavor to respond to such requests.

Notwithstanding the foregoing, to the extent that the Requester is seeking documentary information related to the Panel’s evaluation of the CPE criteria, scoring decisions, or underlying analyses, as noted above, to help assure independence of the process and evaluation of CPEs, ICANN (either Board or staff) is not involved with the CPE Panel’s evaluation of criteria, scoring decisions, or underlying analyses. The EIU is responsible for gathering the application materials and other documentation, including letter(s) of support and relevant correspondence, from the public ICANN website, as well as its

analysis of said materials (See CPE Panel Process Document, Pg. 2, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>.) The end result of the CPE Panel's analysis is the CPE Report, which explains the CPE Panel's determination and scoring, and is available at <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>. Thus, with the exception of the CPE Report, which has been published, ICANN does not have documents that contain the requested information.

The CPE criteria are set forth in Module 4.2.3 of the Guidebook, including the scoring process. (See <http://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>.) The CPE Guidelines provide further clarity around the CPE process and scoring principles outlined in the Guidebook. (See <http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>.) Thus, for those items seeking information regarding the evaluation criteria and scoring applied by the Panel (Item Nos. 8, 11, 12, 13, 15, 16, 17, 21, and 22), the responsive information can be found in the Module 4.2.3 of the Guidebook (<http://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>), the CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>), and the CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

With respect to those items seeking information about which letters of endorsement and/or opposition were considered by the CPE Panel (Item Nos. 10, 18, 19, 20, 22, 23, and 24), letters in support of or in opposition to an application are publicly posted on the application webpage and ICANN's Correspondence webpages. In this instance, letters regarding dotgay LLC's application for .GAY are available at <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>, <https://www.icann.org/resources/pages/correspondence-2012-09-24-en> and <http://newgtlds.icann.org/en/program-status/correspondence>. With respect to the EIU's actions taken to verify, or the EIU's reliance upon, such letters, in accordance with the CPE Panel Process Document the CPE Panel may review documents and communications, including letters of support or opposition, that are publicly available through a number of resources, including, but not limited to: (a) dotgay's application for .GAY available at <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>; (b) the Correspondence webpages available at <https://www.icann.org/resources/pages/correspondence-2012-09-24-en> and <http://newgtlds.icann.org/en/program-status/correspondence>; (c) the Applicant Comment Forum available at <https://gtldcomment.icann.org/comments-feedback/applicationcomment/viewcomments>; (d) the Objection Determinations webpage available at <http://newgtlds.icann.org/en/program-status/odr/determination>; (e) information related to dot gay's Reconsideration Request 14-44 available at <https://www.icann.org/resources/pages/14-44-2014-10-22-en>. (See CPE Panel Process Document at Pg. 2, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>.) As further noted in the CPE Panel Process Document, the EIU reviews ICANN's public correspondence page on a regular basis for recently received

correspondence to assess whether it is relevant to an ongoing evaluation. If it is relevant, the EIU provides the public correspondence to the evaluators assigned to the evaluation of a particular application. (*See id.* at Pg. 5.) ICANN (either Board or staff) is not involved with the CPE Panel’s evaluation of criteria, scoring decisions, or underlying analyses, as such ICANN does. Thus, with the exception of the CPE Report, which has been published, ICANN does not have documents that contain the requested information.

Item No. 14 asks “why CPE Panel has come to a different assessment in relation to the standing of the ILGA expressed by the expert Determination provided by the ICDR.” As noted above this request seeks information, rather than documents, and is not appropriate for the DIDP. Moreover, the Expert Determination provided by the ICDR to which the Requester references relates to a Community Objection filed by Metroplex Republicans of Dallas against dotgay LLC. (*See* <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1713-23699-en.pdf>.) The criteria for Community Objections are set forth in Module 3.5.4, and are not the same standards as CPE.

#### **About DIDP**

ICANN’s DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of the Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at MyICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest because, as we continue to enhance our reporting mechanisms, reports will be posted for public access.

We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

## **Attachment 1**

**Subject:** Application: 1-1713-23699 ready to begin CPE  
**Date:** Monday, May 12, 2014 at 10:51:29 AM Pacific Daylight Time  
**From:** Christopher Bare  
**To:** EIU Designated Confidential Info  
**CC:** Russ Weinstein

Hi EIU Designated Confidential Information

Just wanted to inform you that another application is ready to begin CPE.

Application ID: 1-1713-23699  
String: GAY  
Applicant: dotgay llc  
CPE invite date: 23 April 2014

I have pulled the application comments for this application and placed them in the shared drive under the EIU folder ([//dfs1-lax.ds.icann.org/External-New-gTLD-Prgm/EIU/CPE Application Comment/1-1713-23699\\_Application\\_Comment\\_12MAY14.csv](https://dfs1-lax.ds.icann.org/External-New-gTLD-Prgm/EIU/CPE%20Application%20Comment/1-1713-23699_Application_Comment_12MAY14.csv)).

Note: there are several comments in Arabic, I have forwarded these to our translations team and will get them to you as soon as possible.

There were also several updated letters of support posted to the ICANN correspondence page last week (<http://newgtlds.icann.org/en/program-status/correspondence>). The application detail page also has the original letters submitted with the application (<https://gtldresult.icann.org/applicationstatus/applicationdetails/444>).

Please let me know if any of these need translated.

The New gTLD microsite will be updated to show the application as CPE in progress today or tomorrow.

Thanks  
Chris

**Chris Bare?**  
*GDD Operations Manager*

Email: [Christopher.Bare@ICANN.org](mailto:Christopher.Bare@ICANN.org)

Confidential Contact Information

ICANN?  
12025 Waterfront Drive, Suite 300?  
Playa Vista, CA 90094-2536



## **Attachment 2**

**Subject:** RE: .GAY Reconsideration

**Date:** Tuesday, February 10, 2015 at 3:41:34 PM Pacific Standard Time

**From:** Jared Erwin

**To:** EIU Designated Confidential Information

**CC:** Russ Weinstein, Christopher Bare, EIU Designated Confidential Information

EIU Designated Confidential Information

That is correct. There have been no new comments since 7/7/14, so any additional letters will have to come through correspondence. For sake of the process, I have included a spreadsheet of the comments in the external share drive, dated as of today.

I am still working on getting a response to your other question, but I just want to make sure it's clear that the Panel is free to begin its re-evaluation at this point, now that the comment window has closed. The CPE micro-site (<http://newgtlds.icann.org/en/applicants/cpe>) will be updated by tomorrow morning to show that re-evaluation is in progress.

Thank you and will get back to you with more soon,

Jared

**From:** EIU Designated Confidential Information

**Sent:** February 10, 2015 15:22

**To:** Jared Erwin

**Cc:** Russ Weinstein; Christopher Bare; EIU Designated Confidential Information

**Subject:** Re: .GAY Reconsideration

Thanks, Jared. Unless we get any more from you, then, I'll assume there are no new comments to consider. Same will of course be the case for attachments which have not changed since the initial application. In that case, the only channel for additional potentially relevant letters of support or opposition will be the correspondence.

Thanks,

EIU Designated Confidential Information

On Tue, Feb 10, 2015 at 10:49 AM, Jared Erwin <[jared.erwin@icann.org](mailto:jared.erwin@icann.org)> wrote:

EIU Designated Confidential Information

To your second question: yesterday was the last day for comments/correspondence. Today I was planning on sending you the latest comments. I don't think there are any new ones, though.

As to your first question, I'll try and get an answer/clarification for you as soon as possible.

Thank you!

Jared

EIU Designated Confidential Information

**From:**

**Sent:** February 10, 2015 10:37

**To:** Jared Erwin; Russ Weinstein; Christopher Bare; EIU Designated Confidential

**Subject:** .GAY Reconsideration Information

Hi All,

I remembered as soon as we ended our call that I had a couple questions about this. First off, as per our discussion last week, we are considering dotGay LLC's reconsideration request as well as ICANN's response and any related materials (annexes, etc.) to be now "a part" of the application itself. Can you clarify exactly what that means? In other words, in several areas of dotGay's reconsideration request, they take issue with specific arguments that the CPE Panel made about certain issues - most of them in fact. As you know, ICANN did not rule favorably on any of their responses to the Panel's decisions (with the exception of the one about verification of letters), but nevertheless these arguments are now to be considered part of their application. The problem is that their arguments against the Panel's conclusions definitely verges on re-writing their initial application document. For example, information about Authenticating Partners, a key part of the Delineation section, is presented in a new light and in terms not used in the application document itself. How are our evaluators to consider such information that appears to be revised or differ to some extent from the application document?

Second, Jared, I believe today was the close of the 14-day comment window, is that correct? I just want to make sure we know when we have the last piece of incoming support/opposition materials to deal with.

Thanks.

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## **Attachment 3**

**Subject:** RE: .GAY Reconsideration

**Date:** Wednesday, February 25, 2015 at 5:13:45 PM Pacific Standard Time

**From:** Jared Erwin

**To:** EIU Designated Confidential Information, Russ Weinstein, Christopher Bare, EIU Designated Confidential Information

EIU Designated Confidential Information

I have some feedback for you on this question. Sorry again for the long delay in responding.

- 1) Our intention was to impress upon the panel and evaluators that the reconsideration request materials should be used to *inform* the evaluation, but it should not be *part* of the application. The materials should merely be considered relevant, much in the same way that an objection determination may also be considered relevant and inform the panel's understanding of the community. Here the materials may also inform the panel on the "landscape" of the proposed TLD, community, and the applicant.
- 2) Regarding the fact that this then may create conflicting information, ICANN is of the opinion that this might require a CQ.

Hopefully this is helpful. Let me know if you have any other questions.

Best,  
Jared

**From:** EIU Designated Confidential Information

**Sent:** February 10, 2015 10:37

**To:** Jared Erwin; Russ Weinstein; Christopher Bare; EIU Designated Confidential Information

**Subject:** .GAY Reconsideration

Hi All,

I remembered as soon as we ended our call that I had a couple questions about this. First off, as per our discussion last week, we are considering dotGay LLC's reconsideration request as well as ICANN's response and any related materials (annexes, etc.) to be now "a part" of the application itself. Can you clarify exactly what that means? In other words, in several areas of dotGay's reconsideration request, they take issue with specific arguments that the CPE Panel made about certain issues - most of them in fact. As you know, ICANN did not rule favorably on any of their responses to the Panel's decisions (with the exception of the one about verification of letters), but nevertheless these arguments are now to be considered part of their application. The problem is that their arguments against the Panel's conclusions definitely verges on re-writing their initial application document. For example, information about Authenticating Partners, a key part of the Delineation section, is presented in a new light and in terms not used in the application document itself. How are our evaluators to consider such information that appears to be revised or differ to some extent from the application document?

Second, Jared, I believe today was the close of the 14-day comment window, is that correct? I just want to make sure we know when we have the last piece of incoming support/opposition materials to deal with.

Thanks  
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# **Exhibit 4**

## Reconsideration Request

**1. Requester Information**

**Name:** dotgay LLC

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Counsel:** Bart Lieben – Contact Information Redacted

**2. Request for Reconsideration of (check one only):**

Board action/inaction

Staff action/inaction

**3. Description of specific action you are seeking to have reconsidered.**

On February 1<sup>st</sup>, 2016, ICANN published the Determination of the Board Governance Committee (BGC) in relation to Requester's Reconsideration Request 15-21 (hereinafter: the "Second BGC Determination").

On the basis of the arguments set out in the Second BGC Determination, *"the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21."*

**4. Date of action/inaction:**

February 1<sup>st</sup>, 2016.

**5. On what date did you become aware of the action or that action would not be taken?**

February 2<sup>nd</sup>, 2016.

**6. Describe how you believe you are materially affected by the action or inaction:**

Requester is the applicant for the community-based gTLD .GAY, (Application ID: 1-1713-23699, Prioritization Number: 179; see

<https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>) (hereinafter referred to as the “Application”).

Requester has elected to participate in the Community Priority Evaluation (“CPE”) in accordance with the provisions set out in the Applicant Guidebook.

On October 7, ICANN published the CPE Report that has been drawn up by the EIU, which states that the Requester’s application for the .GAY gTLD *“did not prevail in Community Priority Evaluation”*.

Despite having invoked ICANN’s Accountability Mechanisms on various occasions, *“the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21.”*

Therefore, the Requester is now facing contention resolution with three other applicants for the same string *“through the other methods as described in Module 4 of the Applicant Guidebook”*, requiring Requester to – ultimately – resolve such contention directly with the other applicants for the .GAY gTLD. Such contention resolution may include the participation in a “last resort” auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the EIU Determinations had been developed in accordance with ICANN’s standards, in particular those set out in the Applicant Guidebook.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

Considering the fact that the .GAY gTLD, as contemplated by Requester, intends to be operated to the benefit of and as a safe haven on the internet for a wide variety of members of the gay community, our current and future members and endorsers will be adversely affected if the .GAY gTLD would be awarded to a registry operator that turns it into an unrestricted extension and does not necessarily have the public interests in mind for the community as a whole and the community members it wishes to serve.

Given the fact that gays are still considered a vulnerable group in many countries, the intention of reserving a specific zone on the Internet dedicated to the gay community will promote the safety and security of this community and its members.

The fact that not only Requester but the gay community in its entirety is affected by the CPE Report and the Determinations is substantiated by the various letters of support for the Reconsideration Requests that have been submitted to ICANN by the Federation of Gay Games, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, and the National Gay & Lesbian Chamber of Commerce. Requester also refers in this respect to the numerous letters of support received when developing its Application for the .GAY gTLD.

## **8. Detail of Board or Staff Action – Required Information**

### **8.1. Introduction**

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.

In the First Determination, the BGC specified that *“new CPE evaluators (and potentially new core team members) [were] to conduct a new evaluation and issue a new report that will supersede the existing CPE Panel’s Report.”*

Now, the evidence provided by Requester shows that the EIU has appointed at least one evaluator who developed the First EIU Determination in order to develop the Second EIU Determination, which is contrary to the instructions by the BGC.

### **8.2. The Second BGC Determination**

Section C of the Second BGC Determination reads as follows:

*“The Requester contends that reconsideration is warranted because “it appears that both during the first and second CPE, the EIU appointed the same evaluator for performing the new CPE,” in contravention of the BGC’s Determination on Request 14-44. However, this argument is inaccurate. The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU. Moreover, the identities of CPE evaluators are confidential. ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and replaced one core team member for the administration of the Second CPE.” (emphasis added)*

### **8.3. The “CPE Panel Process Document”**

On August 6, 2014, ICANN published the Economist Intelligence Unit’s Process documentation for Community Priority Evaluation in view of providing

*“transparency of the panel’s evaluation process”.*<sup>1 2</sup>

According to this CPE Panel Process Document:

*“The Community Priority Evaluation panel comprises a core team, in addition to several independent evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit’s Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.”<sup>3</sup> (emphasis added)*

The CPE Panel Process Document describes the CPE Evaluation Process as follows:

*“The EIU evaluates applications for gTLDs once they become eligible for review under CPE. The evaluation process as described in section 4.2.3 of the Applicant Guidebook and discussed in the CPE Guidelines document is described below:*

*[...]*

*As part of this process, one of the two evaluators assigned to assess the same string is asked to verify the letters of support and opposition. (Please see “Verification of letter(s) of support and opposition” section for further details.)”<sup>4</sup> (emphasis added)*

Furthermore, on page 5 of the CPE Panel Process Document, the EIU has described the process for “Verification of letter(s) of support and opposition”, which reads as follows:

*“As part of this CPE evaluation process, one of the two evaluators assigned to assess the same string verifies the letters of support and opposition. This process is outlined below:”*

*[...]*

*“For every letter of support/opposition received, the designated evaluator assesses both the relevance of the organization and the validity of the documentation. Only one of the two evaluators is responsible for the letter*

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<sup>1</sup> See <https://newgtlds.icann.org/en/applicants/cpe>, § CPE Resources.

<sup>2</sup> See <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf> for the actual CPE Panel Process Document.

<sup>3</sup> CPE Panel Process Document, Page 2.

<sup>4</sup> CPE Panel Process Document, Page 2, §CPE Evaluation Process, third bullet.

*verification process.”*

And:

*“To provide every opportunity for a response, the evaluator regularly contacts the organization for a response by email and phone for a period of at least a month.”*

#### **8.4. The EIU made a process error in allowing a third person, not even a core team member, and certainly not an “independent evaluator” to perform the verification of the letters of support and opposition**

Bearing in mind the confirmation by the BGC that the “*CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements*”, and that “*the CPE Materials are entirely consistent with the Guidebook*”, the BGC confirmed – apparently on the basis of information ICANN does not want to see independently verified – that:

*“The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU.”*

Now, considering the fact that the CPE Process Document – which is considered by the BGC to be “*consistent with*” and “*strictly adheres to the Guidebook’s criteria and requirements*”, it is clear that the verification of the letters should have been performed by an independent evaluator (as emphasized in §8.2 above), and not by someone “*responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU*”.

It is therefore clear that, according to the CPE Panel Process Document, the point of contact for organizations had to be an evaluator. Also, the verification of the letters had to be performed by an evaluator.

Based on the statement contained in the last BGC Determination, it is clear that the BGC confirmed that the contact person for organizations was not an evaluator, and the letters of have not been verified by an evaluator.

In any case, it is obvious that – when reviewing the Second BGC Determination in light of the Applicant Guidebook and the CPE Panel Process Document –

previously defined processes and policies have not been followed, regardless of whether one sees the Applicant Guidebook and the CPE Panel Process Document as defining the same process, or that the one complements the other.

### **8.5. The BGC rejected Requester’s arguments that the CPE Materials imposed additional requirements than the ones contained in the New gTLD Applicant Guidebook**

In the context of its First and Second Reconsideration Requests, Requester claimed that the EIU was not entitled to develop the CPE Materials in so far and to the extent they imposed more stringent requirements than the ones set forth by the Applicant Guidebook. Furthermore, Requester contended that the EIU’s use of these CPE Materials violated the policy recommendations, principles and guidelines issued by the GNSO relating to the introduction of new gTLDs.<sup>5</sup>

Nonetheless, the BGC confirmed in the Second BGC Determination that:

- *“none of the CPE Materials comprise an addition or change to the terms of the Guidebook;”<sup>6 7</sup>*
- *“The CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements”;*<sup>8</sup>
- *“the CPE Materials are entirely consistent with the Guidebook”.*<sup>9</sup>

One of the key arguments put forward by the BGC was that Requester should have challenged the development and implementation of the CPE Materials earlier, in particular *“within 15 days of the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action”.*

The BGC concluded that:

- *“[...] nothing about the development of the CPE Materials violates the GNSO policy recommendations or guidelines relating to the introduction of new gTLDs as the Requester has suggested.”; and*
- *“no reconsideration is warranted based on the development or use of the CPE Materials, because any such arguments are both time-barred and without merit.”<sup>10</sup>*

Requester notes that the Applicant Guidebook does not include the concept of a

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<sup>5</sup> Second BGC Determination, page 11.

<sup>6</sup> The Second BGC Determination defines the term “CPE Materials” as “(1) the EIU’s CPE Panel Process Document; (2) the CPE Guidelines; (3) ICANN’s CPE Frequently Asked Questions page, dated 10 September 2014 (FAQ Page); and (4) an ICANN document summarizing a typical CPE timeline (CPE Timeline).”

<sup>7</sup> Second BGC Determination, page 12.

<sup>8</sup> *Ibid.*

<sup>9</sup> Second BGC Determination, footnote 34.

<sup>10</sup> Second BGC Determination, page 14.

“core team” that is appointed in the context of CPE. In fact, the Applicant Guidebook only refers to a “Community Priority Panel” that is appointed by ICANN in order to perform CPE.<sup>11</sup>

Therefore, the CPE Panel Process Document introduces a concept that has not been included in the Applicant Guidebook, which only refers to “evaluators”.

Indeed, according to the CPE Panel Process Document, each application is evaluated by seven individuals, being two independent evaluators and five core team members.

The fact that the BGC confirmed that, in addition to the seven individuals, an eight person has contributed to developing the CPE Determinations, being a “*person [...] responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU*”, can only lead to the following conclusions:

- the CPE Panel Process Document provides for a process and composition of a team that is different from what the Applicant Guidebook states (being only a “Community Priority Panel” that performs CPE);

OR

- the team that has been composed by the EIU in order to perform CPE for Requester’s Application does not have the composition that has been defined in the Applicant Guidebook nor in the CPE Panel Process Document.

## **8.6. Conclusion**

For the reasons set out above, Requester is of the opinion that ICANN and the EIU have not respected the processes and policies:

- contained in the Applicant Guidebook;
- contained in the CPE Materials;
- relating to openness, fairness, transparency and accountability as set out above, and even have carried out the CPE for Requester’s Application in a discriminatory manner.

Indeed, when developing the Second BGC Determination, the BGC should, on the basis of the arguments and facts set out above, have confirmed:

- that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator, as

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<sup>11</sup> See Applicant Guidebook, 4-8.

prescribed by this CPE Panel Process Document, but by someone else (a “core team member” or someone “responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU”; or

- that the CPE Panel Process Document *does* define and describe a process that is more stringent than the one set out in the Applicant Guidebook, which does not require the independent evaluator perform such verification of letters of support and objection.

In the first case, the process followed by the EIU would be in direct contradiction with the processes it has designed itself and, moreover, would be contrary to the First BGC Determination, which required the EIU to appoint a new evaluation panel for performing CPE.

In the second case, the BGC has erred in confirming that “*none of the CPE Materials comprise an addition or change to the terms of the Guidebook*”.

Setting aside any possible arguments regarding possibly unfounded time-barred allegations, it is obvious that the outcome of a process is often, if not always, determined by the fact whether the correct process has been followed. In any event, the above facts clearly show that the EIU and – by extension ICANN – have not.

### **8.7. Request for a Hearing**

Bearing in mind the elements set out above, Requester respectfully submits the request to organize a hearing with the BGC in order to further explain its arguments and exchange additional information in this respect.

### **8.8. Reservation of Rights**

Notwithstanding the fact that Requester only relates to the fact that the EIU and ICANN have not followed due process in developing the Second CPE Determination, Requester is submitting this Reconsideration Request with full reserve of its rights, claims and defenses in this matter, whether or not stated herein.

## **9. What are you asking ICANN to do now?**

Considering the information and arguments included in this Reconsideration Request, Requesters request ICANN to:

- (i) acknowledge receipt of this Reconsideration Request;

- (ii) determine that the Second BGC Determination is to be set aside;
- (iii) invite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;
- (iv) determine that, given the circumstances, any and all of its requests set out in §9 of Requester's Second Reconsideration Request be awarded, which are incorporated herein by reference.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

Requester has standing in accordance with:

- (1) ICANN's By-Laws, considering the fact that Requester has been adversely affected by the Second BGC Determination; and
- (2) ICANN's Top-Level Domain Application Terms and Conditions.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

- Yes
- No

**11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.**

N/A

**Do you have any documents you want to provide to ICANN?**

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to be 'Bart Lieben', with a large, sweeping flourish extending to the right.

February 17, 2016

Bart Lieben

Date

Attorney-at-Law

# **Exhibit 5**

**ARIF HYDER ALI**

Contact Information Redacted  
Contact Information Redacted Direct  
Fax

November 15, 2016

**VIA E-MAIL**

ICANN Board of Directors  
c/o Mr. Steve Crocker, Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Council of Europe Report DGI (2016)17 - .GAY TLD**

Dear Chairman Crocker and Board of Directors,

dotgay LLC (“**dotgay**”) writes to request that the ICANN Board (“**Board**”) add to the materials it is reviewing in connection with dotgay’s application the Council of Europe’s 4 November 2016 Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (“**CoE Report**”).<sup>1</sup> The CoE is Europe’s leading human rights organization, with 47 member states (28 of which are also members of the European Union),<sup>2</sup> all of which are members of the European Convention on Human Rights. The CoE has observer status within ICANN’s Governmental Advisory Committee (GAC).

The CoE Report, standing alone, and certainly when taken together with the following materials, makes it abundantly clear that the EIU erred in its evaluation of dotgay’s application and that the Board is obligated to grant community priority status to dotgay’s application for the .GAY TLD:

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<sup>1</sup> See Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>2</sup> See <http://www.coe.int/en/>.

- (i) the former ICANN Ombudsman Chris LaHatte's Report;<sup>3</sup>
- (ii) the ICC Expert's Determination regarding .LGBT;<sup>4</sup>
- (iii) the Expert Opinion of Professor William N. Eskridge of Yale Law School;<sup>5</sup>
- (iv) the Expert Opinion of Professor M.V. Lee Badgett, Professor of Economics and Director of the School of Public Policy at the University of Massachusetts;<sup>6</sup> and
- (v) the Dot Registry IRP Decision.<sup>7</sup>

The CoE Report identifies a long list of human rights principles, which the Board cannot avoid giving effect in evaluating dotgay's application. The Report amply supports the conclusions reached by the ICANN Ombudsman and the two independent expert reports submitted to ICANN on 13 September and 17 October 2016.

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<sup>3</sup> Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html> (determining that “[t]he board should grant the community application status to the applicant . . . [and] comply [ ] with its own policies and well established human rights principles”).

<sup>4</sup> *The International Lesbian Gay Bisexual Trans and Intersex Association v. Afiliads Limited*, ICC Case No. EXP/390/ICANN/7, Expert Determination (16 Nov. 2013), ¶ 22, <https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf> (finding that the .GAY application “is designed to serve the gay community”).

<sup>5</sup> Letter to ICANN Board from A. Ali, enclosing the Eskridge Report (13 Sept. 2016), pp. 2-3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf> (explaining how Prof. Eskridge shows that “the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement”).

<sup>6</sup> Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), pp. 1-2, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf> (explaining how Prof. Badgett demonstrates that “withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community”).

<sup>7</sup> *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> (holding that the Board Governance Committee (“BGC”) “must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination”).

## The CoE Report Applies Human Rights Principles to .GAY

The CoE Report affirms that human rights principles apply to ICANN.<sup>8</sup> The Report's discussion of human rights and community applications shows that the Board should independently approve dotgay's .GAY application. To assist the Board with its analysis of the CoE Report, we attach particularly relevant excerpts of it, the import of which should be self-evident:

### ICANN Must Protect Public Interest Values through Community TLDs

- Community TLDs should protect “vulnerable groups or minorities. Community-based TLDs should take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They should also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.”<sup>9</sup>
- Community TLDs should protect “[p]luralism, diversity and inclusion. ICANN and the GAC should ensure that ICANN’s mechanisms include and embrace a diversity of values, opinions, and social groups and avoids the predominance of particular deep-pocketed organisations that function as gatekeepers for online content.”<sup>10</sup>

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<sup>8</sup> Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>9</sup> *Id.*, p. 34.

<sup>10</sup> *Id.* (emphasis added).

### **ICANN's Commitment to Human Rights Requires that It Support Community gTLDs**

- The Right to Freedom of Expression: “For Internet users at large, domain names represent an important way to find and access information on the Internet. . . . A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. *A community TLD could help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members.* Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas.”<sup>11</sup>
- The Right to Freedom of Assembly and Association: “Community TLDs create space to collectively act, express, promote, pursue or defend a field of common interests. As a voluntary grouping for a common goal, community TLDs facilitate freedom of expression and association and has the potential to strengthen pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.”<sup>12</sup>

### **ICANN's gTLD Program Improperly Fails to Conform with Human Rights Principles**

- The Right to Procedural Due Process: “ICANN's gTLD program, including community-based applications, needs to be based on procedural due process. . . . Clause 6 of the Terms and Conditions sets out that applicants may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to the application. As such, the agreement limits access to court and thus

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<sup>11</sup> *Id.*, p. 19 (emphasis added).

<sup>12</sup> *Id.*, p. 22.

access to justice, which is generally considered a human right or at least a right at the constitutional level.”<sup>13</sup>

- The Right to Non-Discrimination: “The general principle of equality and non-discrimination is a fundamental element of international human rights law. . . . ICANN has been plagued with allegations that its procedures and mechanisms for CBAs that could prioritise their applications over standard applicants have an inherent bias against communities. Allegedly, the standard has been set so high that practically almost no community is able to be awarded priority.”<sup>14</sup>

Through its discussion of these human rights, the CoE Report confirms the ICANN Ombudsman’s determination that ICANN has a commitment to human rights and that dotgay represents a community that “is real, does need protection and should be supported” by awarding dotgay community priority status.<sup>15</sup> It further supports the Expert Opinion of Prof. M.V. Lee Badgett, which states that ICANN should provide a safe space on the Internet for the gay community to engage in economic activity and social change.<sup>16</sup>

The BGC and the EIU failed to uphold these basic human rights when it considered dotgay’s application for the .GAY TLD. In light of the CoE Report’s recent findings, the ICANN Ombudsman’s determination, the expert opinions submitted to ICANN, and the clearly incorrect determination by the EIU, the Board should correct this error by individually considering the .GAY application in accordance with Article 5.1 of the AGB and awarding the .GAY TLD to dotgay.

### **The CoE Report Further Recognizes Problems with the EIU and the CPE Process**

In addition to human rights considerations, the CoE Report confirms the significant problems with the EIU’s CPE of the .GAY gTLD, corroborating the Expert Opinion of

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<sup>13</sup> *Id.*, p. 25.

<sup>14</sup> *Id.*, p. 26.

<sup>15</sup> Ombudsman Report, <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

<sup>16</sup> See Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

Prof. Eskridge of Yale Law School.<sup>17</sup> The EIU clearly made fundamental errors of inconsistency and discrimination in following and applying its guidelines. The CoE Report criticizes the EIU for these inconsistencies, specifically highlighting the following issues with the EIU's consideration of .GAY:

**The EIU's Inconsistent Acts during the CPE Process Raises Issues of Human Rights Violations, Unfairness, and Discrimination<sup>18</sup>**

- “*First*, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. . . . The Guidebook says utmost care has been taken to avoid any ‘double-counting’. . . . However, the EIU appears to double count ‘awareness and recognition of the community amongst its member’ twice.”<sup>19</sup>
- “*Second*, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others. The EIU appears to have been inconsistent in its interpretation of ‘Nexus’ Under Criterion 2 of the CPE process. *The EUI awarded 0 points for nexus to the dotgay LLC application for .GAY on the grounds that more than a small part of the community identified by the applicant (namely transgender, intersex, and ally individuals) is not identified by the applied for string. However, the EIU awarded 2 points to the EBU for nexus for their application for .RADIO, having identified a small part of the constituent community (as identified), for example network interface equipment and software providers to the industry who would not likely be associated with the word RADIO.* There is no evidence provided of the relative small and ‘more than small’ segments of the identified communities

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<sup>17</sup> See Letter to ICANN Board from A. Ali enclosing the Eskridge Report (13 Sept. 2016), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf>.

<sup>18</sup> Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), pp. 9, 45, 49, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>19</sup> *Id.*, p. 49 (emphasis added).

which justified giving a score of 0 to one applicant and 2 to another.”<sup>20</sup>

- “The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a *majority* of the community. . . . ***By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.***”<sup>21</sup>
- “***Another example of inconsistency occurred in the case of the dotgay LLC application for .GAY, where the applicants were penalised because of lack of global support. Global support would be very hard to satisfy by a community that is fighting to obtain the recognition of its rights around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime.***”<sup>22</sup>
- “***Third***, the EIU changed its own process as it went along.”<sup>23</sup>
- “***Fourth***, various parts of the evaluation of the gTLDs are administered by different independent bodies that could have diverging evaluation of what a community is and whether they deserve special protection or not. Such inconsistencies are for example observed between the assessment of community objections and CPE Panels, leading to unfairness. ***An example***

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<sup>20</sup> *Id.*, pp. 49-50 (emphasis added).

<sup>21</sup> *Id.*, p. 51 (emphasis added).

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> *Id.* (emphasis added).

*that was presented concerned the deliberations on the community objection by the International Lesbian Gay Bisexual Trans and Intersex Association to .LBGT which rejected the objection on the grounds that the interests of the community would be protected through the separate community application for the .GAY string. In fact the CPE panel rejected the community application for .GAY largely on the grounds that transsexuals did not necessarily identify as gay. There is therefore an inconsistency between the objections panel and the CPE panel on whether or not transsexuals are or are not part of the wider gay community.”<sup>24</sup>*

- *Fifth*, “[t]here are four sets of criteria that are considered during the CPE process: community establishment, nexus between the proposed string and the community, registration policies and community endorsement. . . . It would seem that the EIU prefers to award full points on 4A[, the Support prong of ‘Community Endorsement,’] for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community.”<sup>25</sup>

### **ICANN Improperly Accepts EIU Determinations without Question and without Possibility of Appeal**

- “The Independent Review Panel decided in the IRP between Dot Registry and ICANN that the ICANN Board (acting through the BGC that decides on Reconsideration Requests) ‘failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfil its

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<sup>24</sup> *Id.*, pp. 51-52 (emphasis added).

<sup>25</sup> *Id.*, p. 57.

transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publicly available the ICANN staff work on which the BGC relied).’ The Panel majority further concluded that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions. By doing so, the Board did not act consistently with its Articles of Incorporation and Bylaws.”<sup>26</sup>

- “ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. Yet the terms of its contract with applicants suggest that the availability of its accountability mechanisms provides an opportunity to challenge any final decision made by ICANN. This is complex in terms of the CPE process as ICANN has avoided any admission that CPE is anything other than an evaluation taken by a third party (the EIU) and asserts that no decision has been taken by ICANN itself. And yet, ICANN relies on that evaluation as a ‘decision’ which it will not question. Therefore, as seen above, the accountability mechanisms which are available to CBAs who have gone through the CPE process are limited to looking only at the EIU’s processes insofar as they comply with the AGB. The lack of transparency around the way in which the EIU works serves merely to compound the impression that these mechanisms do not serve the interests of challengers.”<sup>27</sup>

**The CPE Process does not Conform with ICANN’s Core Principles, including Human Rights Principles**

- “*In his final report dated 27 July 2016, the outgoing Ombudsman Chris LaHatte looked at a complaint about the Reconsideration Process from dotgay LLC.* Here, he took to task the fact that the BGC has ‘a very narrow view of its own jurisdiction in considering reconsideration requests.’ He points out that ‘it has always been open to ICANN to reject an EIU

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<sup>26</sup> *Id.*, p. 60 (quoting *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016)).

<sup>27</sup> *Id.*, p. 64.

recommendation, especially when public interest considerations are involved.’ *As identified by us in this report, Chris LaHatte raises issues of inconsistency in the way the EIU has applied the CPE criteria, and reminds ICANN that it ‘has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency’.* We endorse his view and hope that our report will strengthen the argument behind his words and result in ICANN reviewing and overhauling its processes for community-based applicants to better support diversity and plurality on the Internet.”<sup>28</sup>

- “As with legal texts, one can interpret the documented proof of the alleged validity of CBAs literally or purposively. The EIU Panel has used the method of literal interpretation: the words provided for by the applicants to prove their community status were given their natural or ordinary meaning and were applied without the Panel seeking to put a gloss on the words or seek to make sense of it. When the Panel was unsure, they went for a restrictive interpretation, to make sure they did not go beyond their mandate. However, such a literal interpretation does not appear to fit the role of the Panel nor ICANN’s mandate to promote the global public interest in the operational stability of the Internet. The concept of community was intentionally left open and left for the Panel to fill in.”<sup>29</sup>

As evidenced by these inconsistencies, the EIU clearly failed to “respect[ ] the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB.”<sup>30</sup> The BGC’s own failure to exercise its independent judgment when evaluating the EIU’s CPE in light of these principles, which it must do according to the Dot Registry Declaration, “must be corrected.”<sup>31</sup>

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<sup>28</sup> *Id.*, pp. 69-70 (quoting Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>) (emphasis added).

<sup>29</sup> *Id.*, p. 31.

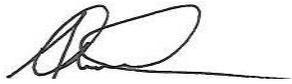
<sup>30</sup> *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34.

<sup>31</sup> Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 60.

**ICANN Must Proceed to Contracting with dotgay for .GAY**

In light of the above considerations, we believe that there are more than sufficient grounds for the Board to act under Article 5.1 of the AGB and award the .GAY TLD to dotgay. The Board should grant dotgay's community priority application without any further delay and proceed to enter into a registry agreement with dotgay, which remains dedicated and enthusiastic about operating the .GAY registry.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arif Hyder Ali', with a long horizontal flourish extending to the right.

Arif Hyder Ali  
Partner

# **Exhibit 6**

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

ICDR Case No. 01 – 14 - 0001 – 5004

In the matter of an Independent Review  
Concerning ICANN Board Action re  
Determination of the Board Governance Committee  
Reconsideration Requests 14-30, 14-32, 14-33 (24 July 2014)

DOT REGISTRY, LLC, for itself and on behalf of The NATIONAL ASSOCIATION OF  
SECRETARIES OF STATE

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

**DECLARATION OF THE INDEPENDENT REVIEW PANEL**

29 July 2016

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

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## I. INTRODUCTION

### A. Internet Corporation for Assigned Names and Numbers (ICANN)

1. ICANN is a nonprofit public-benefit corporation organized under the laws of the State of California. ICANN was incorporated on September 30, 1998. Jon Postel, a computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network ("ARPANET"), which morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations when normal means of communication were unavailable or deemed insecure.

2. Prior to ICANN's creation, there existed seven generic Top Level Domains (gTLDs), which were intended for specific uses on the Internet: *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use; *.org*, intended for the use of non-commercial organizations; *.net*, intended for the use of network related entities; *.edu*, intended for United States higher education institutions; *.int*, established for international organizations; *.gov*, intended for domain name registrations for arms of the United States federal

government and for state governmental entities; and, finally, *.mil*, designed for the use of the United States military.

3. ICANN's "mission," as set out in its bylaws, is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." Bylaws, Art. 1, § 1. ICANN has fulfilled this function under a contract with the United States Department of Commerce.

4. The original ICANN Board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. VI, § 1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VII of the Bylaws.

5. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN Board of Directors began considering the invitation to the general public to operate new gTLDs of its own creation. In 2008, the Board of Directors adopted 19 specific Generic Name Supporting Organization (GNSO) recommendations for the implementation of a new gTLD programs. In 2011 the Board approved the Applicant Guidebook and the launch of a new gTLD program. The application window opened on January 12, 2012, and ICANN immediately began receiving applications.

B. Board Governance Committee (BGC)

6. The Board Governance Committee was created by Charter, approved by the ICANN Board of Directors on October 13, 2012. Among its responsibilities is to consider and respond to reconsideration requests submitted to the Board pursuant to ICANN's Bylaws and to work closely with the Chair and Vice Chair of the Board and with ICANN's CEO. Charter, Sections 1.6 and 2.6, and 2.1.3. At the hearing of this matter, and consistent with the position taken by ICANN before other Independent Review Panels, counsel for ICANN confirmed that the conduct of the BGC was the conduct of the Board for purposes of these proceedings.

7. The BGC is composed of at least three, but not more than 6 voting Board Directors and not more than 2 Liaison Directors, as determined and appointed annually by the Board. Only the voting Board of Directors members shall be voting members of the BGC. Charter, Section 3.

8. A preliminary report with respect to actions taken at each BGC meeting, whether telephonic or in-person, shall be recorded and distributed to BGC members within two working days, and meeting minutes are to be posted promptly following their approval by the BGC. Charter, Section 6. No such preliminary report was produced to the Panel in these proceedings.

C. Dot Registry LLC (Dot Registry)

9. Dot Registry is a limited liability company registered under the laws of the State of Kansas. Dot Registry was formed in 2011 in order to apply to ICANN for the rights to operate five new gTLD strings: *.corp*, *.inc*, *.llc*, *.llp*, and *.ltd*. Dot Registry applied to be the only community applicant for the new gTLD strings *.inc*, *.llc*, and *.llp*. Dot Registry submitted each of its three applications for listed strings on 13 June 2012. Dot Registry submitted these applications for itself and on behalf of the National Association of Secretaries of State (NASS). Dot Registry is an affiliate of the NASS, which is “an organization which acts as a medium for the exchange of information between states and fosters cooperation in the development of public policy, and is working to develop individual relationships with each Secretary of State’s office in order to ensure our continued commitment to honor and respect the authorities of each state.” New gTLD Application Submitted to ICANN by: Dot Registry LLC, String: INC, Originally Posted: 13 June 2012, Application ID: 1-880-35979, Exhibit C-007, Para. 20(b), p. 14 Of 66. For ease of reading, this Declaration shall refer to “Dot Registry” as the disputing party, but the Panel recognizes that Dot Registry and the NASS jointly made the Reconsideration Requests at issue in these proceedings.

10. The mission/purpose stated in its respective applications for the three strings was “to build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically

serve the respective communities of “registered corporations,” “registered limited liability companies,” and/or “registered limited liability partnerships.” Under Dot Registry’s proposal, a registrant would have to demonstrate that it has registered to do business with the Secretary of State of one of the United States in the form corresponding to the gTLD (corporation for *.inc*, limited liability company for *.llc*, and limited liability partnership for *.llp*.)

11. With each of its community applications, Dot Registry deposited an additional \$22,000, so as to be given the opportunity to participate in a Community Priority Evaluation (“CPE”). A community application that passes a CPE is given priority for the gTLD string that has successfully passed, and that gTLD string is removed from the string contention set into which all applications that are identical or confusingly similar for that string are placed. The successful community CPE applicant is awarded that string, unless there are more than one successful community applicant for the same string, in which case the successful applicants would be placed into a contention set.

D. The Economist Intelligence Unit (EIU)

12. The EIU describes itself as “the business information arm of the Economist Group, publisher of the Economist.” “The EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world’s leading provider of country intelligence, the EIU

helps executives, governments and institutions by providing timely, reliable and impartial analysis.” Community Priority Evaluation Panel and Its Processes, at 1.

13. The EIU responded to a request for proposals received from ICANN to undertake to act as a Community Priority Panel. The task of a Community Priority Panel is to review and score community based applications which have elected the community priority evaluation based on information provided in the application plus other relevant information available (such as public information regarding the community represented).” Applicant Guidebook (“AGB”), § 4.2.3. The AGB sets out specific Criteria and Guidelines which a Community Priority Panel is to follow in performing its evaluation. *Id.*

14. Upon its selection by ICANN, the EIU negotiated a services contract with ICANN whereby the EIU undertook to perform Community Priority Evaluations (CPEs) for new gTLD applicants. Declaration of <sup>EIU Contact Information Redacted</sup>  
EIU Contact Information Redacted of the EIU  
(hereinafter <sup>EIU Contact Information Redacted</sup> Declaration”), ¶¶ 1 and 4, at 1 and 2.

15. <sup>EIU Contact Information Redacted</sup> declared that EIU was “not a gTLD decision-maker but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.” <sup>EIU Contact Information Redacted</sup> Declaration, ¶3,

at 2. Further, ICANN confirmed at the hearing that ICANN “accepts” the CPE recommendations from the EIU, a statement reiterated in the Minutes for the BGC meeting considering the subject Reconsideration Requests: “Staff briefed the BGC regarding Dot Registry, LLC’s (‘Requestor’s’) request seeking reconsideration of the Community Priority Evaluation (‘CPE’) Panel’s Reports, and ICANN’s acceptance of those Reports.” (Emphasis added.)

16. Under its contract with ICANN, the EIU agreed to a Statement of Work. Statement of Work No:[2], ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names, March 12<sup>th</sup> 2012 (“EIU SoW”). Under Section 10, Terms and Conditions, supplemental terms were added to the Master Agreement between the parties. Among those terms are the following:

“(ii) ICANN will be free in its complete discretion to decide whether to follow [EIU’s] determination and to issue a decision on that basis or not;

(iii) ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue and the [EIU] shall have no responsibility nor liability to ICANN for any decision issued by ICANN except to the extent the [EIU’s] evaluation and recommendation of a relevant application constitutes willful misconduct or is fraudulent, negligent or in breach of any of {EIU’s} obligations under this SoW;

(iv) each decision and all associated materials must be issued by ICANN in its own name only, without any reference to the [EIU] unless agreed in writing in advance.” EIU SoW, at 14.

17. In order to qualify to provide dedicated services to a defined community, an applicant must undergo an evaluation of its qualifications to serve such community, the criteria for which are set out in the Community Priority Evaluation Guidelines (“CPE Guidelines”). The CPE Guidelines were developed by the Economist Intelligence Unit (“EIU”) under contract with ICANN. According to the EIU, “[t]he CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.” CPE Guidelines Prepared by the EIU, Version 2.0 (“CPE Guidelines”), at 2. In the CPE Guidelines, the EIU states that “the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.” CPE Guidelines, at 22.

18. This message was reiterated in the EIU Community Priority Evaluation Panel and its Processes, where it states that the CPE process “respects the principles of fairness, transparency avoidance of potential conflicts of interest, and non-discrimination. Consistency in approach in scoring applications is of particular importance.” Community Priority Evaluation Panel and its Processes, at 1.

## II. PROCEDURAL HISTORY

### A. Community Priority Evaluation and Reconsideration

19. On June 11, 2014, the EIU issued three Community Priority Evaluation Reports, one for each of the three new gTLDs that are the subject of this

proceeding. In order to prevail on each of its applications, Dot Registry would have to have been awarded 14 out of a possible 16 points per application. In the evaluation of each of its three applications, Dot Registry was awarded a total per application of 5 points. Thus, each of the applications submitted did not prevail.

20. The practical result of this failure to prevail is that Dot Registry would be placed in a contention set for each of the proposed gTLDs with other applicants who had applied for one or more of the proposed gTLDs.

21. On April 11, 2013, Dot Registry submitted three Requests for Reconsideration to the BGC, requesting that the BGC reconsider the denial of Dot Registry's applications for Community Priority.

22. The bases for Dot Registry's requests for reconsideration were the following:

- a. The CPE Panel failed to validate all letters of support of and in opposition to its application for Community Priority status;
- b. The CPE Panel failed to disclose the sources, the substance, the methods, or the scope of its independent research;
- c. The CPE Panel engaged in "double counting," which practice is contrary to the criteria established in the AGB;
- d. The Panel failed to evaluate each of Dot Registry's applications independently;
- e. The Panel failed to properly apply the CPE criteria set out in the guidebook for community establishment, community organization, pre-existence, size, and longevity;
- f. The Panel used the incorrect standard in its evaluation of the nexus criterion;

- g. The failure in determining Nexus, led to a failure in determining “uniqueness.”
- h. The Panel erroneously found that Dot Registry had failed to provide for an appropriate appeals process in its applications;
- i. The Panel applied an erroneous standard to determine community support, a standard not contained in the CPE;
- j. The Panel misstated that the European Commission and the Secretary of State of Delaware opposed Dot Registry’s applications and failed to note that the Secretary of State of Delaware had clarified the comment submitted and that the European Commission had withdrawn its comment.

23. In response to Dot Registry’s Requests for Reconsideration of its applications, on July 24, 2014, The Board Governance Committee (“BGC”) issued its Determination that “[Dot Registry] has not stated grounds for reconsideration.” The BGC’s Determination was based on the failure of Dot Registry to show “that either the Panels or ICANN violated any ICANN policy or procedure with respect to the Reports, or ICANN acceptance of those Reports.” Determination of the Board Governance Committee (BGC) Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014.

B. History of Independent Review Process

24. As all of the party’s substantive submissions and the IRP Panel’s procedural orders are posted on the ICANN web site covering IRP Proceedings (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>), this section will serve only to highlight those that contain significant procedural or substantive rulings.

25. On September 22, 2014, Dot Registry requested Independent Review of the denial of reconsideration of each of its three applications. On October 27, 2014, ICANN filed its Response to Dot Registry's request for Independent Review.

26. On November 19, 2014, Dot Registry requested the appointment of an Emergency Panelist and for interim measures of protection. On November 26, 2014, the emergency panelist, having been appointed, issued Procedural Order No. 1, setting out a schedule for the hearing and resolution of the request for interim measures of protection.

27. On December 8, 2014, ICANN filed a Response to Dot Registry's request for emergency relief.

28. On December 23, 2014, the Emergency Independent Review Panelist issued the Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection. The Order made the following rulings:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP, and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.

4. This Order renders a final decision on [Dot Registry's] Request for emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied

29. The Independent Review Process Panel (the "IRP Panel"), having been duly constituted, issued a total of thirteen procedural orders, in addition to that issued by the Emergency Independent Review Panelist.

All of the orders were issued by the unanimous IRP Panel. The following are descriptions of portions of those orders particularly germane to the present Declaration.

30. On March 26, 2015, the Independent Review Process Panel [the "IRP Panel"] having been duly constituted, the IRP Panel issued an Amended Procedural Order No. 2. Among other matters covered therein, pursuant to its powers under ICDR Rules of Arbitration, Art. 20, 4 ("At any time during the proceedings, the [panel] may order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate") the IRP Panel ordered ICANN to produce to the Panel certain documents and gave each party the opportunity to request of the other additional documents.

31. The order which required production of certain documents to the Panel read as follows:

Pursuant to the Articles of Incorporation and Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") and the International Arbitration Rules and Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process of the International Centre for Dispute

Resolution (“ICDR”), the Panel hereby requires ICANN to produce to the Panel and Dot Registry, LLC (“Dot Registry”) no later than April 3, 2015, all non-privileged communications and other documents within its possession, custody or control referring to or describing (a) the engagement by ICANN of the Economist Intelligence Unit (“EIU”) to perform Community Priority Evaluations, including without limitation any Board and staff records, contracts and agreements between ICANN and EIU evidencing that engagement and/or describing the scope of EIU’s responsibilities thereunder, and (b) the work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry’s Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014, including work done by the EIU at the request, directly or indirectly, of the Board of Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry’s applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board of Governance Committee.

32. In Procedural Order No. 3, issued May 24, 2015, the Panel’s order to ICANN to produce documents was clarified as follows:

The Panel notes that the Panel sought *inter alia* all non-privileged communications and other documents within ICANN’s possession, custody or control referring or describing:

- (a) The engagement by ICANN of the EIU to perform Community Priority Evaluations. That request covers internal ICANN documents and communications, not just communications with the EIU, referring to or describing the subject of the Panel’s request (the engagement to perform Community Priority Evaluations).
- (b) The work done and to be done by the EIU with respect to the Determination of the ICANN board of governance Committee on Dot Registry’s Reconsideration Request. That request again covers internal ICANN documents and communications, not solely communications with EIU, referring to or describing the subject of the Panel’s request (the work done and to be done by the EIU with

- respect to the Determination). As well as the work-product itself in its various draft and final iterations.
- (c) Consideration by ICANN of the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU referring to or describing the subject of the Panel's request (consideration by ICANN of the work performed by the EIU).
  - (d) Acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel's request (both acts done and decisions taken by ICANN with respect to the EIU work).

The Panel notes that in Section 2 of its amended Procedural Order No. 2, material provided by ICANN to the Panel, but not yet to Dot Registry, appears not to include, among other matters, internal ICANN documents and communications referring to or describing the above subject matters that the Panel would have expected to be created in the ordinary course of ICANN in connection with these matters. It may be that the Panel was less than clear in its requests. The Panel requests that ICANN consider again whether the production was fully responsive to the foregoing requests.

The production shall include names of EIU personnel involved in the work contemplated and the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP with respect to Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC), and 14-33 (.LLP), dated July 24, 2024, in that such information may be relevant to the requirements of Sections 2.4.2, 2.4.3, 2.4.3.1, and 2.4.3.2 of Module 2 of the Applicant Guidebook. The Panel expects strict compliance by Dot Registry and its counsel with Paragraph 8 of this Order and the Confidentiality and Non-Disclosure Undertaking procedure set forth therein and in Annex 1 attached hereto.

Procedural Order No. 3 included, among other provisions, a confidentiality provision, which provided in pertinent part:

"Documents exchanged by the parties or produced to the Panel at the Panel's directive which contain confidential information:

- i. May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;
- ii. May not be referenced in any, and any information contained therein must be redacted from any, written submissions prior to posting.

33. In Procedural Order No. 6, issued June 12, 2015, the Panel reiterated its document production order, made express that the BGC was covered by the reference to the “Board,” and required that documents withheld on the basis of privilege be identified in a privilege log. On June 19, 2015, Counsel for ICANN submitted a confirming attestation, the required privilege log, and an additional responsive email. *See. also*, Procedural Order No. 8, issued August 26, 2015, paragraph 3, first sentence.

34. On July 6, 2015, the IRP Panel issued Procedural Order No. 7. That order memorialized the parties’ stipulations that the term “local law” as used in Article 4 of ICANN’s Articles of Incorporation was a reference to California law and that under California law, in the event of a conflict between a corporation’s Bylaws and Articles, the Articles of Incorporation would prevail.

35. In Procedural Order No. 8, “[t]he Panel designate[d] the place of these proceedings as New York, New York.”

36. In Procedural Order No. 12, issued February 26, 2016, the Panel ordered that the hearing would be by video conference and would be limited to seven hours. No live percipient or expert witness testimony would be permitted, and only the witness statements and documents

previously submitted by the parties and accepted by the panel would be admitted. (ICANN had previously submitted one witness declaration, that of <sup>EIU Contact Information Redacted</sup> of the EIU. Dot Registry had previously submitted four witness declarations and one expert witness declaration.) The hearing would consist of arguments by counsel and questions from the Panel. A stenographic transcript of the proceedings would be prepared.

37. On March 29, 2016, a one-day hearing by video conference was held with party representatives and counsel and the Panel present in either Washington, D.C. or Los Angeles, California. Each party presented arguments in support of its case, and the Panel had the opportunity to ask questions of counsel. A stenographic transcript of the proceedings was made. During the hearing, Dot Registry attempted to introduce live testimony from a fact witness. The Panel declined to hear testimony from the proffered witness. Hearing Tr., at p. 42, ll. 11-15. At the conclusion of the hearing, the Panel requested that the parties address specific questions in a post-hearing memorial.

38. On April 8, 2016, the parties filed post-hearing memorials addressing the questions posed by the Panel.

39. On May 5, 2016, the parties stipulated to the correction of limited inaccuracies in the stenographic transcript, which changes were duly noted by the Panel.

### III. SUBMISSIONS OF THE PARTIES

#### A. Dot Registry

40. Dot Registry states that the applicable law(s) to be applied in this proceeding are ICANN's Articles of Incorporation ("Articles") and Bylaws, relevant principles of international law (such as good faith) and the doctrine of legitimate expectations, applicable international conventions, the laws of the State of California ("California law"), the Applicant Guidebook ("AGB"), the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules"), and the Supplementary Procedures for the Independent Review Process (the "Supplemental Rules"). Prior declarations of IRP panels have "precedential value." Additional Submission of Dot Registry, LLC ("DR Additional Submissions"), ¶¶3, at 2-3, and notes 11, 12, and 15. Request of Dot Registry LLC for Independent Review Process ("DR IRP Request"), ¶ 55, at 20. The Standard of Review should be de novo. DR Additional Submission, ¶¶ 4-7, at 3-5.

41. Dot Registry effectively argues that actions of the ICANN staff and the EIU constitute actions of the ICANN board, because, under California law and ICANN's Bylaws, ICANN's board of directors is "ultimately responsible" for the conduct of the new gTLD program. Since ICANN is a California nonprofit public-benefit corporation, all of its activities must be undertaken by or under the direction of its Board of Directors. DR

Additional Submission, ¶¶ 12-14, at 7-8 and notes 37-40; IRP Request, ¶ 62.

42. Dot Registry asserts that ICANN's staff and the EIU are "ICANN affiliated parties," and as such ICANN is responsible for their actions. AGB, Module 6.5.

43. In any event, Dot Registry takes the position that ICANN is responsible for the acts of EIU and the ICANN staff, since EIU can only recommend to ICANN for ICANN's ultimate approval, and ICANN has complete discretion as to whether to follow EIU's recommendations. DR Additional Submission, ¶18, at 11 (citing EIU SoW, §10(b)(ii) – (iv), (vii), at 6.

44. Dot Registry asserts that the EIU also has the understanding that ICANN bears the responsibility for the actions of the EIU in its role as ICANN's evaluator. DR Additional Submission, ¶19, at 11, citing Declaration of EIU Contact Information Redacted

of the EIU, § 3, at 2. In addition, the CPEs were issued on ICANN letterhead, not EIU letterhead. Indeed, on the final page of the CPEs generated by the EIU, there is a disclaimer, which states in pertinent part that "these Community Priority Evaluation results do not necessarily determine the final result of the application." *See, e.g.*, CPE Report 1-990-35979, Report Date: 11 June 2014.

45. Dot Registry contends that under California law the business judgment rule protects the individual corporate directors from complaints by shareholders and other specifically defined persons who are analogous to

shareholders, but does not protect a corporation or a corporate board from actions by third parties. DR Post-Hearing Brief, at 4 – 7.

46. Even assuming *arguendo* that the business judgment rule applies to the present proceeding, Dot Registry argues that it would not protect ICANN, since the ICANN Board and BGC failed to comply with the Articles, Bylaws, and the AGB, performed the acts at issue without making a reasonable inquiry, and failed to exercise proper care, skill and diligence. DR Post Hearing Brief, at 7 – 8.

47. Dot Registry alleges that EIU altered the AGB requirements only as to Dot Registry's applications in the following respects, and thus engaged in unjustified discrimination (disparate treatment) and non-transparent conduct:

- a) Added a requirement in its evaluation that the community must "act" as a community, and that a community must "associate as a community;"
- b) Added the requirement that the organization must have no other function but to represent the community;
- c) Utilized the increased requirement for "association" to abstain from evaluating the requirements of "size" or "longevity;"
- d) Misread Dot Registry's applications in order to find that Dot Registry's registration policies failed to provide "an appropriate appeals mechanism;"

- e) Altered the AGB criteria that the majority of community institutions support the application to require that every institution express “consistent” support;
- f) Altered the requirement that an application must have no relevant opposition to require that an application have no opposition.

See, e.g., Dot Registry Reconsideration Request re *.llc*, Version of 11 April 2013, at 4 -17 (Exhibit C-017).

48. Dot Registry asserts that the EIU applied different standards to other CPE applications, applying those standards inconsistently across all applicants.

49. While EIU required Dot Registry to demonstrate that its communities “act” and “associated” as communities, it did not require that other communities do so.

50. EIU also required that *.llc*, and *.llp* community members be participants in a clearly defined-industry and that the “members” have an awareness and recognition of their inclusion in the industry community.

51. While noting that “research” supported its conclusions, the EIU failed to identify the research conducted, what the results of the research were, or how such results supported its conclusions.

52. Dot Registry also argued that the Board of Governance Committee (“BGC”) breached its obligations to ensure fair and equitable, reasonable and non-discriminatory treatment.

53. In response to a request for reconsideration, the BGC has the authority to:

- a) conduct a factual investigation (Bylaws, Art. 11, § 3, d);
- b) request additional written submissions from the affected party or other parties (Bylaws, Art. IV, § 3, e);
- c) ask ICANN staff for its views on the matter (Bylaws, Art. IV, § 11);
- d) request additional information or clarification from the requestor (Bylaws, Art. IV, §12);
- e) conduct a meeting with requestor by telephone, email, or in person (*Id.*);
- f) request information relevant to the request from third parties (Bylaws, Art. IV, § 13.

The BCG did none of these.

54. Dot Registry requested that the IRP Panel make a final and binding declaration:

- a) that the Board breached its Articles, its Bylaws and the AGB including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry's applications;
- b) that ICANN and the EIU breached the articles, Bylaws and the AGB, including by erring in scoring Dot Registry's CPE applications for *.inc*, *.llc*, and *.llp* and by treating Dot Registry's applications discriminatorily;

- c) that Dot Registry's CPE applications for the *.inc*, *.llc*, and *.llp* strings satisfy the CPE criteria set forth in the AGB and that Dot Registry's applications are entitled to community priority status;
- d) recommending that the Board issue a resolution confirming the foregoing;
- e) awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
- f) awarding such other relief as the Panel may find appropriate in the circumstances.

Claimant's Post-Hearing Brief, April 8, 2016 ("DR Post-Hearing Brief"), at 9.

55. Finally, Dot Registry stated that it "does not believe that a declaration recommending that the Board should send Dot Registry's CPE applications to a new evaluation by the EIU would be proper." DR Post-Hearing Brief, at 9.

## B. ICANN

56. ICANN asserts that ICANN's Articles and Bylaws and the Supplementary Procedures apply to an IRP proceeding. ICANN's Response to Claimant Dot Registry LLC's Request for Independent Review Process, October 27, 2014 ("ICANN Response"), ¶21, at 8, and ¶

29, at 9. ICANN's Response to Claimant Dot Registry LLC's Additional Submission ("Response to Additional Submission"), ¶2, at 1; ¶ 8, at 3.

57. ICANN argues that "there is only one Board action at issue in this IRP, the BGC's review of the reconsideration requests Dot Registry filed challenging the CPE Reports." Response to Additional Submission, ¶ 8, at 3.

58. ICANN contends that this standard only applies as to the BGC's actions (or inactions) in its reconsideration of the EIU or ICANN staff actions. Response to Additional Submission, ¶ 10, at 4; ¶13, at 5

59. ICANN argues that the Bylaws make clear that the IRP review does not extend to actions of ICANN staff or of third parties acting on behalf of ICANN staff, such as the EIU.

60. ICANN contends that, when the BGC responds to a Reconsideration Request, the standard applicable to the BGC's review looks to whether or not the CPE Panel violated "any established policy or procedure." ICANN Response, ¶45, at 20, ¶¶ 46 and 47, at 21. Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10; ¶ 19, at 8.

61. ICANN argues that Dot Registry failed to show that the EIU violated any established policies and procedures, on one occasion referring to "rules and procedures," in another to "established ICANN policy(ies)," and in another to "appropriate policies and procedures." Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10, and ¶19, at 8

62. ICANN contends that Dot Registry failed to show that the BGC actions in its reconsideration were not in accordance with ICANN's Articles and Bylaws. Response to Additional Submission, ¶¶ 21, at 9, and ¶¶ 23 at 10. However, ICASNN has never argued in these proceedings that Dot Registry failed timely or properly to raise claims of *inter alia* disparate treatment/unjustified discrimination, lack of transparency or other alleged breaches of Articles, Bylaws, or AGB by the BGC, only that Dot Registry failed to prove its case on those matters.

63. ICANN agrees that "the 'rules' at issue when assessing the Board's conduct with respect to the New gTLD Program include relevant provisions of the Guidebook." Letter of Jeffrey A. LeVee, Jones Day LLP, to the Panel, dated October 12, 2015, at 6.

64. In response to a question from the Panel, ICANN asserts that, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel (R-12), ICANN did not require the ICANN staff and EIU to adhere to ICANN's Bylaws. ICANN denied that the reference therein that "the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination" and its request "that candidates include a 'statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency" obligated the EIU and the ICANN staff to adhere to any of ICANN's Articles or Bylaws. ICANN's Post-Hearing Brief, ¶¶ 6, 7, and 8, at 4.

65. In response to the Panel’s question as to whether the Call for Expressions of Interest called for EIU to comply with other ICANN policies and procedures, ICANN stated that the Call for Expressions of Interest required applicants to “respect the principles of fairness, transparency and . . . non-discrimination.” ICANN’s Post-Hearing Submission, dated April 8, 2016, at ¶ 5.

66. ICANN asserts that California’s business judgment rule applies to ICANN and “requires deference to actions of a corporate board of directors so long as the board acted ‘upon reasonable investigation, in good faith and with regard for the best interests of’ the corporation, and ‘exercised discretion clearly within the scope of its authority.’” Post—Hearing Brief, ¶ 1, at 1, and *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4<sup>th</sup> 249, 265 (1999).

#### IV. DECLARATION OF PANEL

##### A. Applicable Principles of Law

67. The Panel declares that the principles of law applicable to the present proceeding are ICANN’s Articles of Incorporation, its Bylaws, the laws of the State of California, the Supplemental Rules, and the ICDR Rules of Arbitration. The Panel does not find that there are “relevant principles of international law and applicable international conventions” that would assist it in the task now before it.

68. The review undertaken by the Panel is based on an objective and independent standard, neither deferring to the views of the Board (or the

BGC), nor substituting its judgment for that of the Board. As the IRP in the *Vistaprint v. ICANN* Final Declaration stated (ICDR Case No. 01-14-0000-6505, 9 October 2015:

123. The Bylaws state the IRP Panel is 'charged' with 'comparing' contested actions of the board to the Articles and Bylaws and 'declaring' whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgement in taking a decision believed to be in the best interests of ICANN. In the IRP Panel's view this more detailed listing of a defined standard cannot be read to remove from the Panel's remit the fundamental task of comparing actions or inactions of the Board with the articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstance may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard the ICANN Board's discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.

124. The Panel agrees with ICANN's statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As *Vistaprint* has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.

125. The IRP Panel is aware that three other IRP Panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of the have reached the same conclusion: the

board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard without any presumption of correctness. (Footnote omitted).

69. In this regard, the Panel concludes that neither the California business judgment rule nor any other applicable provision of law or charter documents compels the Panel to defer to the BGC's decisions. The Bylaws expressly charge the Panel with the task of testing whether the Board has complied with the Articles and Bylaws (and, as agreed by ICANN, with the AGB). Bylaws, Article IV, Section 3.11, c provides that an "IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." Additionally, the business judgment rule does not in any event extend under California law to breaches of obligation as contrasted with its application to the exercise of discretionary board judgment within the scope of such an obligation.

70. An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed. Thus, the Dissent's focus on whether Dot Registry should have succeeded in its application for community priority is entirely misplaced. As counsel for ICANN explained:

Mr. LeVee: \*\*\*

. . . the singular purpose of an independent review proceeding, as confirmed time and again by other independent review panels, is to test whether the conduct of the board of ICANN and only of the

board of ICANN was consistent with ICANN's articles and with ICANN's bylaws.

Hearing Tr., p. 75, l. 24 – p. 76, l. 5.

B. Nature of Declaration

71. The question has arisen in some prior Declarations of IRP Panels whether Panel declarations are “binding” or “non-binding.” While this question is an interesting one, it is clear beyond cavil that this or any Panel’s decision on that question is not binding on any court of law that might be called upon to decide this issue.

72. In order of precedence from Bylaws to Applicant Guidebook, there have been statements in the documents which the Panel, or a reviewing court, might consider in its determination as to the finality of an IRP Panel Declaration.

73. As noted, above, Bylaws, Article IV, Section 3.11, c specifies that an “IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws. Bylaws, Article IV, Section 3.11, d provides that the IRP Panel may “recommend that the Board stay any action or decision . . . until such time as the Board reviews and acts upon the opinion of the IRP. Article IV, Section 3.21 provides that “[t]he declarations of the IRP Panel . . . are final and have precedential value.”

74. The ICDR Rules contains a provision that “[a]wards . . . shall be final and binding on the parties.” ICDR Rules, Art. 27(1).

75. The Applicant Guidebook requires that any applicant “AGREE NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.” AGB, Module 6, Section 6 (all caps as in original).

Assuming *arguendo* this waiver would be found to be effective, it would not appear to reach the question of finality of a Panel Declaration.

76. One Panel has declared that its declaration is non-binding (*ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, at ¶134), while another has declared that its declaration is binding. *DCA Trust v. ICANN*, ICDR Case No. 50-2013-001083, Declaration on IRP Procedures, August 14, 2014, at ¶¶ 98, 100-107, 110-111, and 115.

77. Other panels have either expressed no opinion on this issue, or have found some portion of the declaration binding, and another portion non-binding. Further, the Panel understands that this issue may have arisen before one or more courts of law, but that no final decisions have yet been rendered.

78. Since any declaration we might make on this issue would not be binding on any reviewing court, the Panel does not purport to determine whether its declaration is binding or non-binding.

C. The Merits

1) The EIU, ICANN Staff, and the BGC Were Obligated to Follow ICANN's Articles and Bylaws in Performing Their Work in this Matter

79. Whether the BGC is evaluating a Reconsideration Request or the IRP Panel is reviewing a Reconsideration Determination, the standard to be applied is the same: Is the action taken consistent with the Articles, the Bylaws, and the AGB?

80. The BGC's determination that the standard for its evaluation is that a requestor must demonstrate that the ICANN staff and/or the EIU acted in contravention of established policy or procedure is without basis.

81. In response to the three reconsideration requests at issue, the BGC states that "ICANN has previously determined that the reconsideration process can be properly invoked for challenges to determinations rendered by third party service providers, such as EIU, where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination." Reconsideration Determination of Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014, Section IV, at 7-8.

82. For this proposition, the BGC cites its own decision in the *Booking.com B.V. v. ICANN* Reconsideration Request Determination 13-5,

1 August 2013. In that case the BGC references a previous section of the Bylaws, that contains language currently in Section IV, 2, a, which states in pertinent part, that a requestor may show it has been “adversely affected by one or more staff actions or inactions that contradict ICANN policy(ies).”

83. Curiously, the BGC ignores Article IV, Section 1, entitled ‘PURPOSE,’ which sets out the purpose of the Accountability and Review provisions. Article IV, Section 1 applies to both reconsiderations by the BGC, as well as to the IRP process. It states: “In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article 1 of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. . . .” (Emphasis added).

84. Indeed, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel, including from the EIU, ICANN insisted that the evaluation process employed by prospective community priority panels “respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.” As discussed, *infra*, at ¶¶ 101 – 106, all of these principles are embodied in ICANN’s Bylaws, and

are applicable to conduct of the BGC, ICANN staff and the authority exercised by the EIU pursuant to contractual delegation from ICANN.

85. ICANN further required all applicants for evaluative panels, including the EIU, to include in their applications a statement of the applicants' plan for ensuring that the above delineated principles are applied. ICANN Call for Expressions of Interest (Exhibit R-12), Section 5.5 at 6.

86. Subsequent to its engagement by ICANN, the EIU prepared the Community Priority Evaluation Guidelines, Version 2.0 (27 September 2013 (Exhibit R-1), under supervision from ICANN, incorporating the same principles. At page 22 of the Guidelines, it states: "The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest and non-discrimination. Consistency of approach in scoring Applications will be of particular importance." (Emphasis added). These CPE Guidelines "are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB."

87. Even if one were to accept the BGC's contention that it only need look to whether ICANN staff or the EIU violated "established policies and procedures," nowhere has ICANN argued that fairness, transparency, avoiding potential conflicts of interest, and non-discrimination are **not** established policies and procedures of ICANN. Indeed, given that all of these criteria are called out in provisions of ICANN's Articles and Bylaws

as quoted elsewhere in this declaration, it would be shocking if ICANN were to make such an argument.

88. Accordingly, the Panel majority declares that in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB. These matters were clearly raised in Dot Registry's submissions. The Panel majority declares that the BGC failed to make the proper determinations as to compliance by ICANN staff and the EIU with the Articles, Bylaws, and AGB, let alone to undertake the requisite due diligence or to conduct itself with the transparency mandated by the Articles and Bylaws in the conduct of the reconsideration process.

89. The Panel majority further declares that the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations. It is the responsibility of the BGC in its reconsideration to insure such compliance. Indeed, the CPEs themselves were issued on the letterhead of ICANN, not that of the EIU, and Module 5 of the Applicant Guidebook states that "ICANN's Board of Directors has

ultimate responsibility for the New gTLD Program.” AGB, Module 5, at 5-4.

90. Moreover, ICANN tacitly acknowledged as much by submitting the Declaration of EIU Contact Information Redacted

of the Economist Intelligence Unit, the person who negotiated the services agreement with ICANN. EIU Contact Information Redacted also served as Project Director for EIU’s work on behalf of ICANN.

91. In his declaration, EIU Contact Information Redacted states that the EIU is “not a gTLD decision-maker, but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process.”

92. Further, as noted above in paragraph 8 of EIU Contact Information Redacted Declaration, Section 10 of the EIU SoW provides that “ICANN will be free in its complete discretion to decide whether or not to follow [EIU’s] determination,” that “ICANN will be solely responsible to applicants . . . for the decisions it decides to issue,” and that “each decision must be issued by ICANN in its own name only.”

93. Moreover, EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports, See, documents produced to the Panel in response to the Panel’s Document Production Order, ICANN \_DR-00461-466. DR00182-

194, DR 00261—267, DR00228-234, DR00349-355, DR-00547-553, DR00467- 473 and DR00116-122.

94. One example is particularly instructive. In its Request for Reconsideration for *.inc*, Dot Registry complained that “the Panel repeatedly relies on its ‘research.’ For example, the Panel states that its decision not to award any points to the **.INC** Community Application for 1-A Delineation is based on ‘[r]esearch [that] showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an *.inc*’ and also that ‘[b]ased on the Panel’s research there is no evidence of incs from different sectors acting as a community as defined by the Applicant Guidebook.” “Thus, the Panel’s ‘research’ was a key factor in its decision not to award at least four (but possibly more) points to the *.inc* Community Application. However, despite the significance of this ‘research,’ the Panel never cites any sources or gives any information about its substance or the methods or scope of the ‘research.’” Dot Registry Request for Reconsideration re *.inc*, § 8, B at 5-6.

95. The BGC made short shrift of this argument. “The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to ‘cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” (Citations omitted.) “As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to ‘perform independent

research, if deemed necessary to reach informed scoring decisions.”

(Citations omitted). “The Requestor cites no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope or methods of its independent research.” Reconsideration Response, § V.B at 11.

96. A review of the documents produced and the ongoing exchange between the EIU and the ICANN staff reveal the origin of the “research” language found in the final version of the CPEs.

97. The original draft CPEs prepared by the EIU, dated 19 May 2014 at page 2, paragraph beginning “However . . .” contain no reference to any “research.” See DR00229, 00262, and 00548.

98. The first references to the use of “research” comes from ICANN staff. “Can we add a bit more to express the research and reasoning that went into this statement? . . .Possibly something like, ‘based on the Panel’s research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00468. “While I agree, I’d like to see some substantiation, something like . . . ‘based on our research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00548.

99. The CPEs as issued read in pertinent part at page 2, in paragraph beginning “However . . .,” “Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC. Based on the Panel’s research, there

is no evidence of LLCs from different sectors acting as a community as defined in the Applicant Guidebook.”

100. Counsel for ICANN at the hearing acknowledged that ICANN staff is bound to conduct itself in accordance with ICANN's Articles and Bylaws.

Panelist Donahey: So when you hear the word “ICANN” or see the word “ICANN in the bylaws or articles you believe that that is a , is a reference to ICANN’s board and its constituent bodies?

Mr. LeVee: Including its staff, yes

Panelist Kantor: My chair anticipated a question I was going to ask, but he combined it with a question about constituent bodies. I believe I heard, Mr. LeVee, that you said that while the CPE panel is not bound by the provisions I identified, ICANN staff is. Is that correct?

[Mr. LeVee:] Yes. ICANN views its staff as being obligated to conform to the various article and bylaw provisions that you cite.

Hearing Tr., p. 197, l. 20 – p. 198, l.1; p. 199, l. 17 - p. 200, l. 2 (emphasis added).

101. The facts that ICANN staff was intimately involved in the production of the CPE and that ICANN staff was obligated to follow the Articles and Bylaws, further support the Panel majority's finding that ICANN staff and the EIU were obligated to comply with ICANN's Articles and Bylaws. Moreover, when the issues were posed in the Reconsideration Requests, in the course of determining whether or not ICANN staff and the EIU had acted in compliance with the Articles, Bylaws, and the AGB, the BGC was obligated under the Bylaws to exercise due diligence and care in having a reasonable amount of facts in front of them and exercise independent

judgment in taking the decision believed to be in the best interests of ICANN.

## 2) The Relevant Provisions of the Articles and Bylaws and Their Application

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. Articles of Incorporation, Art. 4

In performing its mission, the following core values should guide the decisions and actions of ICANN:

\*\*\*\*

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

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

These core values are deliberately expressed in very general terms so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. Bylaws, Art. I, § 2. CORE VALUES.

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. Bylaws, Art. II, § 3. Non-Discriminatory Treatment.

The Board shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Bylaws, Art. III, §1.

In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of these bylaws. Art. IV, § 1.

103. In addition, the BGC failed several transparency obligations. As well as failing to enforce the transparency obligations in the Articles, Bylaws, and AGB with respect to the research purportedly undertaken by the EIU, the BGC is also subject to certain requirements that it make public the staff work on which it relies. Bylaws, Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the

matter, which comments shall be made publicly available on the Website.”  
Bylaws, Art. IV.2.14 provides that “The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.”

104. The Panel is tasked with determining whether the ICANN Board acted consistently with the provisions of the Articles and Bylaws. Bylaws Article IV, Section 3.11, c states that “[t]he IRP Panel shall have the authority to declare whether an action of inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” As accepted by ICANN, the Panel is also tasked with determining whether the ICANN Board acted consistently with the AGB. Moreover, the Bylaws provide:

Requests for [] independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision believed to be in the best interests of the company?

Bylaws. Art. IV, §3.4.

ICANN's counsel stated at the hearing that the concept of inaction or the omission to act is embraced within "actions of the Board."

Panelist Kantor: At an earlier stage in these proceedings, the panel asked some questions, and we were advised that action here includes both actions and omissions. Does that apply to conduct of ICANN staff or only to conduct of the ICANN Board?

Mr. LeVee: Only to Board.

Hearing Tr., p. 192, l. 25 – p. 193, l. 6.

105. Thus, ICANN confirmed that omissions by the Board to comply with its duties under the Articles and Bylaws constituted breaches of the Articles and Bylaws for purposes of an IRP. See, *also*, ICANN's response to Dot Registry's Submission, ¶ 10 (10 August 2015) ("the only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN's Articles or Bylaws in acting (or failing to act) with respect to that conduct.") and Letter of Jeffrey A. LeVee, Jones, Day LLP, to the Panel, October 12, 2015, at 6 ("ICANN agrees with the statements in Paragraph 53 of the Booking.com IRP Panel's Declaration that . . . the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board . . . .")

106. As discussed, *supra*, at ¶¶ 47-52, Dot Registry contended that the CPE lacked transparency, such as the subject of the research performed, the sources referenced in the performance of the research, the manner in which the research was performed, the results of the research, whether the researchers encountered sources that took issue with the results of

the research, etc. Thus, Dot Registry adequately alleged a breach by ICANN staff and the EIU of the transparency obligations found in the Articles, Bylaws, and AGB.

107. Dot Registry further asserted that it was treated unfairly in that the scoring involved double counting, and that the approach to scoring other applications was inconsistent with that used in scoring its applications. *Id.*

108. Dot Registry alleged that it was subject to different standards than were used to evaluate other Community Applications which underwent CPE, and that the standards applied to it were discriminatory. *Id.*

109. Yet, the BGC failed to address any of these assertions, other than to recite that Dot Registry had failed to identify any “established policy or procedure” which had been violated.

110. Article IV, Section 3.4 of the Bylaws calls upon this Panel to determine whether the BGC, in making its Reconsideration Decision “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision believed to be in the best interests of the company.”

Consequently, the Panel must consider whether, in the face of Dot Registry’s Reconsideration Requests, the BGC employed the requisite due diligence and independent judgment in determining whether or not ICANN staff and the EIU complied with Article, Bylaw, and AGB obligations such as transparency and non-discrimination.

111. Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

112. An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry Requests for Reconsideration.

Panelist Kantor: Mr. LeVee, in those minutes or in the determinations on the reconsideration requests, is there evidence that the Board considered whether or not the CPE panel report or any conduct of the staff complied with the various provisions of the bylaws to which I referred, core values, inequity, nondiscriminatory treatment, or to the maximum extent open and transparent.

Mr. LeVee: I doubt it. Not that I'm aware of. As I said, the Board Governance Committee has not taken the position that the EIU or any other outside vendor is obligated to conform to the bylaws in this respect. So I doubt they would have looked at that subject.

Hearing Tr., p. 221, l. 17 – p. 222, l. 8.

113. Notably, the Panel question above inquired as to whether the Board considered *either* the conduct of the CPE panel (*i.e.*, the EIU) or the conduct of ICANN staff. Counsel's response that he doubted whether consideration was given relied solely upon the BGC's position that *the EIU* was not obligated to comply with the Bylaws. Regardless of whether that position is correct, ICANN acknowledges that the conduct of *ICANN staff* (as described *supra*, at ¶¶89-101) is bound by the Articles, Bylaws, and AGB. ICANN's argument fails to recognize that in any event the conduct

of ICANN staff is properly the subject of review by the BGC when raised in a Request for Reconsideration, yet no such review of the allegedly discriminatory and non-transparent conduct of ICANN staff was undertaken by the BGC.

114. One of the questions on which an IRP Panel is asked to “focus” is whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts” in front of it. In making this determination, the Panel must look to the allegations in order to determine what facts would have assisted the BGC in making its determination.

115. As discussed, *supra*, at ¶¶ 51 and 94 - 95, the requestor argued that the EIU repeatedly referred to “research” it had performed in making its assessment, without disclosing the nature of the research, the source(s) to which it referred, the methods used, or the information obtained. This is effectively an allegation of lack of transparency.

116. Transparency was yet another of the principles which an applicant for the position of Community Priority Evaluator, such as EIU, was required to respect. Indeed, an applicant for the position was required to submit a plan to ensure that transparency would be respected in the evaluation process. *See, generally, supra*, ¶¶ 17 – 18.

117. Transparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.

118. In ICANN's Articles of Incorporation, Article 4 refers to "open and transparent processes." Among the Core Values listed in its Bylaws intended to "guide the decisions and actions of ICANN" is the "employ[ment of] open and transparent policy development mechanisms." Bylaws, Art. I, § 2.7.

119. Indeed, ICANN devotes an entire article in its bylaws to the subject. Article III of the Bylaws is entitled, "TRANSPARENCY." It states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Bylaws, Art. III, § 1.

120. Moreover, in the very article that establishes the Reconsideration process and the Independent Review Process, it states in Section 1, entitled "PURPOSE:"

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

121. By their very terms, these obligations govern conduct not only by the Board, but by "ICANN," which necessarily includes its staff.

122. It seems fair to say that transparency is one of the most important of ICANN's core values binding on both the ICANN Board and the ICANN

staff, and one that its contractor, EIU, had pledged to follow in its work for ICANN. The BGC had an obligation to determine whether ICANN staff and the EIU complied with these obligations. An IRP Panel is charged with determining whether the Board, which includes the BGC, complied with its obligations under the Articles and the Bylaws. The failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those obligations is itself a failure by the Board to comply with its obligations under the Articles and Bylaws.

123. Has the BGC been given the tools necessary to gather this information as Part of the Reconsideration process? The section on reconsideration (Bylaws, Art. IV, Section 2) provides it with those tools. It gives the BGC the power to “conduct whatever factual investigation is deemed appropriate” and to “request additional written submissions from the affected party, or from other parties.” Bylaws, Art. IV, § 2.3, d and e. The BGC is entitled to “ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the website.” Bylaws, Art. IV, §2.11. The BGC is also empowered to “request information relevant to the request from third parties, and any information collected from third parties shall be provided to the requestor [for reconsideration].” Bylaws, Art. IV, § 2.13.

124. The requestor for reconsideration in this case also complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to

other successful applicants. If this were true, the EIU would not only have failed to respect the principles of fairness and non-discrimination it had assured ICANN that it would respect, it would not have lived up to its own assurance to all applicants for CPEs in its CPE Guidelines (Exhibit R-1) that “consistency of approach in scoring applications will be of particular importance.” *See, supra*, ¶¶ 18 and 83.

125. The BGC need only have compared what the ICANN staff and EIU did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the EIU treated the requestor in a fair and non-discriminatory manner. The facts needed were more than reasonably at hand. Yet the BGC chose not to test Dot Registry’s allegations by reviewing those facts. It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.

126. The Panel is called upon by Bylaws Art. IV.3.4 to focus on whether the Board, in denying Dot Registry’s Reconsideration Requests, exercised due diligence and care in having a reasonable amount of facts in front of it and exercised independent judgment in taking decisions believed to be in the best interest of ICANN. The Panel has considered above whether the BGC complied with its “due diligence” duty. Here the Panel considers whether the BGC complied with its “independent judgment” duty.

127. The Panel has no doubt that the BGC believes its denials of the Dot Registry Reconsideration Requests were in the best interests of ICANN.

However, the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment in taking those decisions. The only documentary evidence in the record in that regard is the text of the Reconsideration Decisions themselves and the minutes of the BGC meeting at which those decisions were taken. No witness statements or testimony with respect to those decisions were presented by ICANN, the only party to the proceeding who could conceivably be in possession of such evidence.

128. The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.

129. Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website."

130. Bylaws Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party."

131. Elsewhere in the Bylaws and the Articles of Incorporation, as discussed above, ICANN undertakes general duties of transparency and accountability that are also implicated by ICANN's decision to shield relevant staff work from public disclosure by structuring the staff work to benefit from legal privilege.

132. The documents disclosed by ICANN to the Panel pursuant to the Panel's document orders do not include any documents sent from BGC members to ICANN staff or sent from any Board members to any other Board members. The privilege log submitted by ICANN in these proceedings does not list any documents either sent from Board members to any ICANN staff or sent from any Board member to any other Board member, only a small number of documents sent from ICANN staff to the BGC. The only documents of the BGC that were disclosed to the Panel are the denials of the relevant Reconsideration Request themselves, the agendas for the relevant BGC meetings found on the ICANN website, and the Minutes of those meetings also found on the ICANN website.

133. No documents from ICANN staff to the BGC have been disclosed to the Panel. The privilege log lists one document, dated July 18, 2014, which appears to be the ICANN in-house legal counsel submission to the BGC of the "board package" for the July 24, 2014 BGC meeting at which Dot Registry's Reconsideration Requests were considered. The Panel infers that package included an agenda for the meeting, the CPEs themselves and draft denials prepared by ICANN staff, consistent with a

statement to that effect by ICANN counsel at the hearing. As explained by ICANN counsel at the hearing, that package also apparently included ICANN staff recommendations regarding the CPEs and the Reconsideration Requests, prepared by ICANN legal counsel. The Panel presumes the “package” also included Dot Registry’s Reconsideration Requests, setting out Dot Registry’s views arguing for reconsideration.

134. There is nothing in either the document production record or the privilege log to indicate that the denials drafted by ICANN staff were modified in any manner after presentation by staff to the BGC. Rather, from that record it would appear that the denials were approved by the BGC without change. It is of course possible that changes were in fact made to the draft denials involving ICANN legal counsel, but not produced to the Panel. However, nothing in the privilege log indicates that to be the case.

135. The privilege log submitted by ICANN in this proceeding also lists one other document dated August 15, 2014, which appears to be the “board package” for the August 22, 2014 BGC meeting at which the BGC *inter alia* approved the Minutes for the July 24 BGC meeting. Since the agenda and the Minutes for that August 22 meeting, as available on the ICANN website, do not show any reference to the gTLDs at issue in this IRP, it would appear that the material in the August 15 privileged document related to this dispute is only the draft of the Minutes for the July 24 BGC meeting, which Minutes were duly approved at the August 22 BGC

meeting according to the Minutes for that latter meeting. Thus, the August 15 privileged document adds little to assist the Panel in deciding whether the Board exercised the requisite diligence, due care and independent judgment.

136. Every other document listed on the privilege log is an internal ICANN staff document, not a BGC document.

137. From this disclosure and from statements by ICANN counsel at the hearing, the Panel considers that no documents were submitted to the BGC for the July 24, 2014 BGC meeting other than the agenda for the meeting, the CPEs and Dot Registry's Reconsideration Requests themselves, ICANN staff's draft denials of those Reconsideration Requests, and explanatory recommendations to the BGC from ICANN staff in support of the denials. Moreover, it appears the BGC itself and its members generated no documents except the denials themselves and the related BGC Minutes. ICANN asserted privilege for all materials sent by ICANN staff to the BGC for the BGC meeting on the Reconsideration Requests.

138. The production by ICANN of BGC documents was an issue raised expressly by the unanimous Panel in Paragraph 2 of Procedural Order No. 4, issued May 27, 2015:

Among the documents produced by ICANN in response to the Panel's document production request, the Panel expected to find documents that indicated that the ICANN Board had considered the recommendations made by the EIU concerning Claimant's Community Priority requests, that the ICANN board discussed those recommendations in a meeting of the Board or in a meeting of one or more of its committees or subcommittees

or by its staff under the ICANN Board's direction, the details of such discussions, including notes of the participants thereto, and/or that the ICANN Board itself acted on the EIU recommendation by formal vote or otherwise; or if none of the above, documents indicating that the ICANN board is of the belief that the recommendations of the EIU are binding. If no such documents exist, the Panel requests that ICANN's counsel furnish an attestation to that effect.

139. By letter dated May 29, 2015, counsel for ICANN made the requested confirmation, referring to the Reconsideration Decisions and appending the BGC meeting minutes for the non-privileged record.

140. It is of course entirely possible that oral conversations between staff and members of the BGC, and among members of the BGC, occurred in connection with the July 24 BGC meeting where the BGC determined to deny the reconsideration requests. No ICANN staff or Board members presented a witness statement in this proceeding, however. Also, there is no documentary evidence of such a hypothetical discussion, privileged or unprivileged. Thus apart from *pro forma* corporate minutes of the BGC meeting, no evidence at all exists to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff.

141. Counsel for ICANN conceded at the hearing that ICANN legal counsel supplied the BGC with recommendations, but asserted the BGC does not rely on those recommendations.

2 \*\*\* I  
3 will tell you that the Board Governance  
4 Committee is aided by the Office of General  
5 Counsel, which also consults with Board  
6 staff.

7 The Office of General Counsel does  
8 submit recommendations to the Board  
9 Governance Committee, and of course, those  
10 documents are privileged. For that reason,  
11 we did not turn them over. We don't rely on  
12 them in issuing the Board Governance  
13 Committee reports, we don't cite them, and we  
14 don't produce them because they are prepared  
15 by counsel.

Hearing Tr., p. 94, l. 2 – 15.

For several reasons, the assertion that the BGC does not rely on ICANN staff recommendations, and thus is not obligated to make those staff views public pursuant to Bylaws Arts. I.2.7 and I.2.10, is simply not credible.

142. First, according to Bylaws Art. IV.2.14, the BGC is to act on Reconsideration Requests “on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.” Thus, the Bylaws themselves expect the BGC to look to the public written record, including staff views, in making its decisions.

143. Moreover, according to the documents produced by ICANN in this proceeding and the ICANN privilege log, the BGC apparently had no substantive information before it other than the CPEs, the recommendations of ICANN staff regarding the CPEs, including the recommendations of the Office of General Counsel, and the contrary arguments of Dot Registry contained in the Reconsideration Requests. The Minutes for the July 24 BGC meeting state succinctly that “Staff

briefed the BGC regarding Dot Registry, LLC's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panels' Reports, and ICANN's acceptance of those Reports."

144. Counsel for ICANN made similar points at the hearing.

12 MR. LEVEE: I can.

13 So the Board Governance Committee  
14 had the EIU, the three EIU reports, and it  
15 had the lengthy challenge submitted by Dot  
16 Registry regarding those reports. As I've  
17 said before, the Board Governance Committee  
18 does not go out and obtain separate  
19 substantive advice, because the nature of its  
20 review is not a substantive review.  
21 So I don't know what else it would  
22 need, but my understanding is that apart from  
23 privileged communication, what it had before  
24 it was the materials that I've just  
25 referenced, EIU's reports and Dot Registry's  
1 reconsideration requests, which had attached  
2 to it a number of exhibits.

3 MR. KANTOR: So in evaluating that  
4 request and the CPE panel report, would it be  
5 correct to say that the diligence and care  
6 the Board Governance Committee took in having  
7 a reasonable amount of facts in front of it,  
8 were those two submissions an [sic] inquiry of  
9 staff which is privileged?

10 MR. LEVEE: Yes.

11 MR. KANTOR: Subclause C: How did  
12 the Board Governance Committee go about  
13 exercising its independent judgment in taking  
14 the decisions it took on the reconsideration  
15 requests? Again, with as much specificity as  
16 you can reasonably undertake.

17 MR. LEVEE: The primary thing I  
18 obviously have to refer you to is the report,  
19 the 23-page report of the Board Governance  
20 Committee. I, I don't have other materials  
21 that I have tendered to the panel to say that  
22 the Board members exercised their independent  
23 judgment, beyond the fact that they wrote a

24 document which goes pretty much point by  
25 point through the complaints that Dot  
1 Registry asserted, evaluated each of those  
2 points independently, and reached the  
3 conclusions that they reached.  
4 MR. DONAHEY: Were there drafts of  
5 that 23-page report?  
6 MR. LEVEE: Yes.  
7 MR. DONAHEY: And were those  
8 produced?  
9 MR. LEVEE: They were not.  
10 MR. DONAHEY: And was that because  
11 they were privileged?  
12 MR. LEVEE: Yes.  
13 MR. KANTOR: Mr. LeVee, what exists  
14 in the record before this panel to show that  
15 the Board Governance Committee exercised its  
16 judgment independent from that of ICANN's  
17 staff, including office [of] general counsel?  
18 MR. LEVEE: The record is simply  
19 that the six voting members of the Board  
20 Governance Committee authorized this  
21 particular report after discussing the  
22 report. I cannot give you a length of time  
23 that it was discussed. I don't have a record  
24 of that, but I can tell you, as reflected in  
25 many other situations where similar questions  
1 have been asked, that the voting members of  
2 the Board take these decisions seriously.  
3 They are then reflected in minutes of the  
4 Board Governance Committee which are  
5 published on ICANN's website.  
6 Candidly, I'm not sure what else I  
7 could provide.

Hearing Tr., at pp. 217-219.

145. The BGC thus had before it substantively only the views of the EIU accepted by ICANN staff (the CPEs), the "reports" (i.e., the reconsideration decisions drafted by staff), the staff's own briefing, and the contrary views of Dot Registry. As the Reconsideration Decisions themselves evidence, the BGC certainly did not rely on Dot Registry's

arguments. The BGC therefore simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff.

146. The Minutes of the July 24, 2014 BGC meeting state that “After discussion and consideration of the Request[s],” the BGC denied the Reconsideration Requests. Similarly, counsel for ICANN argued at the hearing that “the six voting members of the Board Governance Committee authorized this particular report after discussing the report. \*\*\* I can tell you, as reflected in many other situations where similar questions have been asked, that the voting members of the Board take these decisions seriously.”

147. Arguments by counsel are not, however, evidence. ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes. The Panel is well aware that such a *pro forma* statement is regularly included in virtually all corporate minutes recording decisions by board of director committees, regardless of whether or not the discussion was more than rubber-stamping of management decisions.

148. If there is any evidence regarding the extent to which the BGC did in fact exercise independent judgment in denying these Reconsideration Request, rather than relying exclusively on the recommendations of

ICANN staff without exercising diligence, due care and independent judgment, that evidence is shielded by ICANN's invocation of privileges in this matter and ICANN's determination under the Bylaws to avoid witness testimony in IRPs.

149. ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges. The ICANN Board is not free, however, to disregard mandatory obligations under the Bylaws. As noted above, Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website." (emphasis added). Bylaws, Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party" (emphasis added). The transparency commitments included in the Core Values found in Bylaws, Art. I, §2 are part of a balancing process. However, the obligations in the Bylaws to make that staff work public are compulsory, not optional, and do not provide for any balancing process.

150. None of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus

subject to the shield of privilege) in reaching its conclusions. By exercising its litigation privileges, though, the BGC has put itself in a position to breach the obligatory requirements of Bylaws Art. IV.2.11 and Art. IV.2.14 to make that staff work public. ICANN has presented no real evidence to this Panel that the BGC exercised independent judgment in reaching its decisions to deny the Reconsideration Requests, rather than relying entirely on recommendations of ICANN staff. Thus, the Panel is left highly uncertain as to whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision.” And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC (other than the *pro forma* meeting minutes), the BGC has put itself in contravention of Bylaws IV.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public.

#### D. Conclusion

151. In summary, the Panel majority declares that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.

152. The Panel majority emphasizes that, in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB. There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach. Rather the Panel majority has concluded that, in making its reconsideration decisions, the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publically available the ICANN staff work on which the BGC relied). The Panel majority further concludes that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.

153. The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority. The IRP Panel is tasked specifically "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." Bylaws, Art. IV, §3.4. This is what the Panel has done.

154. Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution (“ICDR”) totaling \$4,600.00 and the compensation and expenses for the Panelists totaling \$461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC \$235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.

155. The Panel retains jurisdiction for fifteen days from the issuance of this Declaration solely for the purpose of considering any party’s request to keep certain information confidential, pursuant to Bylaws, Article IV, Section 3.20. If any such request is made and has not been acted upon prior to the expiration of the fifteen-day period set out above, the request will be deemed to have been denied, and the Panel’s jurisdiction will terminate.

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156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

A handwritten signature in cursive script that reads "Mark Kantor". The signature is written in black ink and is positioned above a horizontal line.

Mark Kantor

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M. Scott Donahey, Chair

156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2018

For the Panel Majority

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Mark Kantor

A handwritten signature in dark ink, appearing to read "M. Scott Donahey", is written over a horizontal line.

M. Scott Donahey, Chair

## DISSENTING OPINION OF JUDGE CHARLES N. BROWER

1. With the greatest of regard for my two eminent colleagues, I respectfully dissent from their Declaration (“the Declaration”). In my view, Dot Registry LLC’s (“Dot Registry”) Community Priority Evaluation (“CPE”) Applications to operate three generic top level domains (“gTLDs”) (.INC, .LLC, and .LLP) were properly denied, as were Dot Registry’s Reconsideration Requests to the Board Governance Committee (“BGC”) of the Internet Corporation for Assigned Names and Numbers (“ICANN”). Dot Registry’s requests for relief before this Independent Review Proceeding (“IRP”) Panel should have been rejected in their entirety.
2. I offer four preliminary observations:
3. **First**, the Declaration commits a fundamental error by disregarding the weakness of Dot Registry’s underlying CPE Applications. The applications never had a chance of succeeding. The “communities” proposed by Dot Registry for three types of business entities (INCs, LLCs, and LLPs) do not demonstrate the characteristics of “communities” under any definition. They certainly do not satisfy the standards set forth in ICANN’s Applicant Guidebook (“AGB”), which require applicants to prove “awareness and recognition of [being] a community,” in other words “more . . . cohesion than a mere commonality of interest,”<sup>1</sup> because the businesses in question function in unrelated industries and share nothing in common whatsoever other than their corporate form. As ICANN stated:

*[A] plumbing business that operated as an LLC would not necessarily feel itself to be part of a “community” with a bookstore, law firm, or children’s daycare center simply based on the fact that all four entities happened to organize themselves as LLCs (as opposed to corporations, partnerships, and so forth). Although each entity elected to form as an LLC, the entities literally share nothing else in common.*<sup>2</sup>
4. That foundational flaw in Dot Registry’s underlying CPE Applications alone precluded Dot Registry from succeeding at the CPE stage because failure to prove Criterion #1, “Community Establishment,” deprives an applicant of four points, automatically disqualifying the applicant from reaching the minimum passing score of 14 out of a possible 16 points. Therefore while I do not agree that any violation of ICANN’s Articles of Incorporation (“Articles”) or ICANN’s Bylaws (“Bylaws”) occurred in this case, even if it had, this Panel should have concluded that those violations amounted to nothing more than

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<sup>1</sup> AGB § 4.2.3 (“‘Community’ - Usage of the expression ‘community’ has evolved considerably from its Latin origin – ‘*communitas*’ meaning ‘fellowship’ – while still implying more of cohesion than a mere commonality of interest. Notably, as ‘community’ is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.”).

<sup>2</sup> ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2016, ¶ 6.

harmless error.<sup>3</sup>

5. Moreover, the BGC in entertaining a Reconsideration Request is entitled to take its views of the underlying CPE into account in deciding whether or not to exercise its discretion under the Bylaws Article IV.3.d to “conduct whatever factual investigation is deemed appropriate,” Article IV.3.e to “request additional written submissions . . . from other parties,” Article IV.8.11 or to “ask the ICANN staff for its views on the matter.” As ICANN stated in the hearing of this case:

*The fact that you may have your own personal views as to whether the EIU got it right or got it wrong may or may not inform you, your thinking in terms of whether the Board Governance Committee, in assessing the EIU's reports from a procedural standpoint, did so correctly, in essence.<sup>4</sup>*

Hence the BGC’s approach to a Reconsideration Request is in no way necessarily divorced from such views as it may have regarding the underlying subject of the Request.

6. ***Second***, the Declaration purports to limit its analysis to action or inaction of the ICANN Board, but in fact it also examines the application of ICANN’s Articles and Bylaws to ICANN staff and to third-party vendor, the Economic Intelligence Unit (“EIU”). ICANN has conceded that its staff members are subject to its Articles and Bylaws,<sup>5</sup> but ICANN clarified that staff conduct is not reviewable in an IRP,<sup>6</sup> and ICANN has explained that the EIU is neither bound by the Articles or Bylaws, nor may EIU conduct be reviewed in an IRP.<sup>7</sup> The Declaration suggests that it “is *not* assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB.”<sup>8</sup> The Declaration, however, repeatedly concludes that ICANN staff and the EIU are bound by the Articles and Bylaws.<sup>9</sup> Despite the Declaration’s statement to the contrary,<sup>10</sup> I cannot

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<sup>3</sup> I have no quarrel with the Declaration insofar as it recognizes that this Panel should not “substitute our judgment for the judgment of the [CPE Panels] as to whether Dot Registry is entitled to Community priority.” Declaration ¶ 153. However, I disagree with the Declaration’s statement that “the Dissent’s focus on whether Dot Registry should have succeeded in its action is entirely misplaced.” Declaration ¶ 70. ICANN stated that it expects the IRP Panel might consider the merits of Dot Registry’s underlying CPE Applications when resolving this dispute, *See* Hearing Transcript dated 29 Mar. 2016, at 254:14–20, and Dot Registry expressly asked the Panel to rule on its CPE Applications. *See* Claimant’s Post-Hearing Brief dated 8 Apr. 2016, ¶ 21 (“As Dot Registry considers it is the Panel’s role to independently resolve this dispute, it affirmatively requests that the Panel not recommend a new EIU evaluation. Instead, Dot Registry requests that the Panel conclusively decide—based on the evidence presented in the final version of the Flynn expert report, including the annexes detailing extensive independent research—that Dot Registry’s CPE applications are entitled to community priority status and recommend that the Board grant the applications that status.”).

<sup>4</sup> Hearing Transcript dated 29 Mar. 2016, at 254:14–20.

<sup>5</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 196–97, 199–200, 209.

<sup>6</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 187–88, 200.

<sup>7</sup> *See* ICANN’s Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 5–8; ICANN’s Response to Claimant Dot Registry’s Additional Submission dated 10 Aug. 2015, ¶ 9.

<sup>8</sup> Declaration ¶ 152. (Emphasis added.)

<sup>9</sup> *See* Declaration, Heading IV.C(1) and paragraphs 84–89, 100–01, 106, 110, 122, 124.

<sup>10</sup> *See* Declaration ¶ 152 (“There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority’s approach.”).

help but think that the implicit foundation for the Declaration's entire analysis is that ICANN staff and the EIU committed violations of the Articles and Bylaws which, in turn, should have triggered a more vigorous review process by the ICANN Board in response to Dot Registry's Reconsideration Request.

7. In my view, my co-Panelists have disregarded the express scope of their review as circumscribed by Article IV.3.4 of ICANN's Bylaws, which focuses solely on the ICANN Board and not on ICANN staff or the EIU:

*Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*

- a. *did the Board act without conflict of interest in taking its decision?*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

8. ***Third***, in concluding that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws,"<sup>11</sup> the Declaration has effectively rewritten ICANN's governing documents and unreasonably elevated the organization's obligations to act transparently and to exercise due diligence and care above any other competing principle or policy. Tensions exist among ICANN's "Core Values." Article I.2 of ICANN's Bylaws states: "Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."
9. The Declaration recognizes that the "transparency commitments included in the Core Values found in Bylaws, Art. I, § 2 are part of a balancing process," but it goes on to state, in the context of discussing communications over which ICANN claimed legal privilege, that "the obligations in the Bylaws to make [] staff work public are compulsory, not optional, and do not provide for any balancing process."<sup>12</sup> This analysis is misguided. To begin with, Bylaws Article I.2 ("Core Values") concludes thus:

*These core values are deliberately expressed in very general terms, so that*

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<sup>11</sup> Declaration ¶ 151.

<sup>12</sup> See Declaration ¶¶ 149–50.

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

Moreover, the cited provisions are in no way “compulsory.” Article IV.2.11 states that “the [BCG] **may** ask the ICANN staff for its views on the matter, which comments shall be made available on the Website [of ICANN],” and Article IV.2.14 provides that “The [BCG] shall act on a Reconsideration Request on the basis of the public written record, including information submitted by . . . the ICANN staff . . .” (Emphasis added.) Thus if the BGC chooses not to “ask the ICANN staff for its views on the matter,” no such views become part of the “public written record.” The BGC is not mandated to inquire of the ICANN staff, and there is no indication in the record of the proceedings before the BGC, or in the present proceeding, that the BGC exercised its discretion in that regard. All four of the items listed on ICANN’s privilege log addressed to the BGC that the Declaration cites were originated by attorneys. Furthermore, the Declaration itself in paragraph 150 records that “it is beyond doubt that the BGC obtained and relied upon information and views **submitted** by ICANN staff,” not solicited by the BGC. (Emphasis added.)

10. The Declaration otherwise disregards any “balance among competing values” and focuses myopically on transparency and due diligence while ignoring the fact that ICANN may have been promoting competing values when its Board denied Dot Registry’s Reconsideration Requests. For example:

- ICANN was “[p]reserving and enhancing [its] operational stability [and] reliability” by denying meritless Reconsideration Requests. **(Core Value 1)**
- ICANN was “delegating coordination functions” to relevant third-party contractors (the EIU) and also to ICANN staff in assisting with the Determination on the Reconsideration Requests. **(Core Value 3)**
- ICANN was “[i]ntroducing and promoting competition in the registration of domain names” because there are collectively 21 other competing applications for the three gTLDs in question. **(Core Value 6)**
- ICANN was “[a]cting with a speed that is responsive to the needs of the Internet” because it dealt with meritless Reconsideration Requests in an expedient manner. **(Core Value 9)**

11. ***Fourth***, Dot Registry has gone to great lengths to frame this IRP as an “all or nothing” endeavor, repeatedly reminding the Panel that no appeal shall follow the IRP.<sup>13</sup> Under the guise of protecting its rights, Dot Registry has attempted to expand the scope of the IRP, and, in my view, has abused the process at each step of the way. For example:

- Dot Registry submitted four fact witness statements<sup>14</sup> and a 96-page expert report to reargue the merits of its CPE Applications,<sup>15</sup> none of which were submitted with Dot Registry’s Reconsideration Requests to the BGC, even though Article IV.2.7 of ICANN’s Bylaws permitted Dot Registry to “submit [with its Reconsideration Requests already] all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.”
- Dot Registry insisted that it be allowed to file a 75-page written submission despite the requirement set forth in Article 5 of ICANN’s Supplementary Procedures that “initial written submissions of the parties [in an IRP] shall not exceed 25 pages each in argument, double-spaced and in 12-point font.”<sup>16</sup>
- Dot Registry filed a 70-page written submission in response to limited procedural questions posed by the Panel, using the opportunity to reargue at great length the merits of the proceeding despite the Panel’s warning that “submissions be focused, succinct, and not repeat matters already addressed.”<sup>17</sup>
- Dot Registry requested that the Panel hold an in-person, five-day hearing even though Article IV.3.12 of ICANN’s Bylaws directs IRP Panels to “conduct [their] proceedings by email and otherwise via the Internet to the maximum extent feasible” and Article 4 of ICANN’s Supplementary Procedures refers to in-person hearings as “extraordinary.”<sup>18</sup>
- Dot Registry introduced a fact witness to testify at the hearing<sup>19</sup> in plain violation of Article IV.3.12 of ICANN’s Bylaws (“the hearing shall be limited to argument only”), paragraph 2 of the Panel’s Procedural Order No. 11 (“There will be no live percipient or expert witness testimony of any kind permitted at the hearing. Nor may a party attempt to produce new or additional evidence.”), and paragraph 2 of the Panel’s Procedural Order No. 12 (same).

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<sup>13</sup> See, e.g., Dot Registry’s Additional Submission dated 13 July 2015, ¶ 4.

<sup>14</sup> See Witness Statement of Elaine F. Marshall dated 17 Apr. 2015; Witness Statement of Jeffrey W. Bullock dated 24 Apr. 2015; Witness Statement of Shaul Jolles dated 13 July 2015; and Witness Statement of Tess Pattison-Wade dated 13 July 2015.

<sup>15</sup> See Expert Report of Michael A. Flynn dated 13 July 2015.

<sup>16</sup> See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 4.

<sup>17</sup> See Submission of Dot Registry, LLC on the Law Applicable to ICANN and the Structure of the IRP Proceedings dated 12 Oct. 2015 (see especially paragraphs 29–54); Procedural Order No. 6 dated 26 Aug. 2015, ¶ 2.

<sup>18</sup> See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 6.

<sup>19</sup> See Hearing Transcript dated 29 Mar. 2016, at 37–42.

12. The Panel has been extremely generous in accommodating Dot Registry's procedural requests, most of which, in my view, fall outside the purview of an IRP. The Declaration loses sight of this context, and ironically the core principle underlying the Declaration's analysis is that Dot Registry has been *deprived of due process and procedural safeguards*. I vigorously disagree. Dot Registry has been afforded every fair opportunity to "skip to the front of the line" of competing applicants and obtain the special privilege of operating three community-based gTLDs. Its claims should be denied. The denial would not take Dot Registry out of contention for the gTLDs, but, as the Declaration correctly acknowledges, would merely place Dot Registry "in a contention set for each of the proposed gTLDs with [all of the other 21 competing] applicants who had applied for one or more of the proposed gTLDs."<sup>20</sup> In this respect, I find the Declaration disturbing insofar as it encourages future disappointed applicants to abuse the IRP system.

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13. Turning to the merits of the dispute, the Declaration determines that ICANN failed to apply the proper standards in ruling on Dot Registry's Reconsideration Requests, and it concludes that the actions and inactions of the ICANN Board violated ICANN's Articles and Bylaws in four respects. I would note that Dot Registry did not specifically ask this Panel to assess whether or not the BGC applied the proper standard of review when evaluating Dot Registry's Reconsideration Requests.<sup>21</sup> Therefore, I believe that the Declaration should not have addressed the BGC's standard of review. As to the four violations, I have grouped them by subject matter ("Discrimination," "Research," "Independent Judgment," and "Privilege") and address each in turn.

### **Discrimination**

14. The Declaration finds that the ICANN Board breached its obligation of due diligence and care, as set forth in Article IV.3.4(b) of the Bylaws, in not having a reasonable amount of facts in front of it concerning whether the EIU or ICANN staff treated Dot Registry's CPE Applications in a discriminatory manner. That is, the ICANN Board should have investigated further into whether the CPE Panels applied an inconsistent scoring approach between Dot Registry's applications and those submitted by other applicants.<sup>22</sup> A critical mistake of the Declaration is its view that Dot Registry, when filing its Reconsideration Requests, actually "complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to other successful applicants."<sup>23</sup> A review of Dot Registry's three Reconsideration Requests

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<sup>20</sup> Declaration ¶ 20.

<sup>21</sup> See Dot Registry's Request for Independent Review Process dated 22 Sept. 2014, ¶ 65; Dot Registry's Additional Written Submission dated 13 July 2015, ¶ 42; Claimant's Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 20-21.

<sup>22</sup> See Declaration ¶¶ 98-100, 103-04, 122.

<sup>23</sup> Declaration ¶¶ 47-48, 124.

filed with the BGC reveals otherwise. In response to issue number 8 on each of the three “Reconsideration Request Forms,” entitled “Detail of Board or Staff Action — Required Information,” Dot Registry listed the alleged bases for reconsideration:

*The inconsistencies with established policies and procedures include: (1) the Panel's failure to properly validate all letters of support and opposition; (2) the Panel's repeated reliance on "research" without disclosure of the source or substance of such research; (3) the Panel's "double counting"; (4) the Panel's apparent evaluation of the [.INC/.LLC/.LLP] Community Application in connection with several other applications submitted by Dot Registry; and (5) the Panel's failure to properly apply the CPE criteria in the AGB in making the Panel Determination.*<sup>24</sup>

15. As can be discerned from Dot Registry’s own submissions, it raised NO allegations concerning discrimination. Paragraph 22 of the Declaration paraphrases the bases for Dot Registry’s Reconsideration Requests — again, notably NOT including any allegations concerning discrimination — but then the Declaration inexplicably states in paragraph 47 that Dot Registry had alleged “unjustified discrimination (disparate treatment).”
16. My colleagues are mistaken. Dot Registry never asked the BGC for relief on any grounds relating to discrimination. As if Dot Registry’s formal request for relief in its Reconsideration Requests, quoted above, were not clear enough, the remainder of the documents confirms that nowhere did Dot Registry mention or even allude to discrimination. Its Reconsideration Requests do not even use the words “discrimination,” “discriminate,” “discriminatory,” “disparate,” or “unequal.” To the extent that my colleagues take the position that Dot Registry’s discrimination argument was somehow “embedded” within the Reconsideration Requests, I respectfully disagree. At most, Dot Registry referred in passing to an appeals mechanism used in another application (.edu),<sup>25</sup> and it noted, again in passing, that the BGC had ruled a certain way with regard to .MED,<sup>26</sup> but Dot Registry never articulated any proper argument about discrimination. It is undisputed that Dot Registry has alleged discrimination in this IRP<sup>27</sup> — but of course it only raised those arguments after the BGC issued its Determination on Dot Registry’s Reconsideration Requests. By holding the BGC accountable for failing to act in response to a complaint that Dot Registry never even advanced below, the Declaration commits an obvious error.

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<sup>24</sup> See Reconsideration Request for Application 14-30 at 4; Reconsideration Request for Application 14-32 at 3; Reconsideration Request for Application 14-33 at 3.

<sup>25</sup> See Reconsideration Request for Application 14-30 at 16 & n.39; Reconsideration Request for Application 14-32 at 14 & n.39; Reconsideration Request for Application 14-33 at 14 & n.35.

<sup>26</sup> See Reconsideration Request for Application 14-30 at 6-7; Reconsideration Request for Application 14-32 at 4-5; Reconsideration Request for Application 14-33 at 4-5.

<sup>27</sup> See Dot Registry’s Additional Written Submission dated 17 July 2015, at 15-17; Dot Registry’s Submission dated 12 Oct. 2015, at 27-30.

## Research

17. The Declaration finds that the ICANN Board also breached the same obligation of due diligence and care in having a reasonable amount of facts in front of it concerning transparency. More specifically, it concludes that the BGC did not take sufficient steps to see if ICANN staff and the EIU acted transparently when undertaking “research” that went into the CPE Reports.<sup>28</sup> The only references to “research” in the CPE Reports are the same two sentences that are repeated three times verbatim in each of the CPE Reports:

*Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an [INC, LLC, LLP]. Based on the Panel's research, there is no evidence of [INCs, LLCs, LLPs] from different sectors acting as a community as defined by the Applicant Guidebook.<sup>29</sup> (Emphasis added.)*

18. The Declaration traces the origins of this language back to correspondence between ICANN staff and the EIU in which the former suggested that the latter refer to “research” in a draft of what would eventually become the final CPE Reports in order to further “substantiate” the conclusion that INCs/LLCs/LLPs do not constitute “communities.”<sup>30</sup> The Declaration observes that Dot Registry had asserted in its Reconsideration Requests that the CPE Reports “repeatedly relie[d]” upon research as a “key factor” without “cit[ing] any sources or giv[ing] any information about [] the substance or the methods or scope of the ‘research.’”<sup>31</sup> My colleagues are troubled by what they view as ICANN’s Board making “short shrift” of Dot Registry’s position concerning the “research.”<sup>32</sup> The BGC disposed of Dot Registry’s argument as follows:

*The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to “cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to “perform independent research, if deemed necessary to reach informed scoring decisions.[”] The Requestor cites to no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope, or methods of its independent research. As such, the Requestor’s argument does not support reconsideration.<sup>33</sup>*

19. The Declaration views this analysis by the BGC as insufficient. It concludes that the

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<sup>28</sup> Declaration ¶¶ 94–99, 106, 111, 115–22.

<sup>29</sup> Community Priority Evaluation Report for “INC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLP” dated 11 June 2014, at 2, 3, 4.

<sup>30</sup> Declaration ¶¶ 96–99.

<sup>31</sup> Declaration ¶ 94 (quoting Dot Registry’s Reconsideration Requests).

<sup>32</sup> Declaration ¶ 95.

<sup>33</sup> Determination of the Board Governance Committee Reconsideration Request 14-30, 14-32, 14-33 dated 24 July 2014, at 11 (internal citations omitted).

“failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those [transparency] obligations is itself a failure by the Board to comply with its [transparency] obligations under the Articles and Bylaws.”<sup>34</sup>

20. The Declaration suffers from several fatal flaws. To begin with, it consists of a thinly veiled rebuke of actions taken by the EIU and ICANN staff. Although the Declaration does not explicitly so state, it hints at a strong disapproval of the cooperation between the EIU and ICANN staff in drafting the CPE Reports, and it all but says that the EIU and ICANN staff violated ICANN’s transparency policies by citing “research” in the CPE Reports but failing to detail the nature of that “research.” As noted above, however, this Panel’s jurisdiction is expressly limited to reviewing the action or inaction of the ICANN Board and no other individual or entity. ICANN itself has recognized that “the only way in which the conduct of ICANN staff or third parties is reviewable [by an IRP Panel] is to the extent that the Board allegedly breached ICANN’s Articles or Bylaws in acting (or failing to act) with respect to that conduct.”<sup>35</sup> In my opinion, my co-Panelists’ conclusion that ICANN’s Board breached its Articles and Bylaws is driven by their firm belief that ICANN staff and the EIU should have disclosed their research. This reasoning places the “cart before the horse” and fails on that basis alone.
21. Nor has the Declaration given proper consideration to the BGC’s analysis (quoted in paragraph 18 above) or to ICANN’s position as articulated in one of its written submissions to this Panel:

*[T]he CPE Panels were not required to perform any particular research, much less the precise research preferred by an applicant. Rather, the Guidebook leaves the issue of what research, if any, to perform to the discretion of the CPE panel: “The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.”*

*[T]he research performed by the EIU is not transmitted to ICANN, and would not have been produced in this IRP because it is not in ICANN’s custody, possession, or control. The BGC would not need this research in order to determine if the EIU had complied with the relevant policies and procedures (the only issue for the BGC to assess with respect to Dot Registry’s Reconsideration Requests).<sup>36</sup>*

Moreover, as noted in paragraph 5 above, it was reasonable for the BGC not to exercise its discretion to inquire into the details of the EIU’s research, given the rather obvious absence of merit in Dot Registry’s CPE submissions for .INC, .LLC, and .LLP.

22. Had my co-Panelists fully considered the BGC’s Determination on the Reconsideration Requests and ICANN’s analysis, they would have found that both withstand scrutiny. Section 4.2.3 of the AGB establishes a CPE Panel’s right — but not obligation — to perform

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<sup>34</sup> Declaration ¶ 122.

<sup>35</sup> ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 10.

<sup>36</sup> See ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 44 (citing AGB § 4.2.3) (emphasis in original).

research, which it “deem[s] necessary to reach [an] informed scoring decision.” The Declaration effectively transforms that discretionary right into an affirmative obligation to produce any research performed by any ICANN personnel or even by third parties such as the EIU. The Declaration cites for support general provisions concerning transparency that, it says, “reverberate[] through [ICANN’s] Articles and Bylaws,”<sup>37</sup> but it notably fails to cite any clause specifically requiring the disclosure of “research.” There is no such clause. ICANN, its staff, and its third-party vendors should not be penalized for having exercised the right to perform research when they were never required to do so in the first place. I disagree with the Declaration which forces the BGC to “police” any voluntary research performed by ICANN staff or the EIU and spell out the details of that research for all unsuccessful CPE applicants during the reconsideration process.

23. In any event, any reader of the underlying CPE Reports rejecting Dot Registry’s applications would be hard pressed to find that the reasoning and conclusions expressed in those reports would no longer hold up if the two sentences referring to “research” had never appeared in those reports. My colleagues are fooling themselves if they think that extracting those ancillary references to “research” from the CPE Reports would have meant that the CPE Panels would have awarded Dot Registry with four points for “Community Establishment.” Any error relating to the disclosure of that research was harmless at best.

### **Independent Judgment**

24. The Declaration cites Article IV.3.4(c) of ICANN’s Bylaws, which instructs IRP Panels to focus on, *inter alia*, whether “the Board members exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company.”<sup>38</sup> It finds that “the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment.”<sup>39</sup> Besides the text of the BGC’s Determination on the Reconsideration Requests and the minutes of the BGC meeting held concerning that determination, which my co-Panelists dismiss as “*pro forma*” and “routine boilerplate,” the Declaration finds nothing to support the conclusion that the BGC did anything more than “rubber stamp” work supplied by ICANN staff.<sup>40</sup> The Declaration chastises ICANN for submitting “no witness statements or testimony” or documents to prove that its Board acted independently.<sup>41</sup> In response to an assertion from ICANN’s counsel that the Board did not rely on staff recommendations, the Declaration retorts, “[That] is simply not credible.”<sup>42</sup> Ultimately, it holds ICANN in violation of Article IV.3.4(c) on the basis that ICANN presented “no real evidence” that the BGC exercised independent judgment.<sup>43</sup>

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<sup>37</sup> See Declaration ¶¶ 117–21.

<sup>38</sup> Declaration ¶ 126.

<sup>39</sup> Declaration ¶¶ 127, 147.

<sup>40</sup> Declaration ¶¶ 126, 140, 147.

<sup>41</sup> Declaration ¶¶ 127, 147.

<sup>42</sup> Declaration ¶ 141.

<sup>43</sup> Declaration ¶¶ 126, 147, 150.

25. The Declaration<sup>44</sup> relies heavily on Articles IV.2.11 and IV.2.14 of ICANN's Bylaws which state:

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

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

26. The Declaration interprets these Articles by finding that the "obligations in the Bylaws to make . . . staff work public are compulsory, not optional."<sup>45</sup>
27. Once again, the Declaration elevates the mantra of transparency above all else. It is worth recalling, as is set forth in paragraph 9 above, that Article IV.2.11 vests in the BGC the right — but not the obligation — to seek staff views. ICANN has explained that there are no records of "staff . . . views" or "information submitted . . . by the ICANN staff," as contemplated by Articles IV.2.11 and IV.2.14. It should be noted that the privilege log submitted by ICANN does show that there were 14 e-mail exchanges between ICANN officials and their counsel relating to Dot Registry, which controverts the "rubber-stamping" conclusion of the Declaration.<sup>46</sup> ICANN's Senior Counsel has even gone so far as to submit a signed, notarized attestation (albeit after being compelled to do so by the Panel)<sup>47</sup> that ICANN had produced all non-privileged documents in its possession responding to the Panel's inquiries concerning ICANN's internal communications.<sup>48</sup> The Panel, nonetheless, deems ICANN's position "simply not credible."<sup>49</sup> Credibility determinations have no place in this IRP, especially in relation to counsel.<sup>50</sup> The Declaration has effectively gutted the meaning of Articles IV.2.11 and IV.2.14 as discretionary tools available to ICANN and converted them into affirmative obligations that ICANN produce enough evidence in an IRP to prove that its Board acted independently.
28. Curiously, the Declaration refers not even once to "burden of proof." It was wise not to do so, notwithstanding that both Dot Registry and ICANN contended that the other Party bore a burden of proof, given that nowhere in the Bylaws relating to the BGC or to this IRP is there

<sup>44</sup> See Declaration ¶¶ 128, 142, 149–50.

<sup>45</sup> Declaration ¶ 149.

<sup>46</sup> See Privilege Log (attached to Letter from ICANN to the Panel dated 19 June 2015).

<sup>47</sup> See Procedural Order No. 6 dated 12 June 2015, ¶ 4.

<sup>48</sup> See Attestation of Elizabeth Le dated 17 June 2015.

<sup>49</sup> Declaration ¶ 151.

<sup>50</sup> Note that the Declaration also repeatedly refers to the "Declaration" submitted by EIU Contact Information Redacted on behalf of ICANN as evidence showing that ICANN staff worked closely with the EIU. See Declaration ¶¶ 14, 15, 36, 43, 90–92. EIU Contact Information Redacted did not submit a traditional "witness statement." He is the EIU Contact Information Redacted of the EIU. He wrote one five-page declaration dated 13 April 2015 that was submitted by ICANN to Dot Registry as part of the document-production process in this dispute.

any provision for a burden of proof. To the contrary, the present IRP is governed by Bylaws Article IV.3.4, which prescribes that this Panel “shall be charged with comparing contested actions of the Board [BGC] to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of [them].” Nevertheless, it is self-evident that the Declaration not only placed the burden on ICANN to prove that its Board acted independently, but the Declaration’s repeated references to the “silence in the evidentiary record”<sup>51</sup> make it clear that the Declaration viewed ICANN’s failure to submit evidence as *the single decisive factor* behind its holding. None of the previous IRP panels has placed the burden on ICANN to disprove a claimant’s case.<sup>52</sup> Why would they? Guided by the mandate of Bylaws Article IV.3.4, the Panel should simply have taken the record before it, compared it to the requirements of the Articles of Incorporation and the Bylaws, weighed the record and the Parties’ arguments, and then, without imposing any burden of proof on either Party, have proceeded to its decision.

29. Applying that approach to this particular dispute should have led the Panel to the two most obvious pieces of evidence on point: the 23-page Determination on the Reconsideration Requests and the minutes of the Board meeting during which its members voted on that Determination. In my view, the 23-page Determination on the Reconsideration Requests is thorough and sufficient in and of itself to show that the ICANN Board fully and independently considered Dot Registry’s claims. Each argument advanced by Dot Registry was carefully recorded, analyzed, dissected, and rejected. What more could be necessary? Another IRP Panel, deciding the dispute in *Vistaprint Limited v. ICANN*, apparently agreed. It stated:

*In contrast to Vistaprint's claim that the BGC failed to perform its task properly and “turned a blind eye to the appointed Panel's lack of independence and impartiality”, the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC's analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel's own analysis.*<sup>53</sup>

30. The minutes of the ICANN Board meeting held on 24 July 2014 also show that “[a]fter discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports.”<sup>54</sup> The Declaration summarily dismisses those

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<sup>51</sup> Declaration ¶ 128.

<sup>52</sup> See Hearing Transcript dated 29 Mar. 2016, at 91:8–18, 174:14–19.

<sup>53</sup> *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel, ¶ 159.

<sup>54</sup> See <https://www.icann.org/resources/board-material/minutes-bgc-2014-07-24-en>.

minutes as “boilerplate” and “*pro forma*.”<sup>55</sup> Here, too, the Declaration is mistaken. It is to be appreciated that the minutes only go into minimal detail, but the Declaration fails to accord any meaning or weight whatsoever to the words “discussion and consideration.” The words must mean what they say: ICANN’s Board “discussed” and “considered” Dot Registry’s Reconsideration Requests and decided to deny them for all of the reasons set forth in the Determination on the Reconsideration Requests.

31. To accept the analysis set forth in the Declaration, one must start from the premise that ICANN’s Board Members had to “wrestle” with difficult issues raised by Dot Registry’s Reconsideration Requests and therefore a long paper trail must exist reflecting inquiries, discussions, drafts, and so forth. A sober review of the record, however, suggests that the Board never needed to engage in any prolonged deliberations, because it was never a “close call.” Dot Registry’s CPE applications only received 5 out of 16 points (far short of the 14 points necessary to prevail), and its Reconsideration Requests largely reargued the merits of its underlying CPE Applications. The ICANN Board assessed and denied Dot Registry’s weak applications with efficiency. It should have no obligation to detail its work beyond that which it has done.
  
32. Instead of doing as it should have done, however, and in addition to converting discretionary powers of the BGC under the Bylaws into unperformed mandatory investigations, the Panel engaged in repeated speculation in paragraph after paragraph: it “infer[red],” para. 133; “presume[d],” para. 133; stated that “it would appear,” para. 134; “consider[ed],” para. 137; found that since “[n]o ICANN staff or Board members presented a witness statement in this proceeding,” and there is “no documentary evidence of such a hypothetical discussion,” i.e., “oral conversations between staff and members of the BGC, and among members of the BGC, . . . in connection with the July 24 session BGC meeting where the BGC determined to deny the reconsideration requests,” . . . “no evidence at all exists [‘apart from *pro forma* corporate minutes of the BGC meeting’] to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff,” para. 140; found that “[t]he BGC . . . simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff,” para. 145; and concluded that “ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes . . . regardless of whether or not the discussion was more than rubber-stamping of management decisions,” para. 147. (Emphasis in original.)

### **Privilege**

33. Related to the last issue and relying once more on its mistaken interpretation of Articles IV.2.11 and IV.2.14 of ICANN’s Bylaws when viewed in combination as mandating public posting of unsolicited comments from ICANN staff, the Declaration finds that the ICANN

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<sup>55</sup> Declaration ¶ 147.

Board breached its obligation to make ICANN staff work publicly available by claiming legal privilege over communications involving ICANN's Office of General Counsel.<sup>56</sup> It is undisputed that ICANN submitted a three-page privilege log, listing 14 documents, and ICANN's counsel did not hide the fact that ICANN had withheld from its productions those communications concerning Dot Registry that involved ICANN's Office of General Counsel.<sup>57</sup>

34. The question for the Panel is whether ICANN's transparency obligations, particularly those found in the provisions quoted at paragraph 25 above, even as wrongly interpreted by the majority Declaration, prohibited ICANN from claiming legal privilege over communications otherwise reflecting ICANN staff views on Dot Registry's Reconsideration Requests. ICANN's Bylaws could have included limiting language recognizing that ICANN's obligations under Articles IV.2.11 and IV.2.14 to make staff work available to the public would be subject to legal privilege, but the Bylaws do not do so. On the other hand, neither do the Bylaws expressly state that ICANN's transparency obligations trump ICANN's right to communicate confidentially with its counsel, as any other California corporation is entitled to do.<sup>58</sup> Article III of ICANN's Bylaws, entitled "Transparency," does not specifically answer the question before the Panel. My colleagues rely heavily on the first provision of the Article, which states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." My colleagues do not cite the only provision found within Article III that does address "legal matters," albeit in the context of Board resolutions and meeting minutes, which suggests that ICANN's general transparency obligations do NOT trump its right to withhold legally privileged communications.<sup>59</sup> As such, I would not have found ICANN in violation of its Bylaws but I would have favored a Declaration adopting an approach similar to that taken recently by another IRP Panel, *Despegar v. ICANN*, in which the Panel rejected all of the claims brought by the claimants but suggested that ICANN's Board address an issue outside of the IRP context.<sup>60</sup> This Panel just as easily could have urged ICANN to clarify how legal privilege fits within its transparency obligations without granting Dot Registry's applications in this IRP.

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<sup>56</sup> Declaration ¶¶ 133, 135-37, 143, 148-50.

<sup>57</sup> Declaration ¶ 141. The Declaration suggests that ICANN has raised both attorney-client privilege and work-product privilege, *see* Declaration ¶¶ 128 and 149, although the last column in ICANN's privilege log lists "attorney-client privilege" as the only applicable privilege to each document listed.

<sup>58</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 211:17-24.

<sup>59</sup> *See* ICANN Bylaws, Article III.5.2 ("[A]ny resolutions passed by the Board of Directors at [a] meeting shall be made publicly available on the Website; provided, however, that any actions relating to . . . legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN) . . . are not appropriate for public distribution, [and] shall not be included in the preliminary report made publicly available."); ICANN Bylaws, Article III.5.4 (same regarding meeting minutes).

<sup>60</sup> *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157-58 ("[A] number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.").

## Conclusion

35. In my view Dot Registry, apparently with the collaboration of the National Association of Secretaries of State (“NASS”), has quite boldly gamed the system, seeking CPEs which all of the other 21 applicants for the three gTLDs in issue thought were obviously unattainable, since they ventured no such applications, in hopes of outflanking, hence defeating, all of them by bulldozing ICANN in the present proceeding. As noted above, the majority Declaration entirely overlooks the fact that the BGC was empowered, but not required, by the rules governing its proceeding to make certain inquiries, and takes no account of how the exercise of the BGC’s discretion in this regard can legitimately be affected by the patent lack of any kind of “community” among all INCs, LLCs, or LLPs. At the hearing I questioned whether the willingness of the NASS to support Dot Registry in its gamble might not be due to its members’ independent interest in the possibility that their enforcement function would be facilitated if Dot Registry’s applications were to be successful:

*JUDGE BROWER: ... Suppose I'm the secretary of state of Delaware or the head of the NASS, and your client comes to me with his proposition of the applications that have been put before us. And the secretary of state says, oh, wow, this is a great enforcement possibility for us. If you get these domain names approved by ICANN and a provision of being able to use it is that one is registered with the secretary of state of one of the states, that's for me, wow, what a great sort of enforcement surveillance mechanism, because I don't have to pay anything for it. It's better than anything we've been able to do, because I will know anyone using the LLC or LLP or INC as a domain name actually has legitimate -- should have a legitimate legal status. So that's my motive, okay? I'll do anything I can to get that done, and he says, sure, I'll sign anything. I'll say they got it all wrong. Does that make -- would that make any difference?*

*MR. ALI: I mean I wouldn't want to speak for the Delaware secretary of state or any other secretary of state. I think that's precisely the sort of question that you could have put to them if they were in front of you. I mean what their motivations were or what their motivations are, I think it would be highly inappropriate for me to try and get. I would not want to offer you any sort of speculation, but I would say that the obverse of not having that I would say surveillance power, they have that anyway if you want to call it surveillance, because the registration, "surveillance" sounds somewhat sinister, particularly in today's environment of being someone who has some background. So I would simply say that the -- by not having this particular institution as we proposed by Dot Registry, the prospects of consumer fraud and abuse are absolutely massive, because if somebody were to gain the rights to these TLDs, or maybe it's not just one company or one applicant, but three different applicants, not a single one of which is based in the United States, just think of the prospect of a company registered who knows where, representing to the world that it's an INC. That would be highly problematic. That would be -- that would create the potential for significant consumer fraud. I mean consumer fraud on the internet is multibillion dollar*

*liability. This stands, if it's not done properly, to create absolute havoc. And so the secretary of state, in his or her execution of his or her mission, might well be motivated by wanting to prevent further consumer fraud, but that's an entirely legitimate purpose. That's really my own speculation.*

*JUDGE BROWER: No, I don't argue with the legitimate purpose. The question is whether it is a basis of community.*<sup>61</sup>

I believe that this exchange speaks for itself.

36. The majority Declaration unilaterally reforms the entire BGC procedure for addressing Reconsideration Requests and also what heretofore has been expected of an IRP Panel. The majority would have done better to stick to the rules itself, and, as the IRP Panel did in *Despegar v. ICANN*, suggest that the ICANN Board “give due consideration” to general issues of concern raised by the Claimant.<sup>62</sup> The present Declaration, in finding the BGC guilty of violating the ICANN Articles and By-Laws, has itself violated them.
37. The majority Declaration intentionally avoids any recommendations to the Board as to how it should respond to this Declaration. This IRP Panel is, of course, empowered to make recommendations to the Board.<sup>63</sup> Since the Declaration, if it is to be given effect, has simply concluded that the BGC violated transparency, did not have before it all of the facts necessary to make a decision, and failed to act independently — all procedural defects having nothing to do with the merits of Dot Registry’s three applications for CPEs — it appears to me that the only remedy that would do justice to Dot Registry, as the majority Declaration sees it, and also to all of the other 21 applicants for the same three gTLDs, hence to ICANN itself, would be for the Board to “consider the IRP Panel declaration at the Board’s next meeting,” as it is required to do under Article IV.3.21 of the Bylaws, and for the BGC to take whatever “subsequent action on th[e] declaration[.]” it deems necessary in light of the findings of the Declaration.<sup>64</sup> In other words, I would recommend that the Board, at most, request the BGC to rehear the original Reconsideration Requests of Dot Registry, making the inquiries and requiring the production of the evidence the majority Declaration has found wanting. Considering the limits of the Declaration, which has not touched on the merits of Dot Registry’s three CPE applications, it would, in my view, be wholly inappropriate for the Board to grant Dot Registry’s request that its three applications now be approved without further ado.
38. For all of the above-mentioned reasons, I would have rejected each of Dot Registry’s claims and named ICANN as the prevailing party. I respectfully dissent.

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<sup>61</sup> Hearing Transcript dated 29 Mar. 2016, at 65:6-67:23.

<sup>62</sup> *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157–58.

<sup>63</sup> ICANN Bylaws, Article IV.3.11(d) (“The IRP Panel shall have the authority to: ... recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”); ICANN Bylaws, Article IV.3.21 (“Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”).

<sup>64</sup> ICANN Bylaws, Article IV.3.21.

29 July 2016

*Charles N. Brower*

Charles N. Brower

# **Exhibit 7**



**New gTLD Program**  
**Community Priority Evaluation Report**  
Report Date: 6 October 2014

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay llc

**Overall Community Priority Evaluation Summary**

<b>Community Priority Evaluation Result</b>	<b>Did Not Prevail</b>
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

**Panel Summary**

<b>Overall Scoring</b>	<b>10 Point(s)</b>	
Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
<b>Total</b>	<b>10</b>	<b>16</b>
<b>Minimum Required Total Score to Pass <u>14</u></b>		

<b>Criterion #1: Community Establishment</b>	<b>4/4 Point(s)</b>
<b>1-A Delineation</b>	<b>2/2 Point(s)</b>
<p>The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p>	

The community defined in the application (“GAY<sup>1</sup>”) is drawn from:

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA<sup>2</sup>. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.

The application further elaborates the requirements of the above individuals to demonstrate membership in the community:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations. Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights.

This community definition shows a clear and straightforward membership and is therefore well defined. Membership is “determined through formal membership with any of dotgay LLC’s [the applicant’s] Authentication Partners (AP) from the community”, a transparent and verifiable membership structure that adequately meets the evaluation criteria of the AGB.

In addition, the community as defined in the application has awareness and recognition among its members. The application states:

As the foundation of the community, membership organizations are the single most visible entry point to the Gay Community around the world. They serve as “hubs” and are recognized as definitive qualifiers for those interested in affirming their membership in the community. The organizations range from serving health, social and economic needs to those more educational and political in nature; with each having due process around affirming status in the community. In keeping with standards currently acknowledged and used within the community, dotgay LLC will utilize membership organizations as APs to confirm eligibility. APs must meet and maintain the following requirements for approval by dotgay LLC:

1. Have an active and reputable presence in the Gay Community
2. Have a mission statement that incorporates a focus specific to the Gay Community
3. Have an established policy that affirms community status for member enrolment
4. Have a secure online member login area that requires a username & password, or other secure control mechanism.

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<sup>1</sup> In this report the community as defined by the application is referred to as the “GAY community” instead of the “gay community” or the “LGBTQIA community”. The “GAY community” is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD. “Gay community” or “LGBTQIA community” are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant’s defined community. This use is consistent with the references to these groups in the application.

<sup>2</sup> The Applicant notes with regard to its use of the term LGBTQIA that “LGBTQIA – Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Ally is the latest term used to indicate the inclusive regard for the extent of the Gay Community.” This report uses the term similarly.

Based on the Panel's research and materials provided in the application, there is sufficient evidence that the members as defined in the application would cohere as required for a clearly delineated community. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

#### Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic scope and the community as defined is a global one. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA's website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

#### Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization representative of the community defined by the applicant, as referred to above, has records of activity beginning before 2007. LGBTQIA individuals have been active outside of organizations as well, but the community as defined is comprised of members of [AP] organizations.

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

#### Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. While the application does cite global estimates of the self-identified gay/LGBTQIA (lesbian, gay, bisexual, transgender, queer, intersex, and ally) population (1.2% of world population), it does not rely on such figures to determine the size of its community. This is because the applicant requires that any such LGBTQIA individual also be a member of an AP organization in order to qualify for membership of the proposed community. According to the application:

Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members.

The size of the delineated community is therefore still considerable, despite the applicant's requirement that the proposed community members must be members of an AP.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community"<sup>3</sup>, and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

#### Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the .GAY community<sup>4</sup> are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of LGBTQIA individuals has accelerated since then, especially in recent decades and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater rates of visibility of LGBTQIA individuals, recognition of LGBTQIA rights and community organization, both in the US and other western nations as well as elsewhere.<sup>5</sup> While socio-political obstacles to community

<sup>3</sup> "Gay community" or "LGBTQIA community" are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant's defined community.

<sup>4</sup> The ".GAY community" is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD.

<sup>5</sup> Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

organization remain in some parts of the world,<sup>6</sup> the overall historical trend of LGBTQIA rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a “presence in the Gay Community”, and also “incorporate a focus specific to the Gay Community.” By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

**Criterion #2: Nexus between Proposed String and Community**

**0/4 Point(s)**

**2-A Nexus**

**0/3 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community. To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.”

The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus. As cited above:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).

The application, therefore, acknowledges that “the world at large” understands the Gay community to be an entity substantially different than the community the application defines. That is, the general population understands the “Gay community” to be both those individuals who have “come out” as well as those who are privately aware of their non-heterosexual sexual orientation. Similarly, the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part. That is, the community as defined by the applicant refers only to the sub-set of individuals who have registered with specific organizations, the Authenticating Partners.

As the application itself also indicates, the group of self-identified gay individuals globally is estimated to be 1.2% of the world population (more than 70 million), while the application states that the size of the community it has defined, based on membership with APs, is 7 million. This difference is substantial and is indicative of the degree to which the applied-for string substantially over-reaches beyond the community defined by the application.

<sup>6</sup> <http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>

Moreover, while the applied-for string refers to many individuals not included in the application’s definition of membership (i.e., it “substantially over-reaches” based on AGB criteria), the string also fails to identify certain members that the applicant has included in its definition of the .GAY community. Included in the application’s community definition are transgender and intersex individuals as well as “allies” (understood as heterosexual individuals supportive of the missions of the organizations that comprise the defined community)<sup>7</sup>. However, “gay” does not identify these individuals. Transgender people may identify as straight or gay, since gender identity and sexual orientation are not necessarily linked.<sup>8</sup> Likewise, intersex individuals are defined by having been born with atypical sexual reproductive anatomy<sup>9</sup>; such individuals are not necessarily “gay”<sup>10</sup>. Finally, allies, given the assumption that they are heterosexual supporters of LGBTQIA issues, are not identified by “gay” at all. Such individuals may be an active part of the .GAY community, even if they are heterosexual, but “gay” nevertheless does not describe these individuals as required for Nexus by the AGB. As such, there are significant subsets of the defined community that are not identified by the string “.GAY”.

The Community Priority Evaluation panel has determined that the applied-for string does not match nor does it identify without substantially over-reaching the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

**2-B Uniqueness** **0/1 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the “string has no other significant meaning *beyond identifying the community described in the application,*” according to the AGB (emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above.). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

**Criterion #3: Registration Policies** **4/4 Point(s)**

**3-A Eligibility** **1/1 Point(s)**

The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that:

.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC’s Authentication Partners (AP) from the community.

The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Eligibility.

<sup>7</sup> This prevailing understanding of “ally” is supported by GLAAD and others: <http://www.glaad.org/resources/ally>

<sup>8</sup> <http://www.glaad.org/reference/transgender>

<sup>9</sup> [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex)

<sup>10</sup> “Gay” is defined by the Oxford dictionaries as “A homosexual, especially a man.” The applicant defines the community as “individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society.”

<b>3-B Name Selection</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .Gay top-level domain, including rules barring “[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.” The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Name Selection.</p>	
<b>3-C Content and Use</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes “efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression.”</p> <p>The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Content and Use.</p>	
<b>3-D Enforcement</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.</p> <p>Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access. The Community Priority Evaluation panel has determined that the application satisfies both the conditions to fulfill the requirements for Enforcement.</p>	

<b>Criterion #4: Community Endorsement</b>	<b><i>2/4 Point(s)</i></b>
<b>4-A Support</b>	<b><i>1/2 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.</p> <p>To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.</p>	

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). (While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent it. There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

*1/2 Point(s)*

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from a group of non-negligible size, coming from an organization within the communities explicitly addressed by the application, making it relevant. The organization is a chartered 501(c)3 nonprofit organization with full-time staff members, as well as ongoing events and activities with a substantial following. The grounds of the objection do not fall under any of those excluded by the AGB (such as spurious or unsubstantiated claims), but rather relate to the establishment of the community and registration policies. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

**Disclaimer:** Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <[newgtlds.icann.org](http://newgtlds.icann.org)>.

# **Exhibit 8**



New gTLD Program  
Community Priority Evaluation Report  
Report Date: 8 October 2015

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay LLC

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	10 Point(s)	
Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
<b>Total</b>	<b>10</b>	<b>16</b>
<b>Minimum Required Total Score to Pass <u>14</u></b>		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p> <p>In its application, dotgay LLC defines its community as follows:</p>	

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships...

The membership criterion to join the Gay Community is the process of 'coming out'. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible...

Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights. (Application, section 20(a))

The applicant relies on the "process of coming out" to delineate its members, who are individuals with non-normative sexual orientation or gender identities, as well as their allies<sup>1</sup>. The process of "coming out" is by nature personal, and may vary from person to person. Some individuals within the proposed community may not come out publicly, reflecting real or feared persecution for doing so. Similarly, membership in a community organization may not be feasible for the same reason. Furthermore, organizations within the applicant's defined community recognize "coming out" as a defining characteristic of individuals within the defined community.<sup>2</sup> Many such organizations advocate on behalf of individuals even though they are not members, precisely because their coming out publicly may be illegal or otherwise harmful. Therefore, the Panel recognizes that the standard of "coming out" – whether publicly or privately – as homosexual, bisexual, transgender, queer, intersex, or ally is sufficiently clear and straightforward to meet the AGB's requirements.<sup>3</sup>

In addition, the community as defined in the application has awareness and recognition among its members. There is an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies. As cited by the applicant in supporting materials, for example, the American Psychological Association recognizes the process of coming out as a key part of entering the community.<sup>4</sup> For many individuals, this awareness and recognition of community is made more explicit, such as by membership in organizations, participation in events, and advocacy for the rights of individuals with non-normative sexual orientations and gender identities. As the applicant states, organizations and individuals within the community also often cohere around areas of discrimination, whether in the workplace, marketplace, the media, or other areas. Regardless of whether this awareness and recognition of shared community is explicit or rather an implicit consequence of one's coming

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<sup>1</sup> The Panel, following the applicant's reference to "individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society", uses the phrase "non-normative sexual orientations and/or gender identities" throughout this document. The term "non-normative" is used both by the applicant as well as organizations, academics, and publications discussing the topic; it is not the Panel's terminology, nor is it considered to be derogatory in this context. This phrase refers to the same individuals usually referred to with the acronyms "LGBT", "GLBT", "LGBTQ", and others. Because issues related to these acronyms are relevant later in this document, they are not used here.

<sup>2</sup> See as examples <http://www.hrc.org/campaigns/coming-out-center> and [http://www.lalgbtcenter.org/coming\\_out\\_support](http://www.lalgbtcenter.org/coming_out_support)

<sup>3</sup> For allies, the "coming out" process may differ from that of individuals who are acknowledging privately or sharing publicly their own non-normative sexual orientation or gender identity. Nevertheless, there are risks associated even with supporting non-heterosexual individuals; making this support explicit is how allies can mark their awareness and recognition of the wider community and their sense of belonging to it. For example, large international organizations within the applicant's defined community, such as GLAAD, HRC, and PFLAG offer concrete avenues for individuals to "come out" as allies. See <http://www.glaad.org/form/come-outas-ally-join-allynetwork-today>,

<http://www.hrc.org/resources/entry/straight-guide-to-lgbt-americans>, <http://community.pflag.org/page.aspx?pid=539>

<sup>4</sup> <http://www.apa.org/topics/lgbt/orientation.pdf>

out, the Panel has determined that the link among these individuals goes well beyond “a mere commonality of interest” and satisfies the AGB’s requirements for recognition and awareness.<sup>5</sup>

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

#### Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic area and/or segment of the proposed community. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), an umbrella organization whose organizational members also include those representing allies. According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA’s website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

#### Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization mainly dedicated to the community as defined by the applicant, as referred to above, has records of activity beginning before 2007. Individuals with non-normative sexual orientations and/or gender identities, as well as their supporters, have been increasingly active in many countries as they work to advance their acceptance and civil rights.<sup>6</sup>

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<sup>5</sup> Although the score on Delineation is unchanged since the first evaluation, the Panel’s analysis has changed due to the applicant’s response to a Clarifying Question regarding the role of Authentication Partners (APs). Previously, the Panel had understood the APs to be a mechanism of members’ awareness and recognition, but, as above, that is no longer the case and the role of APs is correctly understood to be relevant for the purposes of Section 3.

<sup>6</sup> See for example, advocacy in China, Guyana, and Argentina: <http://www.cnn.com/2013/06/27/world/asia/china-gay-lesbian-marriage/>, <http://www.gaystarnews.com/article/guyana-urged-to-end-ban-on-gay-sex-at-un-human-rights-commission/>, [http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage\\_n\\_1018536.html](http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage_n_1018536.html)

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

1-B Extension

**2/2 Point(s)**

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

#### Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. The application cites global estimates of the self-identified population of individuals with non-normative sexual orientations and/or gender identities, but relies on a more conservative size based on the number of such individuals who are affiliated with one or more of the applicant's community organizations:

Most studies place the global gay population at 1.2% (Williams 1996), higher in countries with existing gays rights protections projected at 4-6% (eg. Australia, Canada, United Kingdom, United States). Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members. This constitutes our base line estimate for projecting the size of the Gay Community and the minimum pool from which potential registrants will stem.

As the applicant also acknowledges, estimating the size of the defined community is difficult because, for example, of the risks of individuals self-identifying in many parts of the world. The applicant instead offers a "minimum" size based on the 7 million individuals who are members of one or more of its "Authentication Partners", organizations serving as entry points for domain registration. Regardless of the method used to produce these estimates, the Panel has determined that the size of the delineated community is considerable.<sup>7</sup>

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

#### Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the community defined in the application are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of individuals with non-normative sexual orientations and/or gender identities and their supporters has accelerated since then, especially in recent decades, and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater visibility of these individuals,

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<sup>7</sup> The Panel has verified the applicant's estimates of the defined community's size and compared it with other estimates. Even smaller estimates constitute a substantial number of individuals especially when considered globally.

recognition of their civil and human rights, and community organization, both in the US and elsewhere.<sup>8</sup> While socio-political obstacles to community organization remain in some parts of the world,<sup>9</sup> the overall historical trend of increasing rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

**Criterion #2: Nexus between Proposed String and Community**

**0/4 Point(s)**

**2-A Nexus**

**0/3 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.” In addition to meeting the criterion for “identify”, in order to receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.

In order to identify the community defined by the applicant as required for Nexus, the applied-for string must “closely describe the community or the community members”, i.e. the applied-for string is what “the typical community member would naturally be called” (AGB). The Panel has therefore considered the extent to which the string “gay” *describes* the members of the applicant’s defined community and has evaluated whether “gay” is what these individuals *would naturally be called*. The Panel has determined that more than a small part of the applicant’s defined community is not identified by the applied-for string, as described below, and that it therefore does not meet the requirements for Nexus.

The community as defined by the application consists of

individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.

The applicant’s assertion that the applied-for string (“gay”) is the “most common” term used by members of its defined community to refer to all gay, lesbian, bisexual, transgender, queer, intersex, and ally individuals is central to its demonstration of Nexus. In order to support this claim, the applicant, in its application and in supporting materials received both prior to and since its initial evaluation, has offered evidence that the Panel has evaluated. The Panel has also conducted its own research. The Panel has determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the

<sup>8</sup> Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

<sup>9</sup> <http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>

media<sup>10</sup> as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider “gay” to be their “most common” descriptor, as the applicant claims. These groups are most likely to use words such as “transgender,” “trans,” “intersex,” or “ally” because these words are neutral to sexual orientation, unlike “gay”. Both within the community and outside of it, such as in the media, acronyms such as “LGBT,” “GLBT,” “LGBTQ,” or “LGBTQIA”<sup>11</sup> are used to denote a group of individuals that includes those described above, i.e. transgender, intersex and ally individuals. In fact, organizations within the defined community, when they are referring to groups that specifically include transgender, intersex or ally individuals, are careful not to use only the descriptor “gay,” preferring one of the more inclusive terms<sup>12</sup>.

The first piece of evidence offered by the applicant to support the claim that “gay” is the “most common” term used to describe the defined community is the Oxford English Dictionary (OED) and its documentation of uses of the word “gay” over hundreds of years. It summarizes the shifting meaning of “gay” in order to show how the word has become embraced by at least a part of its defined community and to support its claim that it is the “most common” term for the entirety of its defined community. According to the applicant, the OED shows that “Gay by the early 20th century progressed to its current reference to a sexuality that was non-heterosexual” (application, 20(d)). The Panel agrees that the more derogatory uses of “gay” or uses unrelated to sexuality have largely fallen away, and that the word has come to refer to homosexual women as well as men, as the applicant asserts, citing the OED. However, the Panel’s review of the OED<sup>13</sup> as well as other sources (cited below) does not support the applicant’s claim that “gay” identifies or closely describes transgender, intersex, or ally individuals, or that “gay” is what these individuals “would naturally be called,” as the AGB requires. This is because “gay” refers to homosexuality (and to some extent non-heterosexuality more broadly), while transgender and intersex individuals may or may not identify as homosexual or gay, and allies are generally understood to be heterosexual.

The applicant acknowledges that its application attempts to represent several groups of people, namely lesbian, gay, bisexual, transgender, queer, intersex, and ally (LGBTQIA) individuals. It claims that all of these groups, or “sub-communities”, are identified by what it calls the “umbrella” term “gay”:

The term “gay” today is a term that has solidified around encompassing several sub-communities of individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. Within these sub-communities even further classifications and distinctions can be made that further classify its members but are equally comfortable identifying as gay, particularly to those outside their own sub-communities. As an example, it has become commonplace for celebrities to acknowledge their homosexuality with the now routine declaration of “Yup, I’m gay” on the cover of newsmagazines as the comedienne Ellen Degeneres did when she “came out” on the cover of TIME magazine.

Notably, “gay” is used to super-identify all these groups and circumstances. Whether homosexual, bisexual, transgender, intersex or ally, all members of the Gay Community march in the “gay pride parade” read the same “gay media” and fight for the same “gay rights.” Gay has become the prevalent term in how members of this community refer to themselves when speaking about themselves as demonstrated by the large number of organizations that use the term globally.

Despite the applicant’s assertions to the contrary, its own evidence here shows that “gay” is most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others. The applicant’s “umbrella term” argument does not accurately describe, for example, the many similar

<sup>10</sup> While a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the data in the applicant’s own analysis as well as on the Panel’s own representative samples of media.

<sup>11</sup> There is some variability to these acronyms but one or another of them is very commonly used throughout the community defined by the applicant to refer to Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Allies.

<sup>12</sup> While a survey of all LGBTQIA individuals and organizations globally would be impossible, the Panel has relied for its research on many of the same media organizations and community organizations that the applicant recognizes. Details of the Panel’s analysis follow.

<sup>13</sup> See “gay, adj., adv., and n.” *OED Online*. Oxford University Press, June 2015. Web. 19 August 2015.

transgender stories in the mass media where “gay” is not used to identify the subject.<sup>14</sup> In these cases, “transgender” is used because “gay” does not identify those individuals. With regard to the applicant’s argument that the various parts of its defined community are engaged in the same activities, such as “gay pride” events and “gay rights” advocacy, the Panel acknowledges that this is likely the case. However, transgender people’s participation in these activities no more identifies them as gay than allies’ participation in transgender rights advocacy identifies them as transgender. Indeed, there are many organizations focused on events and advocacy specific to the needs of transgender individuals<sup>15</sup> and they often take special care to separate labels of sexual orientation from those of gender identity/expression.<sup>16</sup> Similarly, the Panel has reviewed the literature of several organizations that advocate and provide services and support for intersex individuals and they clarify that sexual orientation is unrelated to being intersex.<sup>17</sup> That is, while such organizations would fall within the applicant’s defined community, they explicitly differ on the applicant’s assertion that the applied-for string “gay” identifies all LGBTQIA individuals. Thus, the applicant’s assertion that even the members of its so-called sub-communities “are equally comfortable identifying as gay” is in fact often not the case.

In materials provided in support of the application<sup>18</sup>, a survey of news media articles is analyzed in an effort to show that “gay” is the most common name used to refer to the community defined by the applicant. This analysis shows that indeed “gay” is used more frequently than terms such as “LGBT” or “LGBTQIA” in reference to both individuals and communities:

In the first random sample period (April 1-8, 2013), “gay” was used 2,342 times, “LGBT” 272 times, “lesbian” 1008 times, “queer” 76 times and “LGBTQ” 19 times. “LGBTQIAA” and “GLBTQ” were not used at all, demonstrating that “gay” remains a default generic term for the community. An overwhelming amount of the time these terms beyond gay were used in articles that also used gay. Said another way, “LGBT” was used in only 35 articles that did not also use the term “gay,” “lesbian” in 43 articles, “queer” in 55, and “LGBTQ” in 3. Data shows, thus, that “gay” is both the most frequently used term when referring to non-heterosexual gender identity and sexual orientation and is used as an umbrella term to cover the diversity.

Despite this claim, the analysis fails to show that when “gay” is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities. This is the key issue for the Panel’s consideration of Nexus. That is, the greater use of “gay” does not show that “gay” in those instances is used to identify all LGBTQIA individuals, as the applicant asserts and as would be required to receive credit on Nexus. Indeed, the Panel’s own review of news media<sup>19</sup> found that, while “gay” is more common than terms such as “LGBTQ” or “LGBTQIA”, these terms are now more widely used than ever, in large part due to their greater inclusivity and specificity than “gay”. Even several of the articles cited by the applicant in its reconsideration request<sup>20</sup> as evidence of its “umbrella term” argument do not show “gay” being used to identify the groups in question, nor is “gay” the most commonly used term to refer to the aggregate LGBTQIA community in these articles.<sup>21</sup> Furthermore, researching sources from the same periods as the

<sup>14</sup> As examples of cover stories that parallel the applicant’s own example from Time Magazine, see: <http://time.com/135480/transgender-tipping-point/> and <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>. In these two very prominent examples, the articles do not use “gay” to refer to their subjects.

<sup>15</sup> See for instance <http://transgenderlawcenter.org/>, <http://srtp.org/>, <http://transequality.org/>

<sup>16</sup> See National Center for Transgender Equality: <http://transequality.org/issues/resources/transgender-terminology>

<sup>17</sup> See for example the Organization International Intersex: <http://oii-usa.org/1144/ten-misconceptions-intersex>

<sup>18</sup> See <https://www.icann.org/en/system/files/correspondence/gudelunas-to-icann-eiu-evaluators-30apr14-en.pdf>, drafted and submitted by David Gudelunas a member of the dotGay LLC team according to its website, [http://dotgay.com/the-dotgay-team/#section=Jamie\\_Baxter](http://dotgay.com/the-dotgay-team/#section=Jamie_Baxter)

<sup>19</sup> As noted above, while a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the applicant’s own analysis, as discussed here, as well as on the Panel’s own representative samples of media.

<sup>20</sup> See dotGay’s Reconsideration Request: <https://www.icann.org/en/system/files/request-dotgay-annexes-redacted-29nov14-en.pdf>

<sup>21</sup> See <http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marchesor-clever-substitutes-pride-and-prejudice>, <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html>, <http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>

applicant’s analysis for the terms “transgender” or “intersex” shows again that these terms refer to individuals and communities not identified by “gay”.<sup>22</sup> In other words, “gay” is not used to refer to these individuals because it does not *closely describe* them and it is not *what they would naturally be called*, as the AGB requires for partial credit on Nexus.

Finally, the Panel reviewed in detail the many letters of support submitted on behalf of the applicant by many LGBTQIA organizations worldwide. In addition to evaluating these letters of support, as noted in Section 4, the Panel examined how these organizations refer to their members and those for whom they advocate, noting in particular the words used to identify them. In a minority of cases, these organizations included in their letters the view that “gay” is an “umbrella term” for the LGBTQIA community, as argued by the applicant. However, even the organizations that made this claim in their letters do not use the term “gay” to identify their transgender, intersex, and/or ally members in their own organizational materials. In fact, the names of many of these organizations usually include a term other than “gay” such as “LGBTQ” or, in the case of some, “transgender” or “intersex”.

GLAAD, as an example of one of the applicant’s supporters, writes on its own website, “Transgender people have a sexual orientation, just like everyone else. Transgender people may be straight, lesbian, gay, or bisexual.”<sup>23</sup> Indeed, it is for this reason that GLAAD, like other organizations active in the defined community, have revised their names and use of labels specifically to be more inclusive of the individuals in their communities whom “gay” does not identify by using instead terms like LGBTQ or LGBTQIA.<sup>24</sup> Similarly, ally organizations such as PFLAG (Parents, Families and Friends of Lesbians and Gays) support the applicant and reiterate the importance of allies in the struggles facing the LGBTQIA community. However, not even these organizations use “gay” to describe allies. The Panel’s research and review of the applicant’s materials has demonstrated that even the applicant’s supporters recognize that “gay” is insufficient to identify the diversity of the LGBTQIA community, especially with regard to transgender, intersex, and ally individuals.

The Community Priority Evaluation panel has determined that the applied-for string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness	<b>0/1 Point(s)</b>
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The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the “string has no other significant meaning *beyond identifying the community described in the application*,” (AGB, emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as it does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

<b>Criterion #3: Registration Policies</b>	<b>4/4 Point(s)</b>
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3-A Eligibility	<b>1/1 Point(s)</b>
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The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as

<sup>22</sup> While it is not possible for the Panel to review all the articles in the LexisNexis search results cited by the applicant, the Panel reviewed a representative sample of articles from the same time periods.

<sup>23</sup> See <http://www.glaad.org/transgender/transfaq>

<sup>24</sup> In 2013, to be more inclusive of transgender individuals by not including them in the label “gay” or “lesbian”, the organization’s name officially was changed to GLAAD, as opposed to being an acronym for Gay and Lesbian Alliance Against Defamation (<http://www.glaad.org/about/history>). This is reflective of the trend the Panel identified among organizations within the defined community towards greater inclusivity and away from names and labels that identified only gays and lesbians.

eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that registration in “.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC’s Authentication Partners (AP) from the community.”

According to the application, and as the applicant has confirmed in follow-up materials, in order to register a domain, the applicant requires

community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations.

As the application explains, these Authentication Partners (APs) include some of the largest organizations dedicated to members of the defined community and these organizations will provide “the most trusted entry points into .gay” while “reducing risk to unqualified registrations”.

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Eligibility.

**3-B Name Selection**

***1/1 Point(s)***

The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .gay top-level domain, including rules barring “[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.” The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application fulfills the requirements for Name Selection.

**3-C Content and Use**

***1/1 Point(s)***

The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes “efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression.”

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Content and Use.

**3-D Enforcement**

***1/1 Point(s)***

The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals

mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access.

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Enforcement.

**Criterion #4: Community Endorsement**

**2/4 Point(s)**

Support for or opposition to a CPE gTLD application may come in any of three ways: through an application comment on ICANN’s website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and, as applicable, attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>. The table below summarizes the review and verification of all support and opposition documents for the dotgay LLC application for the string “GAY”.

**Summary of Review & Verification of Support/Opposition Materials as of 5 September 2015<sup>25</sup>**

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	177	0	0	0
Attachments to 20(f)	128	128	128	51
Correspondence <sup>26</sup>	152	136	136	56
<b>Grand Total</b>	<b>457</b>	<b>264</b>	<b>264</b>	<b>107</b>

**4-A Support**

**1/2 Point(s)**

The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.

<sup>25</sup> The table below reflects all comments, attachments, and pieces of correspondence received by the Panel as of the date noted pertaining to the application both during the period of its previous evaluation and the present one. The Verification Attempted column includes efforts made by the Panel to contact those entities that did not include contact information.

<sup>26</sup> The Panel reviewed 41 pieces of correspondence that contained 152 individual letters.

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s).

While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent them. There is no single such organization recognized by all of the defined community's members as the representative of the defined community in its entirety. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

*1/2 Point(s)*

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received relevant opposition from one source. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from one group of non-negligible size.<sup>27</sup> The opposition comes from a local organization in the United States whose mission, membership, and activities make it relevant to the community as defined in the application. The organization is of non-negligible size, as required by the AGB. The grounds of opposition are related to how the applied-for string represents the diversity of the LGBTQ community and the opposition is not made for any reason forbidden by the AGB, such as competition or obstruction. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

**Disclaimer:** Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <[newgtlds.icann.org](http://newgtlds.icann.org)>.

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<sup>27</sup> The Panel has reviewed all letters of opposition and support, even when more than one letter has been received from the same organization. In those cases, as with all others, the Panel has reviewed each letter to determine the most current stance of each organization with respect to the application. In the case of this opposition, all letters have been reviewed.

# **Exhibit 9**

**RECOMMENDATION  
OF THE BOARD GOVERNANCE COMMITTEE (BGC)  
RECONSIDERATION REQUEST 16-3  
26 JUNE 2016**

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The Requester, Dotgay LLC, seeks reconsideration of the Board Governance Committee's (BGC's) denial of the Requester's previous reconsideration request, Request 15-21.

**I. Brief Summary.**

The Requester submitted a community application for .GAY (Application). Three other applicants submitted standard (meaning, not community-based) applications for .GAY. All four .GAY applications were placed into a contention set. As the Application was community-based, the Requester was invited to and did participate in CPE in October 2014 (First CPE). The Requester's Application did not prevail in the First CPE. The Requester filed a reconsideration request (Request 14-44) with respect to the CPE panel's report finding that the Requester had not prevailed in the First CPE (First CPE Report). The BGC granted reconsideration on Request 14-44 on the grounds that the Economic Intelligence Unit (EIU), the entity that administers the CPE process, had inadvertently failed to verify 54 letters of support for the Application. At the BGC's direction, the EIU then conducted a new CPE of the Application (Second CPE). The Application did not prevail in the Second CPE (Second CPE Report). As a result, the Application remains in contention with the other applications for .GAY. Just like all other contention sets, the .GAY contention set can be resolved by ICANN's last resort auction or by some other arrangement amongst the involved applicants.

The Requester sought reconsideration of the Second CPE Report and ICANN's acceptance of it (Request 15-21). After reviewing all of the relevant material, the BGC denied Request 15-21 (Determination on Request 15-21). The Requester has now submitted Reconsideration Request 16-3 (Request 16-3), challenging the Determination on Request 15-21

contending that the BGC erroneously determined that the EIU had adhered to all applicable policies and procedures in conducting the Second CPE. Request 16-3 is premised upon one, and only one, basis: the Requester argues that the EIU improperly permitted someone other than one of the “evaluators” to send verification emails to the authors of letters of support and opposition to the Application, which the Requester contends contravenes applicable policies and procedures.

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3. In response, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support. The Presentation, however, did not relate to the sole issue raised in Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application. Rather, the Presentation focused on the merits of the Second CPE Report, which is neither the subject of Request 16-3 nor a proper basis for reconsideration.

The Requester’s claims do not support reconsideration. The Requester does not identify any misapplication of policy or procedure by the EIU that materially or adversely affected the Requester, and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information. Instead, the Requester relies on a purely administrative step of the verification process that the EIU took in the course of administering the Second CPE. More specifically, the EIU delegated

the physical sending of verification emails for letters of support/opposition to a member of the EIU's core team to serve as a Verification Coordinator rather than one of the evaluators due to the large number of letters of support/opposition. That protocol did not affect the Requester, materially or adversely, as is required to support reconsideration. To the contrary, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation consistent with the Applicant Guidebook (Guidebook). Additionally, the substantive evaluation of the letters was performed by the evaluators in accordance with Module 4.2.3 of the Guidebook. As such, the BGC recommends that Request 16-3 be denied.

## **II. Facts.**

### **A. Background Facts.**

The Requester submitted a community application for .GAY.<sup>1</sup>

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings Limited each submitted standard applications for .GAY.<sup>2</sup> Those applications were placed into a contention set with the Requester's Application.

On 23 February 2014, the Requester's Application was invited to participate in CPE. CPE is a method of resolving string contention, described in Module 4.2 of the Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. The Requester elected to participate in CPE for .GAY (First CPE), and its Application was forwarded to the EIU, the CPE administrator, for evaluation.<sup>3</sup>

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<sup>1</sup> See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

<sup>2</sup> See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1460>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1115>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1519>.

<sup>3</sup> See Community Priority Evaluation (CPE), <http://newgtlds.icann.org/en/applicants/cpe#status>.

On 6 October 2014, the CPE panel (First CPE Panel) issued its report on the Requester's Application (First CPE Report).<sup>4</sup> The First CPE Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application had not prevailed in the First CPE.<sup>5</sup>

On 22 October 2014, the Requester submitted Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of that Report.<sup>6</sup>

Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP (First DIDP Request), seeking documents related to the First CPE Report.<sup>7</sup> On 31 October 2014, ICANN responded to the First DIDP Request (First DIDP Response).<sup>8</sup>

On 29 November 2014, the Requester submitted a revised Reconsideration Request 14-44 (Revised Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of it, and of the First DIDP Response.<sup>9</sup>

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.<sup>10</sup> The BGC directed that "the CPE Panel's Report shall be set aside, and that new [CPE] evaluators will be appointed to conduct a new CPE

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<sup>4</sup> *Id.*

<sup>5</sup> See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>6</sup> <https://www.icann.org/resources/pages/14-44-2014-10-22-en>.

<sup>7</sup> <https://www.icann.org/resources/pages/20141022-02-2014-10-31-en>.

<sup>8</sup> See <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

<sup>9</sup> See <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

<sup>10</sup> Determination of BGC, Reconsideration Request 14-44, *available at* <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf> at Pg. 31.

for the Application.”<sup>11</sup> In addition to directing that new evaluators conduct the second CPE of the Application, the BGC also recommended that the EIU consider including new members of the core team to assess the evaluation results.<sup>12</sup>

In furtherance of the BGC’s Determination on Request 14-44, the EIU administered the Second CPE, appointing two new evaluators as directed by the BGC, and one new core team member as the BGC suggested.

On 8 October 2015, the Second CPE Panel issued the Second CPE Report, finding that the Application did not prevail in the Second CPE.<sup>13</sup>

On 22 October 2015, the Requester submitted Reconsideration Request 15-21, seeking reconsideration of the Second CPE Report and ICANN’s acceptance of it.<sup>14</sup>

Also on 22 October 2015, the Requester submitted a request pursuant to ICANN’s DIDP (Second DIDP Request), seeking documents related to the Second CPE Report.<sup>15</sup> On 21 November 2015, ICANN responded to the DIDP Request (Second DIDP Response).<sup>16</sup>

On 4 December 2015, the Requester submitted a revised Reconsideration Request 15-21 (Request 15-21), which sought reconsideration of the Second CPE Report and ICANN’s acceptance of it, and of the Second DIDP Response.<sup>17</sup>

On 1 February 2016, the BGC issued the Determination on Request 15-21, finding that Request 15-21 should be denied.<sup>18</sup>

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

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

<sup>13</sup> See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>14</sup> <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

<sup>15</sup> See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

<sup>16</sup> See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

<sup>17</sup> See generally <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

The Requester submitted Request 16-3 on 17 February 2016.<sup>19</sup> Request 16-3 challenges the Determination on Request 15-21 on the sole basis that the person at the EIU who sent verification emails to the authors of letters of support and opposition to the Application was not a CPE “evaluator.”<sup>20</sup>

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3.<sup>21</sup> In response, Pursuant to Article IV, Section 2.12 of ICANN’s Bylaws, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support.<sup>22</sup> The Requester, however, did not address the sole issue that is the basis for Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application.<sup>23</sup> Instead, the

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(continued...)

<sup>18</sup> Determination on Request 15-21, *available at* <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>19</sup> *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>. ICANN has also reviewed and considered several letters sent in support of Request 16-3, including one from Transgender Equality Uganda and one from Trans-Fuzja. (*See* <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.) In addition, ICANN also reviewed and considered two letters from CenterLink that the Requester submitted along with its Presentation materials, indicating CenterLink’s support of the Requester’s Application. (*See id.*)

<sup>20</sup> *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>21</sup> Request, § 8.7, Pg. 8.

<sup>22</sup> *See* <https://www.icann.org/resources/board-material/agenda-oec-2016-05-15-en>.

<sup>23</sup> *See* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

Presentation addressed the merits of the Second CPE Report, which is not the subject of Request 16-3 and is not a proper basis for reconsideration.<sup>24</sup> <sup>25</sup>

**B. Relief Requested.**

The Requester asks that ICANN:

1. “[A]cknowledge receipt of this Reconsideration Request;”
2. “[D]etermine that the [Determination on Request 15-21] is to be set aside;”
3. “[I]nvite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;”  
and
4. “[D]etermine that, given the circumstances, any and all of its requests set out in § 9 of Requester’s Second Reconsideration Request be awarded, which are incorporated herein by reference.”<sup>26</sup>

**III. The Relevant Standards For Reconsideration Requests And CPE.**

**A. Reconsideration Requests.**

ICANN’s Bylaws provide for reconsideration of a staff or Board action or inaction in accordance with specified criteria, which include a requirement that the requester has been “materially [and] adversely affected” by the challenged action or inaction.<sup>27</sup> The Requester here

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<sup>24</sup> *Id.*

<sup>25</sup> The BGC also notes that it received and considered the 24 June 2016 letter from dotgay LLC, which can be found at <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dotgay-to-icann-bgc-24jun16-en.pdf>.

<sup>26</sup> Request, § 9, Pgs. 8-9.

<sup>27</sup> Bylaws, Art. IV, § 2. Article IV, §§ 2.1-2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been materially and adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or

challenges both staff and Board action.<sup>28</sup>

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it is asserted that a panel failed to follow established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.<sup>29</sup> In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports. Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the EIU violated any established policy or procedure.

A Board action may be subject to reconsideration where it was undertaken “without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act,” or, where it was “taken as a result of the Board’s reliance on false or inaccurate material information.”<sup>30</sup> Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and the Board agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.

## **B. Community Priority Evaluation.**

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(continued...)

(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.

<sup>28</sup> While the Requester indicated that it challenged staff action (see Request, § 2, Pg. 1), the crux of Reconsideration Request 16-3 is a challenge to the BGC’s Determination on Request 15-21, and as such, challenges both Board and staff action.

<sup>29</sup> See BGC Recommendation on Reconsideration Request 13-5, *available at*

<http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13- en.doc>.

<sup>30</sup> Bylaws, Art. IV, § 2.

The standards governing CPE are set forth in Module 4.2 of the Guidebook. The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook's CPE provisions<sup>31</sup> and summarizing those provisions.<sup>32</sup> In addition, the EIU has published supplementary guidelines (CPE Guidelines) that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.<sup>33</sup>

CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.<sup>34</sup> CPE is performed by an independent panel composed of two evaluators who are appointed by the EIU.<sup>35</sup> A CPE panel's role is to determine whether the community-based application fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points.

#### **IV. Analysis And Rationale.**

The Requester seeks reconsideration of the Determination on Request 15-21, arguing that the BGC should have "confirm[ed]" that the EIU did not follow applicable policies and

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<sup>31</sup> The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

<sup>32</sup> CPE Panel Process Document, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>33</sup> CPE Guidelines, available at <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

<sup>34</sup> Guidebook, § 4.2.

<sup>35</sup> *Id.* at § 4.2.2.

procedures in conducting the Second CPE.<sup>36</sup> Specifically, the Requester claims that the EIU violated the CPE Panel Process Document because the person who sent verification emails to the authors of letters of support and opposition to the Application was a member of the core team (serving as a Verification Coordinator) and was not one of the two “evaluators” assigned to conduct the CPE.<sup>37</sup> However, the Requester fails to identify any conduct by the EIU that contradicts an established policy or procedure in a manner that materially and adversely affected the Requester.<sup>38</sup> The process of verifying letters is an administrative task.<sup>39</sup> Regardless of which person physically sent the verification emails, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation in accordance with Module 4.2.3 of the Guidebook, which included an evaluator’s substantive evaluation of the letters in compliance with the CPE Panel Process Document.

Moreover, the Requester does not identify any material information the BGC did not consider in reaching the Determination on Request 15-21, or any reliance upon false or inaccurate information.<sup>40</sup> The act of sending a verification email is not material, so long as the evaluators performed their task of evaluating the letters of support and opposition. There is no claim that the evaluators did not conduct the actual evaluation. As such, the Determination on Request 15-21 properly confirmed that reconsideration was not warranted based on the EIU’s decision to delegate the sending of verification emails to a Verification Coordinator, and thus the Determination on Request 15-21 does not itself warrant reconsideration.<sup>41</sup>

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<sup>36</sup> Request, § 8.6, Pg. 7.

<sup>37</sup> *Id.*, § 8.4, Pgs. 5-6.

<sup>38</sup> See Bylaws, Art. IV, §§ 2.1-2.

<sup>39</sup> See <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 2.

<sup>40</sup> See Bylaws, Art. IV, § 2.

<sup>41</sup> While Request 16-3 generally is styled as a request for the BGC to reconsider the Determination on Request 15-21, the Requester also argues that the “EIU ha[s] not respected the policies and processes” governing CPE. Request, § 8.6, Pg. 7.

**A. The EIU’s Letter Verification Process Did Not Violate Applicable Policies And Procedures In A Manner That Materially Or Adversely Affected The Requester.**

The Requester’s claims arise entirely out the CPE Panel Process Document’s provisions that an “evaluator” verifies letters of support and opposition to an application undergoing CPE, which the Requester claims did not occur here.<sup>42</sup> In other words, the Requester argues that reconsideration is warranted because the EIU did not adhere to the CPE Panel Process Document insofar as the person who physically sent the emails verifying the letters of support and opposition was not an “evaluator” but, instead, was another EIU employee.<sup>43</sup> However, the EIU’s decision to delegate this administrative task to an employee cannot support reconsideration, because it did not affect the substance of the Second CPE in any fashion and did not change the fact that the evaluators conducted the actual evaluation of the letters.

To start, the Determination on Request 15-21 already addressed this argument.<sup>44</sup> The Determination on Request 15-21 acknowledged that the verification emails were sent by a person “responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU.”<sup>45</sup> The Determination on Request 15-21 also explained that the CPE Panel Process Document mandates that one of the two evaluators

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<sup>42</sup> CPE Panel Process Document at Pg. 5; Request, § 8.4, Pg. 5-6. Request 16-3 also contains a sentence arguing that the EIU appointed one of the same evaluators to conduct the Second CPE as performed the First CPE. Request, § 8.1, Pg. 3. The powerpoint to which the Requester referred during its Presentation also fleetingly touched upon this issue. (See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>, at Pg. 13.) However, other than in passing reference, Request 16-3 does not argue that reconsideration is warranted because the same evaluator conducted the Second CPE. Instead, that argument appears to be a vestige from the Requester’s Request 15-21, which raised that argument. (See Request 15-21, § 8.2, Pg. 5, available at <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.) As explained in the Determination on Request 15-21, that argument fails to support reconsideration because it is factually inaccurate; ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and added a new core team member for the administration of the Second CPE. (Determination on Request 15-21 at Pgs. 28-29.)

<sup>43</sup> See Request, § 8.1, Pg. 3.

<sup>44</sup> Determination on Request 15-21 at Pg. 29, fn. 102.

<sup>45</sup> *Id.*, Pgs. 28-29.

be “responsible for the letter verification process.”<sup>46</sup> Here, the CPE Panel members delegated the physical sending of the verification emails to a Verification Coordinator.<sup>47</sup> This procedure is in accord with the CPE Panel Process Document’s provision that a letter is verified when its author “send[s] an email *to the EIU* acknowledging that the letter is authentic.”<sup>48</sup> While the CPE Panel Process Document indicates that an “evaluator” will contact letter authors,<sup>49</sup> there is no policy or procedure that forbids the EIU from delegating the administrative task of sending the verification email to someone other than the actual “evaluator,” as the Determination on Request 15-21 correctly noted.

Moreover, the Requester has not demonstrated how it was materially or adversely affected by the EIU’s decision to delegate this administrative function to an administrative employee. On that ground alone, no reconsideration is warranted.<sup>50</sup> The identity of the person physically sending the verification emails did not have any impact upon the results of the verification or the results of the Second CPE as a whole; the verification results were communicated to both of the evaluators and the entire core team to permit a full and complete evaluation in accordance with the Guidebook, which included an evaluator’s substantive evaluation of the verified letters in compliance with the CPE Panel Process Document.<sup>51</sup> Nor is there anything inherently nefarious to the EIU’s decision in this regard; much as a company executive might delegate to her assistant the physical sending of emails sent on her behalf, the EIU evaluators assign the Verification Coordinator the task of physically sending the verification emails. In short, the Requester has not indicated how it was affected by the decision to delegate

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<sup>46</sup> See CPE Panel Process Document at Pg. 5; Determination on Request 15-21 at Pg. 29, fn. 102.

<sup>47</sup> Determination on Request 15-21 at Pg. 29, fn. 102.

<sup>48</sup> CPE Panel Process Document at Pg. 5 (emphasis added).

<sup>49</sup> *Id.*

<sup>50</sup> Bylaws, Art. IV, §§ 2.1-2

<sup>51</sup> Guidebook § 4.2.3; CPE Panel Process Document at Pg. 5.

the sending of the verification emails to a Verification Coordinator, much less how it was materially or adversely affected, as is required to support a reconsideration request.<sup>52</sup>

Nonetheless, “[i]n an effort to provide greater transparency on an administrative aspect of the Community Priority Evaluation (CPE) process,” the EIU has provided “additional information regarding verification of letters of support and opposition” (EIU Correspondence).<sup>53</sup> The EIU Correspondence confirms that “the two evaluators assigned to assess a specific application review the letter(s) of support and opposition. For every letter of support/opposition received, both of the evaluators assess the letter(s) as described in the Guidebook, section 4.2.3 Criterion 4: Community Endorsement.”<sup>54</sup> As such, the EIU Correspondence confirms that the EIU complied with the CPE Panel Process Document’s instruction that an evaluator “assesses both the relevance of the organization and the validity of the documentation.”<sup>55</sup> The EIU Correspondence further explains that:

[t]he process of verification of letter(s) is an administrative task. . . . [F]or evaluations involving large numbers of letters of support or opposition, the EIU assigned its Project Coordinator, a senior member of the core team, to serve as Verification Coordinator and to take the purely administrative step of ensuring that the large volume of verification emails, as well as follow-up emails and phone calls, were managed efficiently.<sup>56</sup>

The need for a Verification Coordinator arose when an “administrative issue[] related to the verification of letters of support” occurred, namely certain entities submitted letters of support or opposition to multiple applications.<sup>57</sup> Because different evaluators were assigned to conduct CPE with respect to the various applications, those entities began to receive verification

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<sup>52</sup> See Bylaws, Art. IV, §§ 2.1-2.

<sup>53</sup> EIU Correspondence, *available at* <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 1.

<sup>54</sup> *Id.*

<sup>55</sup> CPE Panel Process Document at Pg. 5.

<sup>56</sup> EIU Correspondence at Pg. 2.

<sup>57</sup> *Id.*

emails from different people within the EIU.<sup>58</sup> The EIU “received complaints from the authors of the letters, who requested that they be contacted by a single individual,” thus the EIU assigned the Verification Coordinator the administrative task of sending all verification emails.<sup>59</sup> As the EIU Correspondence emphasizes, “the results of the verification [a]re communicated to both of the evaluators” and it is the evaluators who score the applications.<sup>60</sup>

In sum, the EIU Correspondence confirms that the Verification Coordinator sends the verification emails purely for administrative ease, and that the Requester was not affected (let alone materially or adversely) by the delegation of this administrative task from the evaluator to the Verification Coordinator. As such, the Requester has not identified any conduct on the part of the EIU that warrants reconsideration.

**B. The Requester Has Not Shown That The Determination on Request 15-21 Was The Result Of The BGC Failing To Consider Material Information, Or Considering False Or Inaccurate Information.**

The Requester argues that reconsideration of the Determination on Request 15-21 is warranted because *either*: (1) “the BGC should . . . have confirmed[] that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator”; *or* (2) the CPE Panel Process Document sets forth “a process that is more stringent than the one set forth in the Applicant Guidebook, which does not require the independent evaluator [to] perform such verification of support and objection.”<sup>61</sup> Reconsideration is not warranted on either ground, because the Requester has not shown that the BGC failed to consider material information or

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at Pg. 1.

<sup>61</sup> Request, § 8.6, Pg. 8.

relied on false or inaccurate information with respect to either issue. The Requester has not shown that either basis for reconsideration it poses actually took place.

First, as explained *supra*, the EIU substantively adhered to the CPE Panel Process Document and the Guidebook in administering the Second CPE, including with respect to the letter verification process. The Requester has not identified any material information the BGC failed to consider, or any false or inaccurate information it relied upon in reaching the Determination on Request 15-21 that no reconsideration was warranted with respect to the fact that an EIU administrative employee sent the verification emails during the Second CPE. As such, no reconsideration of the Determination on Request 15-21 is warranted.<sup>62</sup>

Second, the Requester argues that the BGC “erred in confirming that ‘none of the CPE Materials comprise an addition or change to the terms of the Guidebook.’”<sup>63</sup> As an initial matter, as the Determination on Request 15-21 explained, any challenge to the CPE materials (including the CPE Panel Process Document) is time-barred.<sup>64</sup> The Requester argues that through its reconsideration requests and the Determination on Request 15-21, it has discovered that the CPE Panel Process Document “introduces a concept that has not been included in the . . . Guidebook, which only refers to ‘evaluators’.”<sup>65</sup> However, the CPE Panel Process Document does not in fact comprise an addition or change to the terms of the Guidebook. The Guidebook provides that “[c]ommunity priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications.”<sup>66</sup> The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to

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<sup>62</sup> See Bylaws, Art. IV, § 2.

<sup>63</sup> Request, § 8.6, Pg. 8 (quoting Determination on Request 15-21 at Pg. 12).

<sup>64</sup> Determination on Request 15-21 at Pgs. 11-12.

<sup>65</sup> Request, § 8.5, Pg. 7.

<sup>66</sup> Guidebook § 4.2.2.

implement the Guidebook's CPE provisions<sup>67</sup> and summarizing those provisions.<sup>68</sup> The fact that someone other than an evaluator physically sends verification emails to authors of letters of support or opposition does not mean anyone other than a "community priority panel" has "review[ed]" the Application, as the Guidebook instructs.<sup>69</sup>

In sum, the Requester has not demonstrated that the Determination on Request 15-21 reflects a failure on the part of the BGC to consider material information, or that the BGC considered false or inaccurate information, in concluding either that the EIU substantively complied with the CPE Panel Process Document, or that the CPE Panel Process Document adheres to the Guidebook. Therefore, the BGC thinks that no reconsideration of the Determination on Request 15-21 is warranted.

#### **V. Recommendation.**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration. The BGC therefore recommends that Request 16-3 be denied. If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 18 March 2016. However, the Requester sought, was

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<sup>67</sup> The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

<sup>68</sup> CPE Panel Process Document.

<sup>69</sup> Guidebook, § 4.2.2.

invited to, and did make a Presentation to the BGC regarding Request 16-3 on 15 May 2016.<sup>70</sup>

The timing of the Presentation delayed the BGC's consideration of Request 16-3. The first practical opportunity to address Request 16-3 after receiving the Presentation was 26 June 2016.

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<sup>70</sup> See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

# **Exhibit 10**

AR F HYDER AL

Contact Information Redacted  
Contact Information Redacted Direct  
Fax

25 August 2016

**Via E-Mail**

Mr Göran Marby  
President and Chief Executive Officer  
Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: ICANN Ombudsman Report dated 27 July 2016**

Dear Mr. Marby:

I am writing on behalf of my client, dotgay LLC (“dotgay”), to request that ICANN: (1) promptly, and by no later than Monday, August 29, 2016, post the Ombudsman’s investigative reports for Case No. 16-00177 issued on 15 July 2016 and 27 July 2016, regarding ICANN and the Economist Intelligence Unit’s treatment of dotgay’s application for .GAY (the “Report” or the “Ombudsman’s Report”); and (2) include the Report amongst the briefing materials that will be provided to the ICANN Board.

Dotgay notes that the Ombudsman’s conclusion that ICANN’s Board grant community priority status to dotgay, on the basis that such a step was required under ICANN’s own Articles and Bylaws, already has been broadly publicized within the ICANN community and in media outlets.<sup>1</sup> The posting of the Report by ICANN, however, is crucial to promote an understanding of the issues raised by the Ombudsman regarding the treatment of dotgay’s application in the ICANN community.<sup>2</sup>

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<sup>1</sup> See, e.g., [http://www.theregister.co.uk/2016/07/29/give\\_gays\\_dot\\_gay/](http://www.theregister.co.uk/2016/07/29/give_gays_dot_gay/).

<sup>2</sup> See, ICANN Ombudsman Framework.

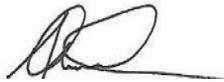
In addition, we note with concern that the Ombudsman's Report was not amongst the board briefing materials provided to ICANN's Board for consideration at its Special Meeting of 9 August 2016.

In the Recommendation to the Board issued by the Board Governance Committee ("BGC") on 26 June 2016, the BGC dismissed the request on technical grounds (improperly, in our view) and *specifically* encouraged dotgay to approach the Ombudsman with any complaints of unfairness:

*"If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter"* (Recommendation of 26 June 2016, § V, p.16).

Dotgay subsequently followed the BGC's Recommendation and cooperated with the Ombudsman's Investigation. The Ombudsman issued his report after completing his investigation, which included seeking comments from ICANN staff and dotgay. His conclusions vindicated dotgay's complaints about being treated unfairly and in a discriminatory manner. Accordingly, the ICANN Board must thoroughly and properly consider the Ombudsman Report during its future deliberations regarding dotgay's Reconsideration Request No. 16-3.<sup>3</sup>

We look forward to seeing the Ombudsman's Report posted on ICANN's website and included amongst the briefing materials provided to the ICANN Board when dotgay's application is tabled for consideration.



Arif Hyder Ali

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<sup>3</sup> See Reconsideration Request No. 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

cc: Steve Crocker, Chairman of the ICANN Board ([steve.crocker@icann.org](mailto:steve.crocker@icann.org))  
John Jeffrey, General Counsel and Company Secretary ([john.jeffrey@icann.org](mailto:john.jeffrey@icann.org))  
Scott Seitz, Chief Executive Officer, dotgay LLC Contact Information Redacted

# **Exhibit 11**

**ARIF HYDER ALI**

Contact Information Redacted

Contact Information Redacted Direct

Fax

September 13, 2016

**VIA E-MAIL**

ICANN Board of Directors  
c/o Mr. Steve Crocker, Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Expert Opinion of Prof. William N. Eskridge, Jr., in Support of dotgay's  
Community Priority Application**

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC (“dotgay”), to submit an independent expert opinion of Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, to the ICANN Board (“Board”) with the goal to assist the Board in evaluating dotgay’s reconsideration request (16-3) on September 15, 2016.<sup>1</sup> Prof. Eskridge is a world renowned expert both in legal interpretation and in sexuality, gender, and the law, and was recently ranked as one of the ten most-cited legal scholars in American history. Prof. Eskridge’s independent expert report explains, step-by-step, fundamental errors in the EIU’s reasons for denying dotgay’s community status.

Pursuant to the Independent Review Panel’s recent findings in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (July 29, 2016) (“Dot Registry Declaration”), which was accepted by the Board by way of its Resolutions 2016.08.09.11 and 2016.08.09.13 on August 9, 2016, it is imperative that the Board carefully reviews and considers Prof. Eskridge’s expert report prior to deciding dotgay’s reconsideration request (16-3).

First, the Board Governance Committee’s (“BGC”) June 26, 2016, recommendation to the Board to deny dotgay’s reconsideration request (16-3) was

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<sup>1</sup> Expert Report of Professor William N. Eskridge Jr., dated September 12, 2016, Exhibit 1

premised on a standard that was subsequently rejected by the Dot Registry Declaration. Specifically, the BGC rejected dotgay's request for reconsideration because dotgay did not "identify any misapplication of policy or procedure by the EIU that materially or adversely affected [dotgay], and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information." The Dot Registry Declaration, however, rejected this standard for reconsideration and held that "in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB."<sup>2</sup> At no point in dotgay's recourse to ICANN's accountability processes from 2014 to date has the Board scrutinized the CPE Report for consistency with the principles of fairness, transparency and non-discrimination; as Prof. Eskridge's Report demonstrates, the CPE Report would fail even the most lenient examination.

Second, the BGC's June 26, 2016 Recommendation improperly declined to consider dotgay's May 15, 2016, presentation and written summary of arguments because "the Presentation focused on the merits of the Second CPE Report." According to the Dot Registry Declaration, "the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations."<sup>3</sup> The BGC's failure to recognize its responsibility to ensure the EIU's compliance with these principles infected its decision to exclude from consideration whether the EIU had in fact been correct in its application of the Articles, Bylaws and AGB. This is troubling because, as explained by Prof. Eskridge in his report, the EIU failed to comply with ICANN's Articles and Bylaws.

Specifically, Prof. Eskridge explains that the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement between the applied-for string (.GAY) and the LGBTQIA community: (1) interpretive errors by misreading the explicit criteria laid out in ICANN's Applicant Guidebook ("AGB") and ignoring ICANN's mission and core values; (2) errors of inconsistency and discrimination by failure of the EIU to follow its own guidelines and its discriminatory application to dotgay's application

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<sup>2</sup> *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration, p. 34 (29 July 2016).

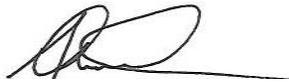
<sup>3</sup> *Id.* at p.34.

when compared with other applications; and (3) errors of fact, namely, a misstatement of important empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities. Prof. Eskridge's report, after discussing EIU's egregious reasoning behind rejecting dotgay's application, concludes that the EIU "engaged in a reasoning process that remains somehow mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory."

Finally, as dotgay has amply demonstrated in its submissions to the ICANN Board, it is entitled to the full two points in relation to community endorsement,<sup>4</sup> since it has the support of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) – a global human rights organization focused on the gay community with member organizations in 125 countries.

Accordingly, pursuant to the Board's obligation to exercise due diligence, due care, and independent judgment in reaching reconsideration decisions, we sincerely hope that the Board: (1) will review and agree with Prof. Eskridge's independent expert opinion that the EIU's evaluation of dotgay's community priority application was flawed, and (2) grant dotgay's community priority application without any further delay.

Sincerely,



Arif Hyder Ali  
Partner, Co-Chair of International Arbitration Group

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<sup>4</sup> See dotgay letter to ICANN Board of Directors (September 8, 2016) pp. 5-9. See also dotgay presentation to the Board Governance Committee (May 17, 2016) pp. 7-9 and Statement of Renato Sabbadini (May 17, 2016).

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EXPERT REPORT**

## **I. EXECUTIVE SUMMARY**

Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report, authored by the Economist Intelligence Unit (EIU) recommended that the application be denied; the major reason was that dotgay did not meet the nexus requirement between the applied-for string (“.gay”) and the community of people who do not conform to traditional norms of sexuality and gender. The CPE Report is fundamentally erroneous. The Report’s fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States. In short, the CPE Report and its recommendations should be rejected, and dotgay should be awarded full credit (4 of 4 points) for establishing the nexus of its string with the community.

## **II. QUALIFICATIONS OF THE EXPERT**

1. I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent legal opinion on the validity of the ICANN Community Priority

Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), evaluating dotgay's community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string ".gay".

2. I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,<sup>1</sup> leading monographs,<sup>2</sup> and dozens of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.<sup>3</sup>
3. My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN's gTLD Applicant Guidebook (AGB), especially Module 4.2.3, "Criterion #2: Nexus Between Proposed String and Community"; (iii) the history of the terminology in dispute, especially the term "gay" and its applicability to the community of sexual and

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<sup>1</sup> William N. Eskridge Jr. & Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation 1997, now in its third edition, with the fourth edition out next year). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, "by far," ever published in the field of legislation and suggesting that it would "alter the law school curriculum").

<sup>2</sup> For interpretation, consult William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (Foundation 2016), and *Dynamic Statutory Interpretation* (Harvard 1994), as well as William N. Eskridge Jr., *A Republic of Statutes: The New American Constitution* (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard 1999), and *Dishonorable Passions: Sodomy Law in America, 1861-2003* (Viking 2008), and *Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence* (Oxford 2006) (co-authored with Darren Spedale).

<sup>3</sup> According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> (viewed September 8, 2016).

gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

### **III. BACKGROUND**

#### **A. DOTGAY'S APPLICATION**

4. Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures established by the Internet Corporation for Assigned Names and Numbers (ICANN).

#### **B. THE GOVERNING RULES: ICANN'S BYLAWS AND ITS APPLICANT GUIDEBOOK**

5. The governing legal materials include ICANN's Bylaws and its Applicant Guidebook. The Bylaws establish ICANN's mission “to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN's “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).
6. Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

7. ICANN's Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay's application. See AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant "community," nexus between the proposed string and the community, registration policies, and community endorsement. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The CPE Panel of EIU awarded dotgay a score of 10 of 16 points, including a score of 0 of 4 points for Criterion #2, the nexus requirement that will be the focus of this Expert Report.

**C. THE ICANN REQUIREMENTS FOR MEETING THE NEXUS BETWEEN THE APPLIED-FOR STRING AND THE COMMUNITY**

8. Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay's application. Dotgay's petition lost 4 of 4 possible points on Criterion #2, and I shall focus on that criterion, "Nexus Between Proposed String and Community (0-4 Points)." More particularly, I shall focus on the nexus requirement, which is responsible for 3 of the 4 points. (A uniqueness requirement accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)
9. An application merits **3 points** for the nexus requirement if "[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community." AGB, 4-12 (emphasis added). "Name" of the community means "the established name by which the community is commonly known by others." AGB, 4-13. "[F]or a score of 3, the essential

aspect is that the applied-for string is commonly known by others as the identification/name of the community.” AGB, 4-13.

10. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.

11. An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that “[s]tring had no other significant meaning beyond identifying the community described in the application.” AGB, 4-13.

#### **D. THE CPE REPORT’S REASONS FOR DENYING DOTGAY ANY POINTS FOR THE COMMUNITY-NEXUS REQUIREMENT**

12. In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus requirement. CPE Report, 4-6. Because dotgay secured 10 points from the remaining Criteria and needed 14 points for approval, Criterion #2 was the critical reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.

13. Recall that an application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12. The CPE Report dismissed this possibility: “The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community.” CPE Report, 5.

14. The CPE Report does not identify precisely what evidence the EIU Panel relied on to conclude that “gay” is not a “well known short-form or abbreviation of the community” defined in dotgay’s application, but it does read into the explicit requirement (“well known short-form or abbreviation of the community”) an implicit requirement that the string **also** “identify” the community and its members. This implicit requirement is taken from the Applicant Guidebook’s explanation for a partial nexus score. Recall that an application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the “identify” requirement (used in the 2-point evaluation) into the 3-point evaluation.

15. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report rephrased the ICANN definition to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, 5. Based upon this narrowing revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender,

intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

16. The Report did not identify the methodology the EIU followed to support these sweeping empirical statements. Instead, the Report asserted that “a comprehensive survey of the media’s language in this field is not feasible,” CPE Report, 5 note 10, and that “a survey of all LGBTQIA organizations globally would be impossible.” CPE Report, 5 note 12.
17. Dotgay’s application relied on the common use of “gay” as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in “gay pride” parades, support “gay rights,” and follow the “gay media.” The CPE Report conceded this point (CPE Report, 7) but nevertheless claimed that “gay” is “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.” CPE Report, 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are “many similar transgender stories in the media where ‘gay’ is not used to identify the subject.” CPE Report, 6-7 and note 14.
18. The CPE Report also conceded that “gay” is used in the media much “more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.” CPE Report, 7. Nonetheless, the EIU Panel asserted that there is no evidence that “when ‘gay’ is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities.” CPE Report, 7. The EIU Panel’s “own review of the news media” (footnote: the Panel said that “a comprehensive survey of the media’s language is not feasible”) found that “gay” is “more common than terms such as ‘LGBT’ or ‘LGBTQIA’, these terms are now more widely used than ever.” CPE Report, 7 and note 19.

19. The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that “gay” is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, 8.
20. Based upon this reasoning, the CPE Report awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the CPE Report awarded 0 of 1 point for uniqueness. CPE Report, 8.

#### **IV. FUNDAMENTAL ERRORS IN THE CPE REPORT’S REASONING**

21. The CPE Report compiled by the EIU Panel is fundamentally incorrect in its approach to the nexus criterion and in its evaluation of the evidence of community nexus. The fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world.

##### **A. THE CPE REPORT MISREAD ICANN’S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS**

22. Recall the requirements ICANN has set forth, explicitly, for the nexus requirement in its Applicant Guidebook: An application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12 (emphasis added). “Name” of the community means ‘the established name by which the community is commonly known by others.’ AGB, 4-13. “[F]or a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”
23. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.
24. As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.<sup>4</sup> As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes.

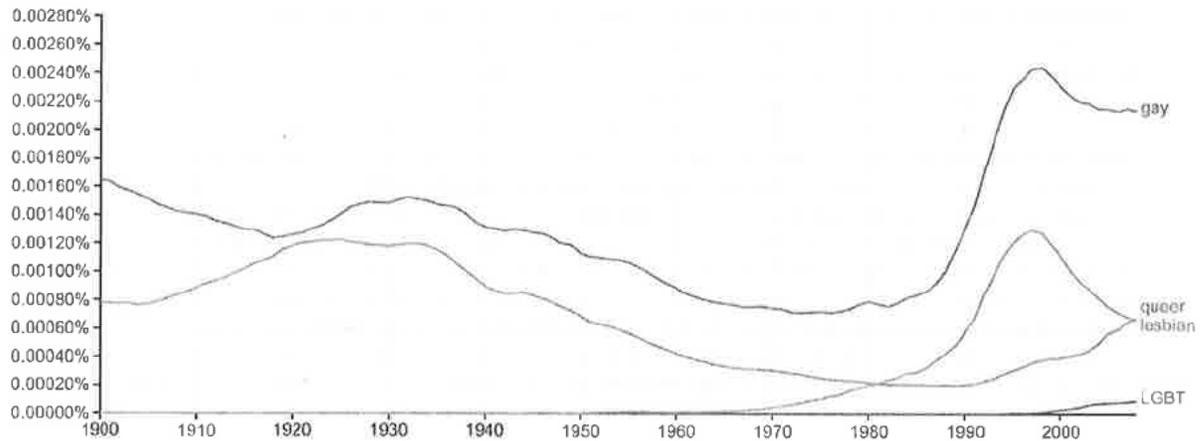
**1. The CPE Report Substantially Ignored The Primary Test: Is the Proposed String a “well known short-form or abbreviation of the community”?**

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<sup>4</sup> The proposition in text is explained and defended in Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37–38 (2012); Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015).

25. To begin with, a major problem is that the EIU Panel systematically ignored the Applicant Guidebook's focus on whether the proposed string (".gay") is "a well known short-form or abbreviation of **the community**" (3 points) or "closely describes **the community**" (2 points) (emphasis added in both quotations). Notice the precise language, especially the language I have set **in bold**. The proposed string does not have to be "**the only** well known short-form or abbreviation of the community" and does not have to be "**the only term that** closely describes the community" (bold type for language I am adding for contrast). More important, the primary focus is "the community," not just "community members" (who are an alternative focus for the 2-point score).

26. The overall community is sexual and gender nonconformists. This is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely embraced natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. "Gay" is a "well known short-form or abbreviation of the community" (the requirement for 3 points) and also "closely describes the community" (the requirement for 2 points). There is no requirement that "gay" must be the only umbrella term for the community or even that it be the most popular term—but in fact "gay" remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that "gay" has been a popular word for more than a century, but also demonstrates that once "gay rights" became ascendant in the 1990s, the term's dominance increased and consolidated.



*Figure 1. A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008*

## **2. The CPE Report Created an “Under-Reach” Criterion Not Found in or Supported by the Applicant Guidebook and Applied the Novel Criterion to create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws**

27. In another major departure from ICANN’s Applicant Guidebook and its Bylaws, the EIU Panel introduced a **Liberum Veto** (Latin for “free veto”) into ICANN’s nexus criteria. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth’s ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The CPE Report created a similar Liberum Veto, by importing a requirement that the applied-for string (“.gay”) can be vetoed if it “does not sufficiently identify **some**

**members** of the applicant’s defined community, in particular transgender, intersex, and ally individuals.” CPE Report, 5 (emphasis added).

28. Where did this *Liberum Veto* come from? It was not taken from the Applicant Guidebook’s explicit instructions for the nexus requirement, AGB, 4-12, nor was it taken from the Guidebook’s Definitions of “Name” or “Identify,” AGB 4-13. Yet the EIU Panel quoted the Applicant Guidebook for its statement of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake.

29. According to the Applicant Guidebook, “Identify,” a key term in the 2-point test, means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report recast this Guidebook criterion to require that the applied-for string “must [1] ‘closely describe the community or the community members’, i.e., the applied-for string is what [2] ‘the typical community member would naturally be called.’ ” CPE Report, 5 (quoting the AGB). Notice that the first part [1] of the CPE Report’s requirement is taken from the Guidebook’s nexus requirement and the second part [2] is quoted from an illustration of **one** example where the Guidebook’s criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook’s focus on “the community” and refocused only on “members of the community,” so the Panel ignored the Applicant Guidebook’s focus on an **objective** view of the community and refocused only on **subjective** usages by some members of the community. And it took subjective usages pretty far by creating a *Liberum Veto*.

30. Moreover, the EIU Panel's Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that the Guidebook defines "Identify" to mean that "the applied-for string closely describes the community or the community members, **without over-reaching substantially beyond the community.**" AGB, 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application, like this:

*ICANN AGB Concern: Applied-For String > Community Defined in Application*

But that's not the concern identified by the EIU Panel's Liberum Veto analysis, which claims that the applied-for string ("gay") "under-reaches" substantially short of the whole community. The Panel's "under-reaching" concern flips the "over-reaching" concern of the Applicant Guidebook. The Panel's worry that the applied-for string is much narrower than the community defined in the application, looks like this:

*EIU Panel Concern: Applied-For String < Community Defined in Application*

31. Although I shall document how the EIU Panel is mistaken in its application of its "under-reaching" analysis, note that this analysis and the Liberum Veto are errors by the EIU Panel and are contrary to the ordinary meaning of ICANN's Applicant Guidebook. The "under-reaching" analysis and the Liberum Veto are also inconsistent with the CPE Guidelines, Version 2.0, prepared by the EIU itself. See EIU, CPE Guidelines, 7-8 (Version 2.0), analyzed below.

### 3. The CPE Report Ignored and Is Inconsistent with ICANN's Bylaws

32. Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN's mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support "broad, informed participation reflecting the \* \* \* cultural diversity of the Internet." ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.
33. There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—.gay—is ideally suited for these purposes.
34. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), "suicide.gay" (one of the community-operated websites proposed in the application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Expert Report) would think "suicide.gay" before they would think "suicide.lgbt" or "suicide.lgbtqia." See Figure 1, above. Indeed, many educated people (including the author of this Expert Report) cannot easily remember the correct order of the letters in the latter string ("lgbtqia"). Does a

Liberum Veto make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as “lgbtqia”). Figure 2, below, is a dramatic illustration of this point: “gay suicide” is a common locution; the search of books published between 1950 and 2008 does not register significant usage for “LGBT suicide” or “LGBTQIA suicide.”

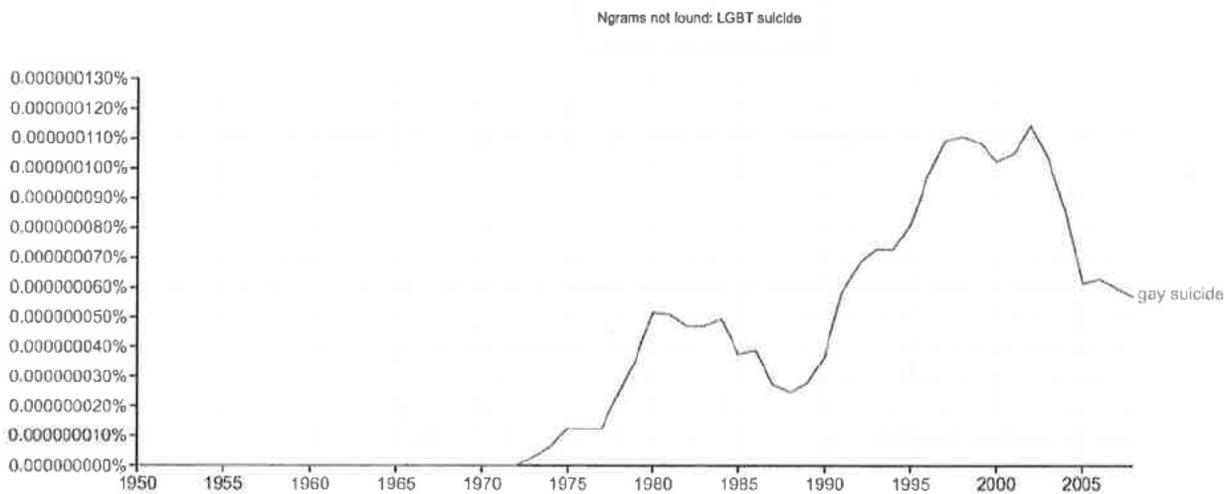


Figure 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the Corpus of Books published between 1950 and 2008

35. Not least important, recall that “non-discriminatory treatment” is a fundamental principle identified in ICANN’s Bylaws. As I shall now show, the EIU has arbitrarily created an “under-reaching” test or requirement, without any notice in its own guidelines. Needless to say, other EIU Panel evaluations have ignored that criterion in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an “under-reaching” test in its nexus requirement, the EIU Panel here has applied it in a most draconian

manner, namely, creating a Liberum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

**B. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES AND PREVIOUS REPORTS AND THEREFORE VIOLATES ICANN'S DUTY OF NON-DISCRIMINATION**

**1. The CPE Report Is Inconsistent with the EIU's Own Guidelines**

36. Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the applied-for string "identifies" the community but does not qualify for a score of 3. I believe dotgay properly qualified for a score of 3, but the CPE Report combined in a confusing way (and apparently contrary to the precise terms of the Applicant Guidebook) the requirements for full (3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the application "identified" the community.
37. "Identify" means that "the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community." AGB, 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string "must 'closely describe the community or the community members', i.e., the applied-for string is what 'the typical community member would naturally be called.'" CPE Report, 5.
38. Based upon this revision of the ICANN criterion, the CPE Report "determined that more than a small part of the applicant's defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus." CPE Report, 5. Specifically, the EIU Panel "determined that the applied-for string does not sufficiently identify some members of the

applicant’s defined community, in particular transgender, intersex, and ally individuals.”  
CPE Report, 5-6.

39. As I concluded above, the EIU Panel has imported a new “under-reaching” test into the nexus analysis—contrary to the Applicant Guidebook’s concern only with “over-reaching.” Indeed, this CPE Report’s unauthorized test is also directly inconsistent with the EIU’s own published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the EIU’s Guidelines quote the Applicant Guidebook’s definition of “Identify,” with the “over-reaching language. Then, the EIU announces its own “Evaluation Guidelines” for this term, including this:

“Over-reaching substantially” means that the string indicates a **wider** geographic or thematic remit than the community has.

EIU, CPE Guidelines, Version 2.0, at 7 (emphasis added). The EIU’s Guidelines do not suggest that the inquiry should be whether the string indicates a “**narrower** geographic or thematic remit than the community has” (emphasis for my substitution).

40. The EIU Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

*Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?*

*Does the string capture a wider geographic/thematic remit than the community has?*

EIU, CPE Guidelines, Version 2.0, at 8 (emphasis in original).

41. Given these Guidelines, one would not expect “under-reaching” decisions, even when an application clearly presents those concerns. An excellent example is the CPE Report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string “.Osaka”. “Members of the community are defined as those who are within the Osaka geographical area as well as those who self-identify as having a tie to Osaka, or the culture of Osaka.” Osaka CPE Report, 2. In a nonexclusive list, the applicant identified as members of the community “Entities, including natural persons who have a legitimate purpose in addressing the community.” Osaka CPE Report, 2.
42. The applied-for string (“.Osaka”) would seem to be one that very substantially “under-reaches” the community as defined by the applicant. Apply to this application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka probably self-identify as “Japanese” rather than “Osakans.” Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. *Liberum Veto?*
43. Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular AirBnB location), or even resident might say, “I am only interested in Chūō-ku! The rest of Osaka has no interest for me.” If a fair number of people feel this way, “more than a small part of the applicant’s defined community is not identified by the applied-for string,” Dotgay CPE Report, 5, if one were following the logic of the EIU Panel evaluating dotgay’s application.

44. I must say that this kind of Libero Vetoevidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for “.Osaka” and that posed by the EIU Panel for “.gay.” Simply substitute “transgender” for “Chūō-ku” in the foregoing analysis, and you have the EIU Panel’s evaluation in the Dotgay CPE Report.

45. By its broad definition of the community, including “[e]ntities, including natural persons who have a legitimate purpose in addressing the community,” the “.Osaka” applicant is screaming “under-reach.” Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the “.Osaka” application simply concluded that the string “matches the name of the community” and awarded the applicant 3 of 3 points for nexus. Osaka CPE Report, 4. “The string name matches the name of the geographical and political area around which the community is based.” Osaka CPE Report, 4. Yes, but the applicant defined the community much, much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an “under-reach” analysis or consider a Libero Vetoevidence in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU’s CPE Guidelines. And, it almost goes without saying, the EIU Panel’s analysis for the dotgay application is strongly inconsistent with the EIU Panel’s lenient analysis for the Osaka application.

## **2. The CPE Report Is Inconsistent with the EIU’s Own Previous Reports**

46. Dotgay’s application may not have been the first time the EIU has performed a nexus analysis suggesting an “under-reach” of an applied-for string, compared with the identified

community. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a *Liberum Veto*.

47. An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether “.hotel” should be approved as a top-level domain. The EIU Panel may have performed a kind of “under-reach” analysis—but it was nothing as critical as that which it performed for dotgay’s application, even though the “.hotel” name was a much more dramatic illustration of “under-reach.”
48. The applicant wanted a domain that would serve the “global Hotel Community.” It defined its community in this way: “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.” Hotel CPE Report, 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.
49. In the discussion of the nexus requirement, the EIU Panel observed that “the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD. However, these entities are considered to comprise only a small part of the community.” Hotel CPE Report, 4. This is a stunning understatement. The applicant’s broad definition of “hotel” would logically sweep into the “community” resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express’s

sleeping car a “hotel”? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be “hotel” rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

50. The EIU’s “under-reach” analysis of the Hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (“.hotel”) did not match the community defined in the application. Contrast the Panel’s tolerant analysis in the Hotel application with its hyper-critical analysis of dotgay’s application. The contrast becomes even more striking, indeed shocking, when you also consider the dotgay CPE Report’s vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in the current Expert Report (reported below).

51. Another example of an EIU Panel’s forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for “.spa”. The EIU Panel awarded the applicant 14 of 16 points, including 4 of 4 points for nexus and uniqueness. Like the “.hotel” applicant, the “.spa” applicant has more significant problems of “under-reach” than dotgay’s application has.

52. The “.spa” applicant defined the community to include “Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors.” Spa CPE Report, 2. The EIU Panel awarded the

applicant 4 of 4 points based upon a finding that these three kinds of persons and entities “align closely with spa services.” Spa CPE Report, 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with “spa” and would not think “.spa” if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this “alignment” concern, and awarded the spa applicant 3 of 3 points for nexus.

**C. THE CPE REPORT IGNORED IMPORTANT HISTORICAL AND EMPIRICAL EVIDENCE THAT STRONGLY SUPPORTS DOTGAY’S APPLICATION**

53. Assume, contrary to any sound analysis, that the CPE Report correctly stated the Applicant Guidebook’s requirements for Criterion #2 (community nexus and uniqueness). Even under the EIU Panel’s excessively restrictive understanding of ICANN’s requirements, dotgay’s application would merit 4 of 4 points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.

54. Recall that the EIU Panel “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community

described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

55. The CPE Report makes no effort to situate dotgay’s claims within the larger history of sexual and gender minorities in history or in the world today. Nor does it identify the methodology the EIU Panel followed to support these sweeping empirical statements. The remainder of this Expert Report will attempt to do that. The analyses contained in Appendix 2 will explain the methodology my research team and I followed for each of the Figures used below.

### **1. From Stonewall to Madrid: “Gay” as an Umbrella Term for Sexual and Gender Minorities, as Well as a Term for Homosexual Men**

56. In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as “degenerates,” “moral perverts,” “intersexuals,” and “inverts,” as well as “homosexuals.”<sup>5</sup> European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of “inverts” and “perverts” departed from “natural” (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a “degeneration” from natural forms.<sup>6</sup>

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<sup>5</sup> E.g., Havelock Ellis, *Sexual Inversion* (3d ed. 1915); William Lee Howard, *The Perverts* (1901), and *Effeminate Men and Masculine Women*, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 39-49 (2008); Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 213 et al. (1983).

<sup>6</sup> Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, 46-49.

57. Even the “inverts” themselves used these terms, as illustrated by Earl Lind’s *Autobiography of an Androgyne* (1918) and *The Female Impersonators* (1922). Lind’s was the first-person account of an underground New York City society of people he describes as “bisexuals,” “inverts,” “female impersonators,” “sodomites,” “androgynes,” “fairies,” “hermaphroditoi,” and so forth. What these social outcasts and legal outlaws had in common is that they did not follow “nature’s” binary gender roles (biological, masculine man marries biological, feminine woman) and procreative sexual practices that were socially expected in this country. See also Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908); Xavier Mayne (a/k/a Edward Stevenson), *The Intersexes: A History of Simulsexualism as a Problem in Social Life* (1908). Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.
58. Most of these terms were at least somewhat derogatory, as was “homosexual,” a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe “urnings,” and Magnus Hirschfeld described “transvestites” with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was “gay,” a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this “happy” word as a description of their own amorphous subculture.
59. An early literary example is Gertrude Stein’s *Miss Furr and Miss Skeene* (1922, but written more than a decade earlier). The author depicts a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a

woman would “naturally” marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed or posed as a man. (Such an explicit book would have been subject to immediate censorship.) Instead, Gertrude Stein described the women thus:

“They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay.”

If they were not completely baffled, most readers in the 1920s would have assumed the traditional reading of “gay,” used here in a distinctively repetitive manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the “man’s role,” or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an “androgynous” or “hermaphrodite.”

60. Gertrude Stein’s story illustrates how “gay” could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. (As the twentieth century progressed, meaning (1) has been almost completely eclipsed by meanings (2) and (3).) There was in this early, closeted era a “camp” feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences “in the know” could find delight in the ambiguity.

61. An early example from popular culture might be helpful. In the hit cinematic comedy *Bringing Up Baby* (1938), Cary Grant's character sends his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asks why the handsome leading man is thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line highly amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.<sup>7</sup>

62. In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular **and** as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. See Figure 1, above. Indeed, in many countries, "queer" to this day carries more negative connotations than "gay," which continues to make "queer" a less attractive generic term.

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<sup>7</sup> For a provocative analysis of the bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

63. A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City's Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the "Gay Revolution."<sup>8</sup> Sympathetic accounts of the Stonewall riots mobilized the popular term "gay" to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the "Gay Revolution." For example, Carter's account reports that this "Gay Revolution" began when a "butch dyke" punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights of protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that "special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. \* \* \* A common theme links those who resisted first and fought the hardest, and that is gender transgression."<sup>9</sup>

64. Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts almost universally described as a "gay bar." The patrons of the gay bar included homosexual and bisexual men who were insisting they be called "gay" and not the disapproved Greek terms ("homosexual" and "bisexual") that had been devised by the doctors. Many of the people in the "gay bar" were not homosexual men, but were lesbians,

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<sup>8</sup> David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2010).

<sup>9</sup> *Id.* at 261; see *id.* at 150-51 (describing the first punch thrown by the "butch dyke," who floored a police officer).

gender-bending “bull dykes” and “drag queens,” gender rebels, bisexual or sexually open youth, and the friends of these gender and sexual nonconformists.<sup>10</sup>

65. Early on, Stonewall was hailed as “the birth of the Gay liberation movement.”<sup>11</sup> In New York alone, it spawned organizations for “gay rights” that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other “gay” groups. These groups included “gay” men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and “queers” of all sorts. The community of sexual and gender minorities knowingly used the term “gay” in both senses—as a term displacing “homosexual” for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman’s *The Gay Manifesto* (1970) made clear that the “gay agenda” was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. “Closet queens” should “come out” and celebrate their differences.

66. Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls “Gay American History.” First published in 1976 and reissued many times since, Katz’s *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called “hermaphrodites” and “man-women”;<sup>12</sup> poet Walt Whitman, who celebrated “the love of

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<sup>10</sup> See *id.* at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

<sup>11</sup> Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 508 (1976).

<sup>12</sup> *Id.* at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

comrades,” which he depicted as male bonding and intimate friendships;<sup>13</sup> “male harlots,” or prostitutes, on the streets of New York;<sup>14</sup> Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans;<sup>15</sup> lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman.<sup>16</sup> More recent historical accounts of the diverse community of sexual and gender nonconformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York*.<sup>17</sup>

67. Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.
68. Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by “lesbian and gay” persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as “LGB” (lesbian, gay, and bisexual) persons, and soon after that the blanket term “LGBT” (lesbian, gay, bisexual, and

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<sup>13</sup> Id. at 509-12 (Whitman).

<sup>14</sup> Id. at 68-73 (male prostitutes, called “harlots” in a contemporary report).

<sup>15</sup> Id. at 317-90 (dozens of women who “passed” as men, many of whom marrying women).

<sup>16</sup> Id. at 118-27 (Smith), 787-97 (Goldman).

<sup>17</sup> Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) (excellent account of the increasingly diverse and differentiated population of “Gay Los Angeles”); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) (although an account focusing on the world of men, this book includes within the “gay male world” bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term “gay” still captured the larger community. I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: “Gaylaw is the ongoing history of state rules relating to gender and sexual nonconformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgendered people.”<sup>18</sup> Although many readers were taken aback that “gaylaw” might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that “gaylaw” and “gay rights” did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

69. In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with “queer” added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay’s application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.

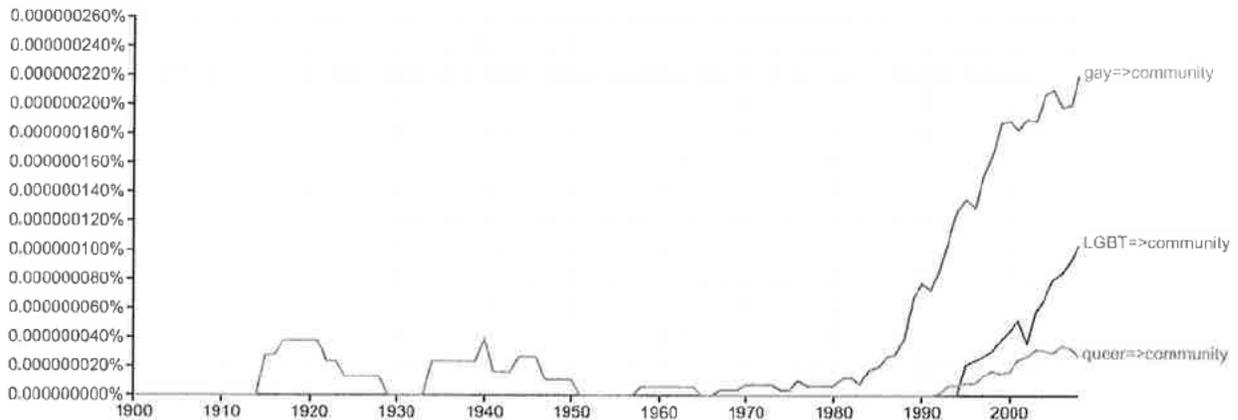
70. Has the expanding acronym rendered “gay” obsolete as the commonly understood umbrella term for our community? Not at all. Recall that the requirement for the nexus requirement

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<sup>18</sup> William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn from *Gaylaw* as well. See *id.* at 567-68. Justice Scalia’s dissenting opinion cited *Gaylaw* so often that he short-formed it “Gaylaw.” See *id.* at 597-98 (dissenting opinion).

between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (“gay”) “is a well-known short-form or abbreviation of the community.” AGB, 4-12.

There are many, many specific examples indicating that it is.



*Figure 3. A Depiction of Dependency Relations among “Community” and Modifying Adjectives (“Gay”, “LGBT”, and “Queer”)*

71. Figure 3, above, reflects the usage in the searchable Internet of “gay” as modifying “community,” and offers a comparison with other adjectives, such as “queer” and “LGBT” modifying “community.” (As with the other Figures, the methodology for the search is contained in Appendix 2.)

72. There are other corpuses that can be searched, and we have done so to check the reliability of the data in Figure 3. Brigham Young University maintains a Corpus of Contemporary American English (“BYU Corpus”); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at <http://corpus.byu.edu/coca/> (last viewed

Sept. 9, 2016). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that “gay” dominates “LGBT” and other acronyms used to describe sexual and gender minorities. Specifically, we had 26,530 hits on the BYU Corpus for “gay,” 673 hits for “LGBT,” 193 hits for “LGBTQ,” and 0 hits for “LGBTQIA.”

73. Does “gay community” generate a comparable number of hits? In our search of the BYU Corpus, we found “gay community” eight times more frequently than “LGBT community.” (“LGBTQIA community” returned no results.) While “LGBT community” is much more popular now than it was ten or even five years ago, the most popular term remains “gay community.” Figure 3A provides an illustration of these results.

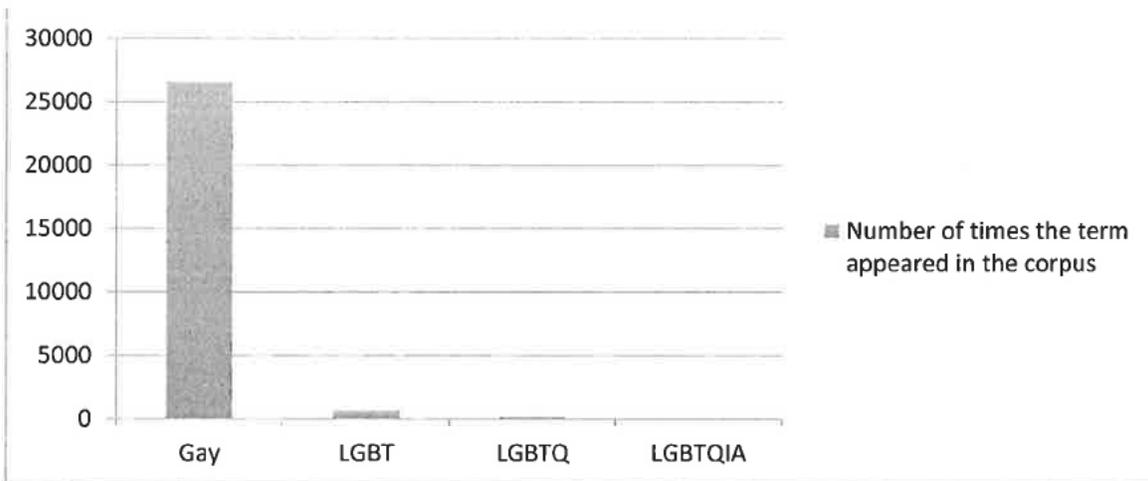


Figure 3A. A Depiction of Dependency Relations found in the BYU Corpus among “Community” and Modifying Adjectives (“Gay”, “LGBT”, “LGBTQ” and “LGBTQIA”)

74. How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN’s Applicant Guidebook awards 3 of 3 points

for the community-nexus category if the applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that “gay” is a “well known short-form or abbreviation for the community.” Indeed, the data would support the proposition that “gay” is the “**best known** short-form or abbreviation for the community” (“best” substituted for “well”). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). To confirm this point, consider some current evidence.

75. Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the “gay bar” in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this unprecedented mass assault by a single person on American soil.<sup>19</sup> Almost all of them described Pulse as a “gay bar,” the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a “gay bar” and a “gay community” that included lesbians, bisexual men and women, transgender persons, queer persons, and “allies,” as well as many gay men.

76. Forty-nine “gay people” died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.<sup>20</sup> Most of the victims were

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<sup>19</sup> We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

<sup>20</sup> For biographies of victims in the Pulse shootings, see <http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims> (last viewed 9/2/16).

homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer “allies” such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

77. Consider, finally, a positive legacy of the Stonewall riots, namely, “gay pride.” For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called “the Gay Pride Parade.”<sup>21</sup>

78. Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Auckland to Gay Pride Rome to Gay Pride Orgullo Buenos Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 “gay pride events”

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<sup>21</sup> E.g., *Highlights from New York's Gay Pride Parade*, N.Y. Times, June 26, 2016, available at <http://www.nytimes.com/live/gay-pride-parade-nyc-2016/> (viewed Sept. 10, 2016).

all over the world, <https://www.nighttours.com/gaypride/> (viewed Sept. 9, 2016). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

79. There are also international gay pride events. In 2017, it will be World Pride Madrid, celebrating Spain's leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid's annual pride celebration was voted "best gay event in the world" by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as "Gay World Pride."<sup>22</sup> Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use "gay" **both** as a generic, umbrella term for sexual and gender minorities **and** as a term referring to homosexual men—often in the same article.

## **2. "Gay" Is an Umbrella Term for the Community That Includes Transgender, Intersex, and "Allied" Persons**

80. As illustrated by the accounts of the Orlando "gay bar" and the world-wide "gay pride" events, the term "gay" remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that "gay people," the generic term, remains the most popular use of the term "gay," with "gay men" and "gay women" also popular, but much less so.

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<sup>22</sup> E.g., *Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at <http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/>.

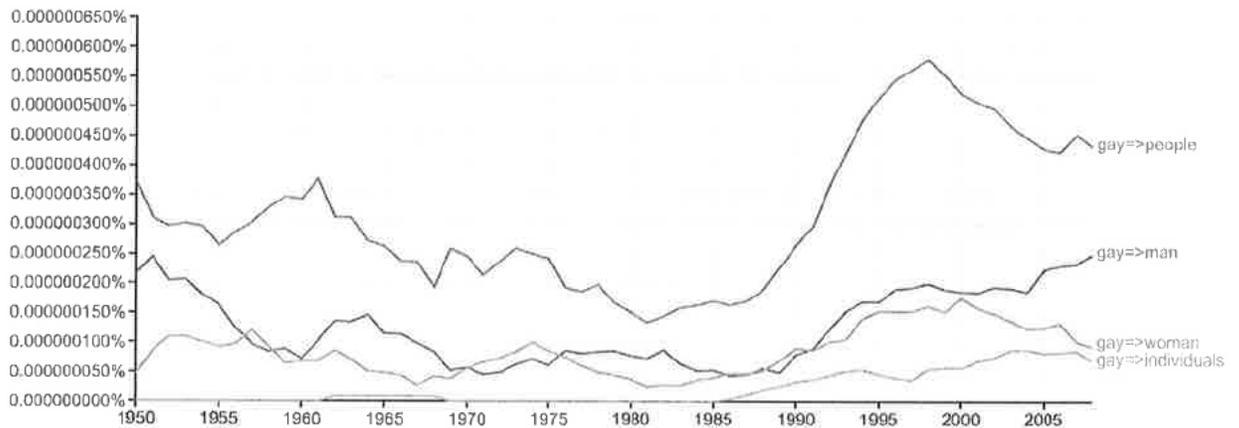


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”

81. The CPE Report, however, insisted that “gay community” does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition, aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing. As I shall show, the EIU Panel did not browse very extensively.
82. To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that “gay” does not describe the overall community. Indeed, the CPE Report and this Expert Report are in agreement that the term “gay” has been the only stable term that has described the community of sexual and gender nonconformists over a period of generations. That “gay” has been a longstanding, stable, and widely referenced term

makes it perfect for an Internet domain (".gay") for the community that consists of sexual and gender minorities.

83. Thus, almost all of the CPE Report's examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay's claim that "gay" is a "well known short-form or abbreviation for the community." The EIU Panel objected that dotgay's analysis "fails to show that when 'gay' is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities." CPE Report, 7. Although I do not believe the EIU Panel fairly characterized dotgay's application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).

84. Consider the famous "Gay Games," an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. The stated purpose of the Gay Games is to foster "self-respect of lesbian, gay, bisexual, transgender, and all sexually-fluid or gender-varient individuals (LGBT+) throughout the world."<sup>23</sup> The mission of the Federation is "to promote equality through the organization of the premiere international LGBT and LGBT-friendly sports and cultural event known as the Gay Games."<sup>24</sup> Notice how the Federation uses the term "gay" as both a generic, umbrella term ("Gay Games") and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly,

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<sup>23</sup> Federation of Gay Games, *Purpose and Mission Statement*, ¶ 1, <https://gaygames.org/wp/about-the-fgg/about-the-federation/purpose-and-mission-statement-2/> (viewed Sept. 9, 2016).

<sup>24</sup> *Id.*, ¶ 2.

LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., “Gay” Games.

85. Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know “gay” to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer “Gay Games” (or its predecessor, “Gay Olympics”) than “Trans Games” or “Intersex Olympics.”

86. The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate “gay pride” events or engage in “gay rights” advocacy.<sup>25</sup> “Gay rights” include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted

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<sup>25</sup> CPE Report, 7; *Gay Pride Calendar*, <http://www.gaypridecalendar.com/> (viewed Sept. 9, 2016) (the website that lists dozens of “pride” parades, operating under a variety of names but all clustered under the generic “gay pride calendar”).

transgender and intersex persons, the mainstream media constantly referenced this as an “anti-gay” measure or as a law that implicated “gay rights.”<sup>26</sup>

87. In addition to being a unifying term to describe the community’s political and legal activity, the short-form “gay” is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called “gay bars.” These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies.<sup>27</sup> *Gay Star News* is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues.<sup>28</sup>

88. Recent histories by LGBT+ insiders continue to use “gay” as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons’ account of *Gay L.A.* They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has “exhausted [her] identity as a ‘lesbian of color’ \* \* \*. But, as she affirms, there is a

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<sup>26</sup> E.g., Richard Socarides, *North Carolina and the Gay-Rights Backlash*, *New Yorker*, Mar. 28, 2016; Jonathan M. Katz & Erik Eckhom, *Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina*, *New York Times*, Apr. 5, 2016.

<sup>27</sup> Sunnive Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, *Advocate*, June 20, 2016, <http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video> (viewed Sept. 9, 2016).

<sup>28</sup> Greg Hernandez, *Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015*, *Gay Star News*, Sept. 8, 2016, <http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA> (viewed Sept. 9, 2016).

panoply of identities from which to choose in an expansive **gay L.A.**”<sup>29</sup> These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger “gay community.” And recall that the test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term “gay community” to be a “short-form or abbreviation” for sexual and gender nonconformists.

89. Consider another recent example, James Franco. He is a famous actor who is as coy about his sexual orientation and gender identity as he is friendly and “allied” with the gay community. He is often asked whether he is “gay,” and his characteristic (and current) answer is that, yes, he is “gay,” even though he does not have sex with men and is neither transgender nor intersex.<sup>30</sup> In a March 2015 interview with himself, “Gay James Franco” said this: “Well, I like to think that I’m gay in my art and straight in my life. Although, I’m also gay in my life up to the point of intercourse, and then you could say I’m straight.”<sup>31</sup> James Franco is a friend, an ally, a co-explorer with sexual and gender nonconformists of all sorts. Like Raquel Gutierrez, he is part of a larger “gay community.” Both people illustrate how “gay” can be **both** a popular term referring to sexual orientation and activity **and** a generic, umbrella term referring to a sensibility or a community whose members do not conform to traditional gender and sexual norms.

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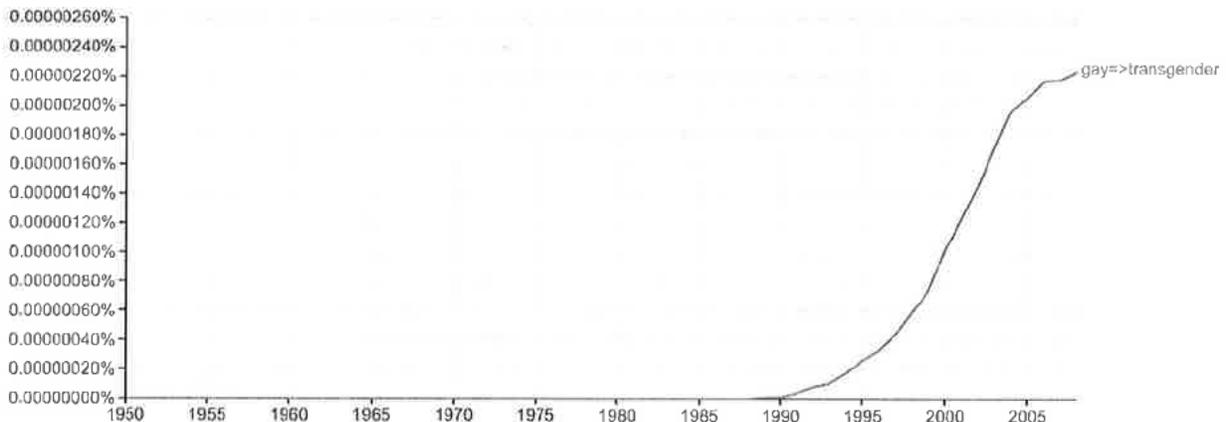
<sup>29</sup> Faderman & Timmons, *Gay L.A.*, 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

<sup>30</sup> *Understanding James Franco*, Rolling Stone, April 7, 2016 (account and quotations in text).

<sup>31</sup> J. Bryan Lowder, *James Franco Is Gay—Well, At Least Half of Him Is*, Slate, March 16, 2015.

Another example is Miley Cyrus, an announced “pansexual” who has recently been sporting clothes with the slogan “Make America Gay Again.”<sup>32</sup>

90. As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. My research associates and I have run a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where “gay” is not only in the same sentence as “transgender,” but is, more specifically, being used to include “transgender.” Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing “gay,” as the CPE Report suggested, “transgender” becomes associated with “gay.” Specifically, we found thousands of examples where “gay” was used in a way that included “transgender” or “trans” people.



*Figure 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”*

<sup>32</sup> Joe Williams, *Miley Cyrus Wants to ‘Make America Gay Again,’* Pink News, July, 25, 2016, available at <http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/> (viewed Sept. 9, 2016).

91. The relationship between the gay community and intersex persons is trickier to establish, because “intersex” is a newer and still-mysterious term, and it is not clear how many acknowledged intersex persons there are in the world. Most discussion of intersexuality in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter (“I”) to the expanding acronym—hence the LGBTQIA term used in dotgay’s application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon.

92. Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya of South Africa won the gold medal in the women’s 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a “Gender in Sport” policy that creates opportunities for fair competition without stigmatizing gender minorities.<sup>33</sup>

93. Common usages of “gay” as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website,

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<sup>33</sup> Federation of Gay Games, “Gender in Sport,” <https://gaygames.org/wp/sport/sports-policiesd/gender/> (viewed Sept. 9, 2016).

*Everyone Is Gay*.<sup>34</sup> The *Gay Star News* is a news source for the broad gay community, and it includes informative articles in intersex persons.<sup>35</sup> While there are many intersex-focused websites, *Everyone Is Gay* does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

## V. CONCLUSION AND SIGNATURE

94. Return to ICANN’s mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

95. Dotgay’s application for the string “.gay” would seem to fit perfectly within the mission and core values of ICANN. “Gay” is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Expert Report. Such a “.gay” string would create a readily-identifiable space within the Internet for this community. Not surprisingly,

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<sup>34</sup> *Intersex Advice*, *Everyone Is Gay*, <http://everyoneisgay.com/tag/intersex/> (viewed Sept. 9, 2016).

<sup>35</sup> E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, *Gay Star News*, Mar. 16, 2016, <http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg> (viewed Sept. 9, 2016).

ICANN's requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay's application. Indeed, dotgay's application more than meets the requirements actually laid out in the Applicant Guidebook.

96. Moreover, ICANN "shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." ICANN Bylaws, Art. II, § 3 ("Non-Discriminatory Treatment"). And ICANN "and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." ICANN Bylaws, Art. III, § 1.

97. Evaluating dotgay's application, the EIU has not acted in a completely "open and transparent manner," nor has it followed "procedures designed to ensure fairness." To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

98. Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and to grant dotgay's application, for it legitimately deserves at least 14 of 16 points (i.e., including 4 of 4 points for Criterion #2, the community nexus requirement).

**Respectfully submitted,**

**Date,** September 13, 2016



William N. Eskridge Jr.

John A. Garver Professor of Jurisprudence  
Yale Law School

## **APPENDICES**

### **APPENDIX 1**

#### **CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL**

##### **EDUCATION**

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha  
(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

##### **POSITIONS HELD**

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present

Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995

Stanford, 1995

Toronto, 1999, 2001

Vanderbilt, 2003

Columbia, 2003

Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011

Fordham, 2008

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998

Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 - 1979

(SELECTED) PUBLICATIONS

*Books*

**Interpreting Law: A Primer on How to Read Statutes and the Constitution** (Foundation 2016)

**Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes** (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

**A Republic of Statutes: The New American Constitutionalism** (Yale 2010) (co-authored with John Ferejohn)

**"Dishonorable Passions": Sodomy Law in America, 1861-2003** (Viking 2008)

**Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence** (Oxford 2006) (co-authored with Darren Spedale)

**Equality Practice: Civil Unions and the Future of Gay Rights** (Routledge 2002)

**Legislation and Statutory Interpretation** (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

**Gaylaw: Challenging the Apartheid of the Closet** (Harvard 1999)

**Constitutional Tragedies and Stupidities** (NYU 1998) (co-authored and edited with Sanford Levinson)

**Sexuality, Gender, and the Law** (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

**The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment?** (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

**Dynamic Statutory Interpretation** (Harvard 1994)

**Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century** (West Publishing Co. 1993; 2d ed. 1998; 3d ed. 2004, 4th ed. 2009; 5th ed. 2013) (co-authored with Daniel Farber & Philip Frickey and, with fifth edition, Jane Schacter)

**Legislation: Statutes and the Creation of Public Policy** (West 1987; 2d ed. 1994; 3d ed. 2001; 4th ed. 2007; 5th ed. 2014) (co-authored with Philip Frickey and, after second edition, Elizabeth Garrett; starting with fifth edition, add James Brudney)

**A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem** (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

*(Selected) Articles*

“The First Marriage Cases, 1970-74,” in *Love Unites Us: Winning the Freedom to Marry in America* 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett, eds., 2016)

“Law and the Production of Deceit,” in Austin Sarat ed., *Law and Lies: Deception and Truth-Telling in the American Legal System* 254-312 (2015)

“Original Meaning and Marriage Equality,” 52 *Hous. L. Rev.* 1067 (2015)

“Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011,” 92 *Tex. L. Rev.* 1317 (2014) (with Matthew R. Christiansen)

“Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,” 93 *B.U.L. Rev.* 275 (2013)

“Expanding *Chevron*’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,” 2013 *Wis. L. Rev.* 411

“The New Textualism and Normative Canons,” 113 *Colum. L. Rev.* 531 (2013) (book review)

“Marriage Equality: An Idea Whose Time Is Coming,” 37 *NYU Rev. L. & Soc. Change* 245 (2013)

“Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms,” 57 *St. Louis U.L. Rev.* 865 (2012)

“Vetogates and American Public Law,” *J.L. Econ. & Org.* (April 2012), available online at <http://jleo.oxfordjournals.org/content/early/2012/04/19/jleo.ews009.abstract>

“Family Law Pluralism: A Guided-Choice Regime of Menus, Default Rules, and Override Rules,” 100 *Geo. L.J.* 1881 (2012)

“Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms,” 45 *Ga. L. Rev.* 657 (2011)

“Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?,” 50 *Washburn L.J.* 1 (2010)

“*Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases,” 110 *Colum. L. Rev.* 1727 (2010) (with Connor N. Raso)

"The California Proposition 8 Case: What Is a Constitution For," 98 Calif. L. Rev. 1235 (2010)

"Sexual and Gender Variation in American Public Law: From Malignant to Tolerable to Benign," 57 UCAL L. Rev. 1333 (2010)

"The California Supreme Court, 2007-2008—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy," Calif. L. Rev. (2009)

"A Pluralist Theory of Equal Protection," U. Pa. J. Const'l L. (2009)

"Constitutional Horticulture: Deliberation-Respecting Judicial Review," 87 Tex. L. Rev. 1273 (2009) (with John Ferejohn)

"Vetogates, Preemption, *Chevron*," 83 Notre Dame L. Rev. 1441 (2008)

"The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*," 96 Geo. L.J. 1083 (2008) (co-authored with Lauren Baer) (the Ryan Lecture)

"America's Statutory 'Constitution,'" 41 U.C. Davis L. Rev. 1 (2007) (the Barrett Lecture)

"No Frills Textualism," 119 Harv. L. Rev. 2041 (2006) (book review)

"*Chevron* and Agency Norm Entrepreneurship," 115 Yale L.J. 2623 (2006) (essay co-authored with Kevin Schwartz)

"Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion," 57 Fla. L. Rev. 1011 (2005) (the Dunwoody Lecture)

"Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics," 114 Yale L.J. 1279 (2005)

"*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism," 2 Int'l J. Const'l L. 555 (2004)

"*Lawrence's* Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics," 88 Minn. L. Rev. 1021 (2004)

"Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century," 100 Mich. L. Rev. 2062 (2002)

"Structuring Lawmaking to Reduce Cognitive Bias: A Critical View," 87 Cornell L. Rev. 616 (2002)

"Channeling: Identity-Based Social Movements and Public Law," 150 U. Pa. L. Rev. 419 (2001)

"All About Words: Early Understandings of the 'Judicial Power' in Statutory Interpretation, 1776-1806," 101 Colum. L. Rev. 999 (2001)

"The Relationship Between Obligations and Rights of Citizens," 69 Fordham L. Rev. 1721 (2001)

"Super-Statutes," 50 Duke L.J. 1215 (2001) (co-authored with John Ferejohn)

- "Equality Practice: Reflections on the Jurisprudence of Civil Unions," 64 Alb. L.J. 853 (2001) (Sobota Lecture)
- "January 27, 1961: The Birth of Gaylegal Equality Arguments," 58 NYU Ann. Survey Am. Law 39 (2001)
- "No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review," 75 NYU L. Rev. 1327 (2000)
- "Destabilizing Due Process and Evolutive Equal Protection," 47 UCLA L. Rev. 1183 (2000)
- "Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward Recognizing Gay Unions," 31 McGeo. L.J. 641 (2000)
- "The Circumstances of Politics and the Application of Statutes," 100 Colum. L. Rev. 558 (2000)
- "Multivocal Prejudices and Homo Equality," 100 Ind. L.J. 558 (1999) (Harris Lecture)
- "Norms, Empiricism, and Canons in Statutory Interpretation," 66 U. Chi. L. Rev. 671 (1999)
- "*Hardwick* and Historiography," 1999 U. Ill. L. Rev. 631 (Baum Lecture)
- "Relationships Between Formalism and Functionalism in Separation of Powers Cases," 22 Harv. J.L. & Pub. Pol'y 21 (1998)
- "Should the Supreme Court Read the *Federalist* But Not Statutory Legislative History?," 66 Geo. Wash. L. Rev. 1301 (1998)
- "Textualism, the Unknown Ideal," 96 Mich. L. Rev. 1509 (1998) (book review)
- "A Jurisprudence of 'Coming Out': Religion, Sexuality, and Liberty/Equality Collisions in Public Law," 106 Yale L.J. 2411 (1997)
- "Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961," 24 Fla. St. U.L. Rev. 703 (1997) (Mason Ladd Lecture)
- "Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981," 25 Hofstra L. Rev. 817 (1997) (Visiting Scholar in Residence Lecture)
- "Willard Hurst, Master of the Legal Process," 1997 Wis. L. Rev. 1181
- "From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945," 82 Iowa L. Rev. (1997) (Murray Lecture)
- "Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism," 68 U. So. Cal. L. Rev. 1447 (1995) (co-authored with Jenna Bednar)
- "Virtual Logrolling: How the Court, Congress, and the States Multiply Rights," 68 U. So. Cal. L. Rev. 1545 (1995)
- "Regulatory Variables and Statutory Interpretation," 73 Wash. U.L.Q. 1103 (1995) (co-authored with Judith Levi)

"Fetch Some Soupmeat," 16 *Cardozo L. Rev.* 2209 (1995)

"The Supreme Court, 1993 Term – Foreword: Law as Equilibrium," 108 *Harv. L. Rev.* 26 (1994) (co-authored with Philip Frickey)

"The Elastic Commerce Clause: A Political Theory of American Federalism," 49 *Vand. L. Rev.* 1355 (1994) (co-authored with John Ferejohn)

"The Making of 'The Legal Process,'" 107 *Harv. L. Rev.* 2031 (1994) (essay, co-authored with Philip Frickey)

"From Handholding to Sodomy: The First Amendment and the Regulation of Homosexual Conduct," 29 *Harv. C.R.-C.L. L. Rev.* 319 (1994) (co-authored with David Cole)

"The Economics Epidemic in an AIDS Perspective," 61 *U. Chi. L. Rev.* 733 (1994) (review essay co-authored with Brian Weimer)

"Gaylegal Narratives," 46 *Stan. L. Rev.* 607 (1994)

"Post-Enactment Legislative Signals," 57 *Law & Contemp. Probs.* 75 (Winter 1994)

"The Judicial Review Game," 88 *Nw. U.L. Rev.* 382 (1993)

"Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet," 2 *Reconstruction* 52 (1993)

"The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in a Nutshell," 61 *Geo. Wash. L. Rev.* 1731 (1993)

"A History of Same-Sex Marriage," 79 *Va. L. Rev.* 1419 (1993)

"The Relationship Between Theories of Legislatures and Theories of Statutory Interpretation," in *The Rule of Law (Nomos, 1993)* (co-authored with John Ferejohn)

"A Gay Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda," 102 *Yale L.J.* 333 (1992) (review essay)

"Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking," 45 *Vand. L. Rev.* 593 (1992) (co-authored with Philip Frickey)

"The Article I, Section 7 Game," 80 *Geo. L.J.* 523 (1992) (co-authored with John Ferejohn)

"Overriding Supreme Court Statutory Interpretation Decisions," 101 *Yale L.J.* 331 (1991)

"Making the Deal Stick: Enforcing the Original Constitutional Understanding," *J.L. Econ & Org.* (1991) (co-authored with John Ferejohn)

"Reneging on History? Playing the Court/Congress/President Civil Rights Game," 79 *Calif. L. Rev.* 613 (1991)

"The New Public Law Movement: Moderation as a Postmodern Cultural Form," 89 *Mich. L. Rev.* 707 (1991) (co-authored with Gary Peller)

"The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases)," 88 Mich. L. Rev. 2450 (1990)

"Legislative History Values," 66 Chi.-Kent L. Rev. (1990)

"Dynamic Interpretation of Economic Regulatory Statutes," 21 L. & Pol'y Int'l Bus. 663 (1990)

"Gadamer/Statutory Interpretation," 90 Colum. L. Rev. 609 (1990)

"The New Textualism," 37 UCLA L. Rev. 621 (1990)

"Statutory Interpretation as Practical Reasoning," 42 Stan. L. Rev. 321 (1990) (co-authored with Philip Frickey)

"Spinning Legislative Supremacy," 78 Geo. L.J. 319 (1989)

"Public Values in Statutory Interpretation," 137 U. Pa. L. Rev. 1007 (1989)

"Metaprocedure," 98 Yale L.J. 945 (1989) (review essay)

"Interpreting Legislative Inaction," 87 Mich. L. Rev. 67 (1988)

"Overruling Statutory Precedents," 76 Geo. L.J. 1361 (1988)

"Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation," 74 Va. L. Rev. 275 (1988)

"Dynamic Statutory Interpretation," 135 U. Pa. L. Rev. 1479 (1987)

"Legislation Scholarship & Pedagogy in the Post-Legal Process Era," 48 U. Pitt. L. Rev. 691 (1987) (co-authored with Philip Frickey)

"*Les Jeux Sont Faits*: Structural Origins of the International Debt Problem," 25 Va. J. Int'l L. 281 (1985)

"One Hundred Years of Ineptitude," 70 Va. L. Rev. 1083 (1984)

"The Iranian Nationalization Cases," 22 Harv. Int'l L.J. 525 (1981)

"*Dunlop v. Bachowski* & the Limits of Judicial Review under Title IV of the LMRDA," 86 Yale L.J. 885 (1977) (student note)

#### ENDOWED LECTURES

Henry J. Miller Lecture, Georgia State University College of Law, "Marriage Equality, 1967-2017," September 15, 2016

Frankel Lecture, University of Houston Law Center, "Marriage Equality as a Testing Ground for Original Meaning," November 2014, published as "Marriage Equality and Original Meaning," 52 Hous. L. Rev. 1057 (2015)

Mathew O. Tobriner Memorial Lecture on Constitutional Law, University of California at Hastings, College of Law, "Marriage Equality's Cinderella Moment," September 6, 2013

2012 Distinguished Lecture, Boston University School of Law, "Beyond Backlash: How Constitutional Litigation Has Advanced Marriage Equality in the United States, 1970-2012," November 15, 2012, published as "Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States," 93 B.U.L. Rev. 275 (2013)

Foulston Siefkin Lecture, Washburn University School of Law, March 26, 2010, published as "Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?"

Sibley Lecture at the University of Georgia, School of Law, March 18, 2010, published as "Noah's Curse and Paul's Admonition: What the Civil Rights Cases Can Teach Us about the Clash Between Gay Rights and Religious Liberty"

Centennial Visitor, Public Lecture, Chicago-Kent College of Law, "Administrative Constitutionalism," March 5, 2009

Edward Barrett Lecture at the University of California, Davis, School of Law January 17, 2007, published as "America's Statutory constitution," U.C. Davis L. Rev. (2008).

Ryan Lecture at Georgetown University Law Center, November 4, 2006, published as "The Supreme Court's Deference Continuum, An Empirical Study (from *Chevron* to *Hamdan*)," 86 Geo. L.J. (2008)

Center for Religious Studies at Princeton University, November 2005, "Nordic Bliss: What the American Same-Sex Marriage Debate Can Learn from Scandinavia"

Lockhart Lecture at University of Minnesota School of Law, "Same-Sex Marriage and Equality Practice," October 2005,

Dunwoody Lecture at University of Florida School of Law, March 2005, published as "Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion," Fla. L. Rev. (2005)

President's Lecture at Davidson College, March 2004, "The Case for Same-Sex Marriage"

Brennan Lecture at Oklahoma City University School of Law, March 2004, "*Lawrence v. Texas* and Constitutional Regime Shifts"

Dean's Diversity Lecture at Vanderbilt University School of Law, February 2000, "Prejudice and Theories of Equal Protection"

Steintrager Lecture at Wake Forest University, February 1999, "Jeremy Bentham and No Promo Homo Arguments"

Adrian C. Harris Lecture at the University of Indiana School of Law, October 1998, published as "Multivocal Prejudices and Homo Equality," *Ind. L.J.* (1999)

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Donley Lectures at West Virginia University School of Law, published as "Public Law from the Bottom Up," 97 *W. Va. L. Rev.* 141 (1994)

## Congressional Testimony and Consultation

Senate Comm. on Labor, Pensions, 111<sup>th</sup> Congress, 1<sup>st</sup> Sess., *Proposed Employment Non-Discrimination Act of 2009* (Nov. 2009) (written testimony only)

House Comm. on Education & Labor, 111<sup>th</sup> Congress, 1<sup>st</sup> Sess., *Proposed Employment Non-Discrimination Act of 2009* (Sept. 2009)

Senate Comm. on the Judiciary, Senator Arlen Specter (Chair), Confirmation of Judge John Roberts as Chief Justice, United States Supreme Court (2005) (consultation only)

*H.R. 1283, The Fairness in Asbestos Compensation Act*, House Comm. on the Judiciary, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1999) (written testimony only) (jumbo consolidations in asbestos litigation)

Senate Comm. on the Judiciary, Senator Joseph Biden (Chair), Confirmation of Judge Stephen Breyer as Associate Justice, United States Supreme Court (1994) (consultation only)

*S. 420, the Ethics in Government Reform Act of 1993, and S. 79, the Responsible Government Act of 1993*, Subcomm. on Oversight of Government Management of the Senate Comm. On Governmental Affairs, 103d Cong., 1<sup>st</sup> Sess. (1993)

*Interpreting the Pressler Amendment: Commercial Military Sales to Pakistan*, Senate Comm. on Foreign Relations, 102d Cong., 2d Sess. (1992)

*S. 2279, the Lobbying Disclosure Act of 1992*, Subcomm. On Oversight of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. (1992)

*Statutory Interpretation and the Uses of Legislative History*, Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101<sup>st</sup> Cong., 2d Sess. (1990)

*Adjustable Rate Mortgages (ARMs)*, Subcomm. On Housing and Community Development of the House Comm. on Banking and Urban Affairs, 98<sup>th</sup> Cong., 2d Sess. (1984)

## APPENDIX 2

### EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

#### **FIGURE 1. *A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English Corpus of Books published in the United States from 1900 to 2008***

This Figure is a comparison of the frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are “Gay” “Queer” “Lesbian” and “LGBT”?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the English Corpus of Books published in the United States from 1950 to 2008**

This Figure is a comparison of the frequency of “gay suicide” and “LGBT suicide” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/uniforms in the sample of books, what percentage of them are “gay suicide” and what percentage of them are “LGBT suicide.”

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 3. A Depiction of Dependency Relations: Frequency of Various Adjectives (“Gay”, “LGBT”, and “Queer”) Modifying “Community”**

This Figure is a comparison of how often “community” is modified by “gay” “LGBT” and “queer” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 4. *A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”***

This figure is a comparison of how often “gay” modifies “people” “man” “woman” and “individuals” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”**

This figure is a comparison of how often “gay” modifies the word “transgender” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

# **Exhibit 12**

ARIF HYDER ALI

October 17, 2016

**VIA E-MAIL**

ICANN Board of Directors  
c/o Mr. Steve Crocker, Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's  
Community Priority Application No: 1-1713-23699**

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC (“**dotgay**”), to submit the **independent Expert Opinion** of **Professor M.V. Lee Badgett**, the Director of the Center for Public Policy and Administration, and Professor of Economics at the University of Massachusetts Amherst. Professor Badgett is also co-founder and Distinguished Scholar at the Williams Institute on Sexual Orientation, Gender Identity Law and Public Policy at the UCLA School of Law, a research center recognized worldwide for LGBTI research and expertise. Professor Badgett has published widely, including having written or co-edited three books on economics and LGBT life, along with many academic articles and policy reports. She has testified on her research before the U.S. Congress, several U.S. state legislatures, and in litigation. She has also been a consultant and contractor to the World Bank, USAID, the UN Development Programme, and the U.S. Department of State on these issues.

Professor Badgett’s Opinion will assist the ICANN Board (“**Board**”) in evaluating dotgay’s pending application (Application No: 1-1713-23699) for community priority status.<sup>1</sup> Prof. Badgett explains that withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community. She relies upon her research to show that the stigma, discrimination and violence faced by the community is real and leads to lower

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<sup>1</sup> Exhibit 1, Expert Report of Professor M.V. Lee Badgett, dated October 17, 2016.

incomes, poverty and lower mental and physical health among other unattractive outcomes. She notes that the internet has become the predominant safe space where members of the community can meet, share ideas and engage in collective action to create a more equal world. The .GAY TLD (as envisaged by the community applicant) is part of the effort to create that safe space for economic activity and social change. Prof. Badgett identifies the many and real benefits to the community from dotgay's Public Interest Commitments and registration policies. She also considers the harm that would befall the community in the absence of a community .GAY TLD (which is the likely outcome if dotgay's application for community priority status is unsuccessful).

In short, her reports adds another dimension of support to dotgay's application for community priority status, which has already been substantiated by dotgay's presentation and submissions to the ICANN Board, the **Expert Opinion of Professor William Eskridge Jr of Yale Law School**, and **ICANN Ombudsman's Report**, all of which conclusively demonstrate that dotgay's application is entitled to community priority status under ICANN's Articles, Bylaws and Applicant Guidebook. We urge ICANN to consider Professor Badgett's Expert Opinion together with the existing support on record.

Sincerely,



Arif Hyder Ali

**EXPERT OPINION OF PROFESSOR M.V. LEE BADGETT IN  
SUPPORT OF DOTGAY'S COMMUNITY PRIORITY APPLICATION  
OCTOBER 17, 2016**

# EXPERT OPINION OF PROFESSOR M.V. LEE BADGETT

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# EXPERT OPINION

## I. EXPERT OPINION

ICANN's failure to grant dotgay's community priority application for the .GAY top level domain name would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay economic community. That global economic community, made up of LGBTIA individuals exchanging ideas, knowledge, goods, and services, is a central priority of dotgay's application and mission. Below I describe the challenges and needs of the LGBTIA community and how .GAY could support or hinder efforts to achieve their full social and economic inclusion.

### **a. LGBTIA people experience stigma, discrimination, and violence around the world.**

A growing body of evidence demonstrates that LGBTIA people continue to face stigma, discrimination, and violence around the world. While some countries have moved closer to legal equality than others, many governments, employers, educational institutions, faith communities, families, and other social settings in every country continue to treat lesbian, gay, bisexual, transgender, and intersex people as less than fully equal in market, personal, and social interactions. These individual and institutional forms of exclusion from full and equal participation in life reduce access to education, employment, health care, and government services and increase exposure to unhealthy stress. Thus exclusion contributes to lower incomes, poverty, poorer mental and physical health, and other negative outcomes. These disparities are well documented in my own research cited below, and by research by many other scholars, governments, NGOs, and private research organizations. Much of this research is described in my books and reports (fully cited in Section II), including *Money, Myths, and Change: The Economic Lives of Lesbian and Gay Men*, *Sexual Orientation Discrimination: An International Perspective*, and "The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies."

### **b. To fight social exclusion, LGBTIA people need to create safe spaces to meet each other.**

In this context of exclusion, it is essential for LGBTIA people to be able to create spaces for themselves that enable them to survive and to expand safe spaces into the broader community. They need to meet and support each other, share ideas and knowledge, and engage in collective action to move toward a more equal world. In some countries at different moments in history, we know that markets have allowed the development of such

meeting places. Bookstores, newspapers, magazine, bars, and restaurants emerged in commercial spaces and became important locations that drew LGBTIA people together. More recently in some countries, such spaces have also been found in corporate employee resource groups or gay-straight alliances in educational settings. In many places, LGBTIA organizations have used such settings to create a social movement, economic opportunities, and a community of individuals, bound together in common interest and common challenges.

**c. The internet is now one of the most important spaces for LGBTIA people.**

Since the early 1990's, the internet has become that meeting space. Over time, the internet has largely replaced some physical locations and products—particularly gay newspapers, gay magazines, and gay bookstores—and greatly influenced others. The internet has proven to be conducive to creating cyberspace locations for LGBTIA people to meet and share their lives and knowledge. Organizations around the world have been able to use the privacy afforded Internet users and new technologies to grow their membership and to connect LGBTIA people with each other online and in person.

In the future, the global gay community will continue to be a creative source of new businesses and organizations that will be tied to the Internet. The community built around the life reality of being seen as “gay”—whether for lesbians, gay men, transgender men and women, intersex individuals, or bisexual people, along with the allies who support them—has developed that term that is recognizable and a form of common property. The .GAY TLD could be used on the internet to promote greater community-building that would lead to social change under the right circumstances.

**d. Of all of the applicants for the .GAY TLD, only dotgay has made public commitments to community accountability.**

Of the three .GAY applicants that filed public interest commitments, only one—dotgay—made public commitments specific to the gay community, and those commitments to community accountability are significant. Only dotgay expressed an intention and plan to proactively ensure that only members of the community will be allowed to register, an important consideration to prevent abuse that might be likely to occur if a commercial applicant owns .GAY, as discussed further below in section (f). In addition, only dotgay pledged to share a substantial proportion of profits with the community, and only dotgay committed to including members of the community in the development of policies for .GAY. Neither of the other two applicants filing public commitments expressed any knowledge of the challenges and potential concerns of the gay or LGBTIA community, much less any intention to promote the interests of the gay community. Indeed, the only time the word “gay” even appears in the public commitments of the other two applicants is in the term “.GAY”.

**e. Community accountability will be essential if .GAY is to enhance the economic, social, and legal well-being of LGBTIA individuals around the world.**

More specifically, .GAY has enormous potential to promote equality and prosperity for LGBTIA people if the development of .GAY is guided by dotgay, a community organization that would include the broad involvement of the gay community. Indeed, .GAY is highly unlikely to be a powerful platform for LGBTIA people if there is no community accountability. The value of .GAY would be diminished—or even negative—without community ownership.

As suggested by the analysis of public commitments in section (d), commercial ownership of the .GAY TLD would likely not balance community needs with stockholder goals. The failure to weigh community needs would greatly reduce the value of .GAY to LGBTIA organizations and businesses. Without community interaction and oversight, the pricing decisions, marketing strategies, and development of .GAY would not prioritize community benefit. For example, a purely financial incentive would exist to auction or sell domains like Pride.gay, Center.gay, Hate.gay, Lesbian.gay, Transgender.gay and Lambda.gay, Legal.gay, Health.gay to those willing to pay the most for it without considering the community's best interest. Such sales would likely price out existing and new organizations or businesses in the global LGBTIA community. It is highly unlikely that the winning bidders, lacking community oversight, would use such spaces as community resource hubs, as planned by dotgay. Commercial owners' lack of a vision for meeting the community's needs in developing .GAY would simply perpetuate the current economic and social disadvantages of LGBTIA people.

**f. Without community oversight, .GAY could become a source of activity that would harm LGBTIA people.**

If ICANN rejects dotgay's community priority application, effectively eliminating community oversight of .GAY, the platform would be highly attractive for organizations and government agencies that are hostile to equality for LGBTIA people. For example, the very active efforts in many countries to commit LGBTIA people to coercive (but professionally discredited) "conversion therapies" could be greatly aided by a site that appears to be gay-supportive but is actually feeding personal information to anti-gay organizations or law enforcement. Such information could be used to publicly disclose someone's sexual orientation or to blackmail them into coercive and harmful treatment.

Such outcomes are not mere speculation. Research has uncovered many examples of police, governmental, and individual efforts to entrap, blackmail, or extort LGBTIA people, where consensual same-sex activity is criminalized, such as in countries as diverse as Zimbabwe, Iran, Kuwait, Kenya, Nigeria, India, and (historically) the United States. For examples, see "Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa," International Gay and Lesbian Human Rights Commission, 2011 (<https://www.outrightinternational.org/sites/default/files/484-1.pdf>). Today, at least 75 countries criminalize same-sex sexual activity, with a death penalty possible in 13 of those countries. In countries that have criminalized advocacy for homosexuals or for certain gay issues, such as Russia or Nigeria, allies participating in .GAY online forums might also be targeted. Thus an online platform seemingly tied to the gay community—while completely unaccountable to actual vital community interests—would be ripe for abuse by people,

organizations, and agencies that would use it to further the oppression of LGBTIA people. Such outcomes would both reduce the economic value of .GAY to its legitimate users in the community and would result in severe personal and economic harms to the individuals targeted.

If ICANN continues to reject dotgay's community priority application, which would provide community oversight of .GAY, these potential negative outcomes are plausible predictions and would make it harder for LGBTIA businesses and organizations to form and to operate effectively. While specific research has not been done to estimate the social and economic cost of these outcomes to the LGBTIA community, those costs would be real and would add to the existing stigma and discrimination faced by LGBTIA people around the world.

## II. QUALIFICATIONS

I offer my opinion as an expert on the economic impact of stigma, discrimination, and exclusion of the LGBTI people and on the larger economy. I base this opinion about .GAY on twenty-five years of research as a professor of economics, currently at the University of Massachusetts Amherst. For nine years I was also director of the School of Public Policy at UMass Amherst. My Ph.D. in economics is from the University of California, Berkeley. I am a cofounder of and Distinguished Scholar at the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law, a research center that is recognized worldwide for LGBTI research and expertise.

*Published Works and Global Consulting:* I have written or co-edited three books on economics and LGBT life, along with many academic articles and policy reports, all of which are listed on my CV below. This body of research includes work on many different countries. I have testified on my research to the U.S. Congress, several state legislatures, and in litigation. I have been a consultant or contractor to the World Bank, USAID, the UN Development Programme, and the U.S. Department of State on these issues, and I have attended numerous global conferences on LGBTI human rights and development. I have done speaking tours on these topics in Australia, Vietnam, Philippines, China, South Korea, and Peru, among other countries. I have been asked to speak to the ambassadors of the OECD and the board of directors of the Inter-American Development Bank, as well as numerous business audiences around the world.



Signed: \_\_\_\_\_

M. V. Lee Badgett

Date: October 17, 2016

**Full Curriculum Vitae of Professor M.V. Lee Badgett**

**M. V. LEE BADGETT**



**HOME ADDRESS:**

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Department of Economics  
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**CURRENT POSITION and AFFILIATIONS:**

Professor	Dept of Economics, Univ. of Massachusetts Amherst
Faculty	School of Public Policy, Univ of Mass Amherst
Williams Distinguished Scholar	Williams Institute, UCLA School of Law
Scholar-in-residence	Equal Employment Opportunity Commission
Fellow	Salzburg Global Seminar, LGBT Forum

**EDUCATION:**

	<b>DEGREE</b>	<b>DATE</b>	<b>FIELD</b>
University of California, Berkeley	Ph.D.	1990	Economics
Dissertation title: "Racial Differences in Unemployment Rates and Employment Opportunities"			
University of Chicago	A.B.	1982	Economics

**PREVIOUS POSITIONS:**

Director, School of Public Policy (formerly Center for Public Policy and Admin.) (2007-2016 name change), UMass Amherst  
Research Director, Williams Institute, UCLA School of Law (2006-2013)  
Assistant & Associate Professor, Dept. of Economics, University of Massachusetts-Amherst (1997-2008)  
(Adjunct) Professor, Whittier Law School (Summer 2011)  
Visiting Professor, UCLA School of Law (2005-2007; Summer 2008)  
Visiting Researcher, Amsterdam School for Social Science Research, University of Amsterdam (2003-2004)  
Co-founder & Research Director, Institute for Gay and Lesbian Strategic Studies (1994-2006)

Visiting Assistant Professor, Women's Studies and Lesbian and Gay Studies, Yale University (1995-1996)

Research Analyst, National Commission for Employment Policy, U.S. Department of Labor (Summer 1994)

Assistant Professor, School of Public Affairs, University of Maryland, College Park (1990-1997)

#### **CURRENT RESEARCH TOPICS:**

Connections between inclusion of LGBT people and economic development  
Sexual orientation and gender identity discrimination in labor markets and impact of public policy

Poverty in LGBT community

#### **COURSES TAUGHT:**

*Economics:* Microeconomics (University of Massachusetts)

Microeconomics and Public Policy (University of Massachusetts-Amherst)

Political Economy of Sexuality (University of Massachusetts-Amherst)

Labor Economics--undergraduate and Ph.D. level (University of Massachusetts-Amherst)

Feminist Economics (co-taught as part of Traveling Course at University of Minnesota)

*Policy:* Policy Analysis (University of Massachusetts-Amherst), Capstone course (University of Massachusetts-Amherst)

Social Inequality and Social Justice: Problems and Solutions (University of Massachusetts-Amherst)

Social Science and Public Policy on LGBT Issues (Whittier Law School Barcelona program; UMass Online)

Public Policy Seminar: Global LGBT Human Rights and Criminal Justice Reform in U.S. (Univ. of Mass.)

#### **BOOKS:**

*The Public Professor: How to Use Your Research to Change the World*, NYU Press, 2016.

*When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage*, New York University Press, 2009. Distinguished Book Award, American Psychological Assoc., Division 44, 2010; Korean translation published, Minumsa, 2016.

*Sexual Orientation Discrimination: An International Perspective*, co-edited by M. V. Lee Badgett and Jeff Frank, Routledge, 2007.

*Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men*, University of Chicago Press, 2001.

#### **INSTITUTION-BUILDING PROJECTS**

- Led growth and transition into School of Public Policy from Center for Public Policy & Administration at UMass Amherst

- Co-founder, Institute for Gay and Lesbian Strategic Studies, merged with Williams Institute in 2006
- Co-builder of the Williams Institute on SOGI Law and Public Policy as founding research director
- Co-PI, *EEO DataNet*, Equal Employment Opportunity Network of academics and EEOC, funded by NSF grant.
- Co-founder and steering committee member, LGBT Poverty Collaborative (U.S.)

#### **JOURNAL ARTICLES:**

Alyssa Schneebaum and M. V. Lee Badgett, "Poverty in Lesbian and Gay Couple Households," 2016, under review.

Co-editor with Christopher Carpenter of special issue of *Industrial Relations*, Symposium on Sexual Orientation and the Labor Market. Vol. 54, No. 1, January 2015. Author of "Introduction to the Special Issue," pp. 1-3.

"Same-Sex Legal Marriage and Psychological Well-Being: Findings From the California Health Interview Survey," Richard G. Wight, Allen J. LeBlanc, and M. V. Lee Badgett, *American Journal of Public Health*, February 2013, Vol. 103, No. 2, 339-346.

"Separated and Not Equal: Binational Same-Sex Couples," *Signs*, Vol. 36, No. 4, Summer 2011, 793-798.

"Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands," *Journal of Social Issues*, Vol. 67, No. 2, 2011, pp. 316-334.

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"The Double-Edged Sword in Gay Economic Life: Marriage and the Market." *Washington and Lee Journal of Civil Rights and Social Justice*, Vol. 15, No. 1, Fall 2008, pp. 109-128.

"Registered Domestic Partnerships Among Gay Men and Lesbians: The Role of Economic Factors," M. V. Lee Badgett, Gary J. Gates, and Natalya Maisel, *Review of Economics of the Household*, December 2008.

"The Impact on Maryland's Budget of Allowing Same-Sex Couples to Marry," M. V. Lee Badgett, Amanda K. Baumle, Shawn Kravich, Adam P. Romero, R. Bradley Sears, *University of Maryland Law Journal of Race, Religion, Gender and Class*, Vol. 7, No. 2, 2007, pp. 295-339.

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"Predicting Partnership Rights: Applying the European Experience to the United States," *Yale Journal of Law and Feminism*, Vol. 17, No. 1, Spring 2005, 71-88.

"Putting a Price on Equality? The Impact of Allowing Same-Sex Couples to Marry on California's Budget," co-authored with R. Bradley Sears, *Stanford Law & Policy Review*, Vol. 16, No. 1, 2005, pp. 197-232. Winner of 2005 Dukeminier Award for Best Sexual Orientation Law Review Articles, reprinted in *The Dukeminier Award Journal*, Vol. 5, 2006.

"Now That We Do: Same-Sex couples and Marriage in Massachusetts," with Randy Albelda and Michael Ash, *Massachusetts Benchmarks*, Vol. 7, Issue 2, 2005, 17-24.

"Asking the Right Questions: Making the Case for Sexual Orientation Data," 2004 *Proceedings of the American Statistical Association*, Statistical Computing Section [CD-ROM], Alexandria, VA: American Statistical Association.

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"Same-sex partners bring nurturing--and financial benefits--to the altar," op-ed piece with Gregory Adams, *Chicago Sun-Times*, June 8, 1996, p. 16.

"The Last of the Modernists: A Reply," *Feminist Economics*, Vol. 1, No. 2, 1995.

"Domestic Partner Recognition: Doing the Right--and Competitive--Thing," *Synthesis: Law and Policy in Higher Education*, Vol. 6, No. 4, Spring 1995.

"Equal Pay for Equal Families," *Academe*, May/June 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," in *Higher Education Collective Bargaining During a Period of Change*, Proceedings, Twenty-Second Annual Conference, April 1994, The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, 1994.

"Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men," pamphlet published by National Organization of Gay and Lesbian Scientists and Technical Professionals and the Institute for Gay and Lesbian Strategic Studies, 1994. (Early version of book chapter of same title.)

Co-author and co-editor, *Labor and the Economy*, published by the Center for Labor Research and Education, Institute of Industrial Relations, UC Berkeley, 1989.

"Looking for the Union Label: Graduate Students at U.C.," *California Public Employee Relations*, No. 85, June 1990.

"Rusted Dreams: Documenting an Economic Tragedy," *Labor Center Reporter*, No. 219, October 1987.

"How the Fed Works," *Labor Center Reporter*, No. 177, November 1986.

**EXPERT WITNESS EXPERIENCE (LITIGATION 2009-2014):**

Written testimony, *Birchfield and Mocko v. Armstrong and Jones*, March 2016 (challenge to Florida's policies on death certificates for same-sex spouses)

Written testimony, *Whitewood et al. v. Wolf et al.*, February 2014 (challenge to Pennsylvania's marriage equality prohibition)

Written testimony, *Harris v. McDonnell*, No. 5:13-cv-00077 (W.D. Va.), December 2013 (challenge to Virginia's marriage equality prohibition)

Written testimony, *DeLeon v. Perry*, No. 5:13-cv-00982 (S.D. Tex.), November 2013 (challenge to marriage equality prohibition in Texas)

Written testimony, *Kitchen v. Herbert*, No. 2:13-cv-00217 (D. Utah), October 2013 (challenge to Utah's marriage equality prohibition)

Written testimony, *Darby/Lazaro v. Orr*, No. 12 CH 19718 (Ill. Cir. Ct., Cook Cnty.), April 2013 (challenge to Illinois' marriage equality prohibition)

Written testimony, *Sevcik v. Sandoval*, No. 2:12-cv-00578 (D. Nev.), 2012 (challenge to Nevada's marriage equality prohibition)

Written testimony and deposition, *Bassett v. Snyder*, No. 2:12-cv-100382012 (E.D. Mich.), 2012 and 2013 (challenge to Michigan's Domestic Partner Benefit Restriction Act).

Written testimony, *Glossip v. Missouri Dep't of Transp. and Highway Patrol Employees' Ret. Sys.*, No. 10-CC00434 (Mo. Cir. Ct., Cole Cnty.), 2011 (challenge to denial of death benefit to state trooper's surviving same-sex partner).

Written testimony, *Collins v. Brewer* (later *Diaz v. Brewer*), No. 2:09-cv-02402 (D. Ariz.), 2010 (challenge to Arizona's cancellation of domestic partner benefits).

Deposition and trial testimony, *Perry v. Schwarzenegger* (later *Perry v. Brown, Hollingsworth v. Perry*), No. 3:09-cv-02292 (N.D. Cal.), 2010 (challenge to California's Proposition 8).

**LEGISLATIVE WITNESS EXPERIENCE (Selected):**

U.S. Senate Committee on Health, Education, Labor, and Pensions, S.811, The Employment Non-Discrimination Act of 2011, June 12, 2012.

Written testimony, S. 598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families, M. V. Lee Badgett, Ilan H. Meyer, Gary J. Gates, Nan D. Hunter, Jennifer C. Pizer, Brad Sears. July 2011.

U.S. House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Postal Service, and the District of Columbia on HR 2517: Domestic Partnership Benefits and Obligation Act of 2009, July 2009.

U.S. House of Representatives, Committee on Education and Labor, Subcommittee on Health, Employment, Labor, and Pensions, Testimony on Employment Non-Discrimination Act (HR 2015), September 2007.

Written and oral testimony on legislation or regulations in Alaska, California, Hawaii, Maryland, Massachusetts, New Hampshire, Oregon, Rhode Island, Vermont.

#### **SELECTED MEDIA APPEARANCES AND PROFILES:**

Featured solo panelist, *The Economist* "Pride and Prejudice: The Business and Economic

Featured economist, "Gay Myths Derailed by Economist Badgett's Data Research," by

Jeanna Smialek, *Bloomberg*, June 20, 2014,

<http://www.bloomberg.com/news/articles/2014-06-20/gay-myths-derailed-by-economist-badgett-s-data-research>

Featured guest, *Tell Me More*, NPR, June 10, 2013.

Featured guest, *Encounter*, Radio National, ABC (Australian Broadcasting Corp), October 9, 2011.

Featured guest, *Faith Middleton Show*, January 13, 2011.

<http://www.yourpublicmedia.org/content/wnpr/faith-middleton-show-when-gay-people-get-married>

Featured guest, "Same-Sex Marriage, Five Years On," *On Point*, National Public Radio, May 27, 2009. <http://www.onpointradio.org/2009/05/same-sex-marriage-five-years-on>

Featured guest, "Gay Commerce," *Talk of the Nation*, National Public Radio, 1997.

Featured guest, "Gay Market," *Odyssey: A Daily Talk Show of Ideas*, NPR nationally syndicated show, 2005.

[http://www.chicagopublicradio.org/DWP\\_XML/od/2005\\_05/od\\_20050512\\_1200\\_4906/episode\\_4906.ram](http://www.chicagopublicradio.org/DWP_XML/od/2005_05/od_20050512_1200_4906/episode_4906.ram)

Interviewed on *All Things Considered*, "Gay Marriage in Massachusetts, One Year Later," May 2005. <http://www.npr.org/templates/story/story.php?storyId=4655621>

Featured guest, *CNN American Morning*: "The Future of Marriage," June 2006.

[http://www.law.ucla.edu/williamsinstitute/images/CNN\\_AmericanMorning\\_FutureOfMarriage\\_LeeBadgett\\_062006.mov](http://www.law.ucla.edu/williamsinstitute/images/CNN_AmericanMorning_FutureOfMarriage_LeeBadgett_062006.mov)

#### **SELECTED PRESENTATIONS OF PAPERS SUBMITTED TO ACADEMIC CONFERENCES:**

“Assessing the best policy approach for reducing LGBT poverty,” M. V. Lee Badgett and Alyssa Schneebaum, APPAM research conference, Nov. 2015, Miami.

Invited panelist, Roundtable on Marriage Equality, American Political Science Association, Sept. 4, 2015, San Francisco.

Invited panelist, Roundtable on Employment Discrimination Against LGBT People, American Sociological Association meeting, August 25, 2015, Chicago.

“The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies,” Amherst College conference, LGBT Rights in the Americas and Beyond (May 2015), International Associate for Feminist Economics (Berlin, July 2015); Williams Institute Webinar, Feb. 25, 2015; Allied Social Science Associations (economist orgs) meeting, SF, January 2016

Roundtable participant at Institute for Development Studies (UK) panel, “Sexuality, law, and economic development: what are the key conversations and alliances?” Mar. 6, 2015.

“Assessing the effect of nondiscrimination policies related to sexual orientation and gender identity,” Badgett and Samantha Schenck. Presented at: Sexual Orientation Discrimination in the Labor Market, University of Paris 1 Pantheon-Sorbonne, 6/20/2012; International Association for Feminist Economics, Barcelona Spain. 6/27/2012; APPAM conference, November 2012.

“Waves of Change: Is Latin America Really Following Europe in Same-Sex Couples?,” at 8<sup>th</sup> Annual Update, Williams Institute, “Global Arc of Justice: Sexual Orientation Law Around the World, March 14, 2009.

“Gay poverty,” Presented at 2009 Allied Social Science Association Meeting; 2009 Association for Public Policy Analysis and Management Research Conference; 2008 IAFFE Research Conference, Torino, Italy, June 2008; Williams Institute Annual Update, February 2008.

“Registered Domestic Partnerships Among Gay Men and Lesbians: The Role of Economic Factors,” (with Gary J. Gates and Natalya Maisel), presented at 2007 APPAM Meeting, Washington, DC; 2008 Allied Social Science Associations Annual meeting, New Orleans.

“Predicting Same-Sex Marriage in Europe & the US,” Presented at 2008 IAFFE Research Conference, Torino, Italy, June 2008.

“Social Lab Outcomes: Same-Sex Couples and Legal Recognition,” Temple University Law School, “States as Social Laboratories,” October 20, 2007.

“The Double-Edged Sword in Gay Economic Life: Marriage and the Market.” Washington & Lee School of Law, Feb 2008.

“Why Marry?” Presented at 2006 IAFFE Research Conference, Sydney, Australia, July 2006; New School for Social Research, October 2006; Sociology Family Working Group, UCLA, 2006.

“An exploration of foster care and adoption among lesbians and gay men,” joint work with Jennifer Macomber, Kate Chambers, Gary Gates. Family Pride conference, Philadelphia, PA, May 2006.

“Survey Data on Sexual Orientation: Building a Professional Consensus,” presented at 2005 Joint Statistical Association Meetings, August 2005. Also presented to Canadian Population Society, June 2005; Williams Project Annual Update, UCLA Law School, February 2005.

“Alternative Legal Statuses for Same-sex couples and other families: Can Separate Be Equal Enough?” Presented at International Association for Feminist Economics, Washington DC, July 2005; APPAM, Washington, DC, November 2005; UCLA Law School 2006.

“Looking into the European Crystal Ball: What Can the U.S. Learn About Same-Sex Marriage?” Tulsa Gay and Lesbian History Project, October 2004; University of Connecticut, October 2004; Yale University, February 2005; American Psychological Association, August 2005; National Council of Family Relations (invited special session), 2005.

“Predicting Partnership Rights: Applying the European Experience to the United States,” Yale University Law School, March 5, 2005.

“Asking the Right Questions: Making the Case for Sexual Orientation Data,” Joint Statistical Meetings of the American Statistical Association, Toronto, August 2004; Williams Project Annual Update, UCLA, February 2005; Canadian Population Society, June 3, 2005.

“A New Gender Gap: Sex Differences in Registered Partnerships in Europe,” International Association for Feminist Economics research conference, London, August 2004.

“Variations on an Equitable Theme: International Same-sex Partner Recognition Laws,” Research Conference of International Associate for Feminist Economics, July 2002. Stockholm University, September 2003; University of Linz, Austria, November 2003; University of Amsterdam, June 2004; American Political Science Association, Chicago, September 2004.

“The Myth of Gay Affluence and Other Tale Tales: The Political Economy of Sexual Orientation,” University of California, San Diego, June 2002.

“A Family Resemblance: Legal Recognition of Same-Sex Partners in the United States,” Research Conference of International Association for Feminist Economics, Oslo, Norway, June 2001; University of Southern Maine, October 2001; University of Massachusetts, February 2002; Washington University Political Science Department, March 2002; University of Wisconsin, LaCrosse, April 2002.

"A Movement and a Market: GLBT Economic Strategies for Social Change," University of Wisconsin, LaCrosse, April 2002; Macalester College, April 2002.

"Job Gendering: Occupational Choice and the Marriage Market," Research Conference of International Association for Feminist Economics, Ottawa, CA, June 1999.

"Tolerance, Taboos, and Gender Identity: The Occupational Distribution of Lesbians and Gay Men," Research Conference of International Association for Feminist Economics, Amsterdam, The Netherlands, June 1998.

"The Impact of Affirmative Action on Public-Sector Employment in California," ASSA Meetings, 1997.

"Tolerance or Taboos: Occupational Differences by Sexual Orientation," presented at American Economic Association Meetings, January 1996, and American Psychological Association convention in Toronto, August 1996.

"A Race, Ethnicity, and Gender Analysis of the 1990-91 Recession," ASSA Meetings 1995.

"Choices and Chances: Is Coming Out at Work a Rational Choice?" The Sixth North American Lesbian, Gay, and Bisexual Studies Conference, University of Iowa, November 18, 1994.

"Civil Rights and Civilized Research: Constructing a Sexual Orientation Policy Based on the Evidence," Association for Public Policy Analysis and Management Research Conference, October 27, 1994

"Where the Jobs Went in the 1990-91 Downturn," National Conference on Race Relations and Civil Rights in the Post Reagan-Bush Era, The Roy Wilkins Center, Humphrey Institute, University of Minnesota, October 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," The American Political Science Association meeting, September 1994.

Panelist, "Developing Lesbian/Gay Studies in Economics," ASSA Meetings, 1994.

"The Rainbow at Work: Differences in the Economic Status of Women Workers in the United States," presented at the 5th International Interdisciplinary Congress on Women, 1993.

"The Economic Well-Being of Lesbians and Gay Men: Pride and Prejudice," December 1992, presented at 1993 ASSA Meetings.

"Affirmative Action in a Changing Legal and Economic Environment," revised, December 1992, presented at 1993 ASSA Meetings.

"The Effects of Structural Change on the Race and Gender Distribution of Employment," with Rhonda M. Williams, presented at Eastern Economic Association Meeting, 1992.

"Changes in Racial Inequality Among Women: Evidence from Unemployment Rates," presented at AEA Meetings, 1992.

"Labor Market Discrimination--Economic and Legal Issues for Gay Men and Lesbians," presented at AEA Meetings, 1992.

"Rising Black Unemployment: Changes in Job Stability or in Employability?" presented at National Economic Assoc., 1992.

"Rising Black Unemployment and the Role of Affirmative Action Policy," presented at APPAM Research Conference, October 1990.

**INVITED KEYNOTES AND OTHER PRESENTATIONS (Selected):**

"The Public Professor," book talks at University of Massachusetts Amherst, Duke University, University of North Carolina-Chapel Hill, Odyssey Bookstore, UCLA, Hunter College, Vanderbilt University, Georgia State University, University of Washington, January-May 2016; "Author meets critics" session at Southern Sociological Society, April 2016.

"The Marriage Equality Experience—An International Perspective," East China Normal University, Shanghai; Renmin University Beijing; Ewha University, Seoul; Korea University School of Law; March 2016.

"The Business Case for LGBT Equality and Inclusion," Sookmyung Women's University (SMU) Entrepreneurship Center, Seoul, Korea, March 11, 2016.

"Left Out—Lesbian, Gay, and Bisexual Poverty in the U.S." Franklin and Marshall College, Oct 21, 2015; Colorado State Univ, Nov 2015; Univ of Minnesota, Feb 2016.

"The Economic Cost of Stigma and Exclusion of LGBT People," Board of Directors of Inter-American Development Bank, Oct. 2, 2015 and March 6, 2015; Boston Consulting Group, Oct. 7, 2015; Salzburg Global LGBT Forum, June 14-18, 2015; Clinton Global Initiative learning call, April 8, 2015, World Bank Fall Meeting, Nov. 9, 2014; UN Development Programme Experts Meeting, Sept. 16-17, 2015.

US State Department Speaker Program: Oct. 12-18, 2014: Series of talks to government ministries, American Chamber of Commerce, universities, community groups, international agencies, Lima, Peru. August 12-21, 2015: Series of talks to Congress, universities, municipal policymakers, community groups, and other government agencies, The Philippines.

“Sexual Orientation and Gender Identity Diversity in Entertainment: Experiences and Perspectives of SAG-AFTRA Members,” Gender, Sexual Orientation, and Labor in Entertainment Panel at conference of UCLA Institute for Research on Labor and Employment, April 18, 2015.

Dublin City University, School of Applied Language and Intercultural Studies, and Marriage Equality; Keynote speaker for The Marriage Equality Experience: An International Perspective, my talk: When Gay People Get Married Dublin, Ireland, March 19, 2015.

Presentation at Overseas Development Institute and Kaleidoscope Trust meeting, London (by skype), “The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies” , Feb. 12, 2015.

Panelist, USAID Frontiers in Development, Sept. 2014.

Invited keynote speaker, “The Economic Cost of Homophobia,” The World Bank, March 12, 2014.

Invited speaker, “The Impact of LGBT Inclusion on Economic Outcomes,” OECD, Paris, February 12, 2014.

Invited Keynote Speaker, “Workshop on Comparative Experiences in Protection of LGBT Rights in the Family and Marriage Relations,” hosted by Ministry of Justice, Viet Nam, and UNDP, December 20-21, 2012, Hanoi.

“When Gay People Get Married,” London School of Economics and Politics, Keynote for LSE Pride Week, November 2012; Bryant University, November 2013; University of Pennsylvania Dept of Sociology, March 2014.

Keynote speaker at Roundtable, "Taking Poverty Out of the Closet," Horizons Foundation, San Francisco, March 19, 2012.

“The Impact of Allowing Same-sex Couples to Marry,” Australian National University College of Law. March 1, 2012; Gough Whitlam Institute, Sydney Australia, March 2, 2012.

Australian Parliament, Canberra, "The Impact of Allowing Same-Sex Couples to Marry," February 27, 2012.

Keynote lunch speaker, E-Marriage Symposium, Michigan State University Law School, “My Marriage, No Marriage,” November 11, 2011.

“When Gay People Get Married,” University of North Carolina Chapel Hill, October 13, 2011.

IAFFE, 2011, Hangzhou China: Roundtable on Sexuality and the Economy, Roundtable on Enhancing IAFFE's Vision in the 21<sup>st</sup> Century. June, 2011.

Panelist, "Same-Sex Marriage: Past, Present and Future," M. V. Lee Badgett, David Boies, and Nancy Cott, UCLA History Department, February 24, 2011.

Janus Lecture, Debate on same-sex marriage, Brown University, February 17, 2011.

Panelist, "Queering Where We Work: Bridging LGBTQ Policy Advocacy, Front-Line Activism, and Research," University of Toronto, Rotman School of Management, November 5, 2010.

"The Economic Value of Marriage," Drake Constitutional Law Center's Annual Symposium, The Same-Sex Marriage Divide, Drake University, Iowa. April 10, 2010.

Keynote address, "Out and Equal in the Workplace: Sexual Orientation Discrimination, Univ of Pittsburgh School of Law. March 18, 2010.

"When Gay People Get Married": Portland State Univ Portland, OR. 4/23/2010; University of Chicago Alumni Weekend, Chicago, IL; University of Chicago, June 3, 2010; Kennesaw State University, Atlanta, GA, March 24, 2010; Andrew Young School of Public Affairs; Georgia State University, March 25, 2010; and many other bookstores and locations.

"Challenges for LGBT Workers" Department of Labor at invitation of Assistant Secretary for Policy, January 29, 2010.

Keynote Address on Sexual orientation and economics, University of Illinois-Chicago, September 30, 2009.

Multiple talks, University of Minnesota, Duluth, April 2009.

"On the Road to Equality: Health Care for LGBT Americans," Opening address, 2007 National LGBT Health Expo, Washington, DC, November 2, 2007.

"Does diversity make a difference? A view from the marketplace." *Keynote Address*, 7th annual international conference on diversity in organizations, communities, and nations, Amsterdam, The Netherlands, July 1, 2007.

"Not-So-Gay Divorce: A Reason for Marriage," Gay Divorce Conference, King's College London, May 20, 2006.

"Thinking for Change/Changing our Thinking: Effective Research in GLBT Policy Debates", Presidential Invited Address, Division 44, American Psychological Association Convention, August 2005.

"Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men," University of Toronto, March 16-17, 2005.

Panelist, "Aging in the Gay Community," American Association of Retired Persons, June 2000.

"Money and Our Discontents," Keynote speech, Smart Women/Smart Money conference by the Astraea Foundation. November 1999.

"Homo Economics: The Myth of Gay Affluence and Other Tall Tales," University of Connecticut, March 1999; American University, October 1999.

Same-Sex Couples and Public Policy, panel member, University of Maryland, College Park, October 1999.

"A Bridge to the Future or the Road to Nowhere? Respectability and Lesbian and Gay Think Tanks," Remarks prepared for the Politics of Respectability Conference, University of Chicago, April 1999

Panelist, Unifying Anti-Subordination Theories, DePaul University Law School, February 1999.

"Lesbians, Gays, and Bisexuals in a Gender Agenda," Roundtable on Feminism and Public Policy, 1998 ASSA Meetings, Chicago, IL.

"Economic Issues for Lesbians," Workshop on Lesbian Health Research Priorities, Institute of Medicine, Board on Neuroscience and Behavioral Health, Washington, DC, October 6, 1997.

"Lesbians, Gays, Bisexuals, and Transgenders: Who Gives, How Much, and Why," OutGiving Conference, Aspen, CO, September 1997; Horizons Foundation and United Way, San Francisco, CA, October 1997; NGLTF Creating Change conference, San Diego, November 1997; Cream City Foundation Milwaukee, WI; Chicago, IL; Boston Foundation, February 1998.

"Lesbian and Gay Money: Is There a Gender Gap?" Towson State University, March 1997.

Panelist, "Out in the Workplace," University of Pennsylvania, February 10, 1997.

"Workplace Policy Issues for Lesbian, Gay, and Bisexual People," Gender, Race, Economics, and Public Policy Conference of the New School for Social Research, April 5, 1996.

Panelist, "Compensating for Gender, Race, and Class Inequalities: Is Affirmative Action the Means to Social Justice," A Future of Equality: Feminist Rethinkings of the Affirmative Action and Welfare Debates, Yale University Women's Center, March 30, 1996.

"Equal Pay for Equal Work," University of Delaware Lavender Scholars Series, March 7, 1996.

"Lesbian and Gay Think Tanks," Center for Lesbian and Gay Studies, CUNY Graduate School, February 9, 1996.

Panelist, Affirmative Action in the 21st Century, Chicago United, February 15, 1996.

"The Economic Status of Lesbians and Gay Men: Discrimination, Data, and Debate," Bureau of Labor Statistics, U.S. Department of Labor, June 15, 1995; Institution for Social and Policy Studies, Yale University, September 1995; University of Massachusetts, Boston, May 1996.

Panelist, "Gay Money: Power of the Purse," National Lesbian & Gay Journalists Association, October 19, 1995.

Panelist, Domestic Partner Benefits and Other Gay Rights Policy Issues: Creating Change on Campus, American Association of University Professors, June 9, 1995.

Prepared testimony, Select Education and Civil Rights Subcommittee, Committee on Education and Labor, U. S. House of Representatives, Testimony on the 30th Anniversary of the Equal Pay Act, 1994. (Hearing cancelled at the last minute.)

"Economic Evidence of Sexual Orientation Discrimination," Gay, Lesbian, and Bisexual Studies Faculty Seminars, Univ. of Massachusetts, Amherst, Dept. of Economics and Program for Gay, Lesbian, and Bisexual Concerns, May 11, 1994.

"The Economics of Being Lesbian, Gay, or Bisexual: Pride, Prejudice and Politics," Brown Bag Series in Gay, Lesbian, and Bisexual Studies, University of Massachusetts, Amherst, May 11, 1994.

"Thinking Homo/Economically," conference presentation, Center for Lesbian and Gay Studies, CUNY Graduate School, May 7, 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," Annual Conference, The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, April 19, 1994. Also presented at the American Political Science Association meeting, September 1994.

"The Changing Contours of Discrimination: Race, Gender, and Structural Economic Change," presented at University of Michigan, School of Social Work, Profs. Mary Corcoran and Sheldon Danziger, March, 15, 1994.

"Redefining Families: Research and Policy," American Political Science Association meetings, Washington, D.C., September 3, 1993.

"A Cost/Benefit Analysis of Coming Out," presented at OUT Magazine press conference, broadcast on CSPAN, April 21, 1993.

**GRANTS:**

U.S. Department of State, Speaker's Grants for trip to Peru, October, 2014; Trip to The Philippines, August, 2015.

National Science Foundation, "Building an Interdisciplinary Equal Employment Opportunity Research Network and Data Capacity," 7/1/13 to 6/30/16 (\$245,216), co-PI.

Five Colleges Inc (from Mellon Foundation): Bridging the Liberal Arts and Professional Training in Public Policy & Social Innovation (\$178,000)

Five Colleges Inc: Social Justice Public Policy Practitioners-in-Residence (\$95,000)

Ford Foundation, 2003-2006 (2 grants), Data on Sexual Orientation (total \$600,000)

2002 Wayne F. Placek Award, American Psychological Foundation, "Health Insurance Inequality for Gay, Lesbian, and Bisexual People," with Michael A. Ash.

1995 Wayne F. Placek Award, American Psychological Foundation, "The Impact of Attitudes on Lesbian and Gay Male Earnings and Occupations." (\$15,000)

The Aspen Institute, Nonprofit Sector Research Fund, "Lesbian, Gay, and Bisexual Giving and Volunteering," 1996. (\$40,000)

**CONSULTANCIES:** World Bank; UN Development Programme; Pew Research Center

**BOARDS, PANELS, AND COMMITTEES:**

Board, Interdisciplinary Studies Institute, UMass Amherst, 2013-2016

Co-convenor of LGBT economists network, American Economic Association, 2016

Board, International Association for Feminist Economics, 2015-2017

Board member and Co-chair of Board, Wellspring Cooperative Corporation, 2014-present.

Chair, Diversity Committee, International Association for Feminist Economics, 2011-2013.

Association for Public Policy Analysis and Management (APPAM): Institutional representative, 2007-present and Vice Chair of Inst. Reps 2011-12; Program Committee for 2010 conference.

Nat'l Association of Schools of Public Administration and Affairs (NASPAA): Leslie Whittington Teaching Award Committee, 2010.

Advisory Committee for "Real Families, Real Facts: Research Symposia on LGBT-headed Families," Family Pride, held May 2006.

Planning committee and facilitator for research meeting held at Out & Equal Workplace conference, September 2005.

Reviewer, Wayne F. Placek Award, American Psychological Foundation

Women's Funding Network, Lesbian Donor Research Project Advisory Committee, 1997-1998

Visiting Lecturer and co-designer, Traveling Feminist Economics Ph.D. Course, Univ. of Minnesota, 1997-1998

**FELLOWSHIPS AND HONORS:**

School of Public Policy faculty created an annual "M. V. Lee Badgett Social Justice Award" for a graduating student, 2016

Women in Leadership Award, Williams Institute, UCLA School of Law, 2015.

Samuel F. Conti Faculty Fellowship, University of Massachusetts Amherst, 2013-2014.

“When Gay People Get Married,” Distinguished Book Award, American Psychological Association, Division 44, 2010; chosen for Diversity Book Club, Kennesaw State University, 2010.

Distinguished Faculty Lecture, University of Massachusetts-Amherst, November 9, 2009, and Chancellor’s Medal (the highest honor bestowed on individuals for exemplary and extraordinary service to the campus)

Named one of twenty most influential lesbians in academia, *Curve Magazine*, 2008

Rockwood Leadership Fellow in Lesbian, Gay, Bisexual, and Transgender Community & Advocacy, 2008-09

2005 Dukeminier Award for Best Sexual Orientation Law Review Article

College Outstanding Teacher Award, Social and Behavioral Sciences, University of Massachusetts, 2000-2001

Out 100, *Out Magazine*, 2001.

One of Our Best and Brightest Activists, *The Advocate*, 2000.

Lilly Fellow, Center for Teaching, University of Massachusetts- Amherst, 1999-2000

Certificate of Appreciation, Stonewall Center, 1999.

Certificate of Recognition, University of Maryland at College Park Diversity Initiative, 1994-95

Graduate Opportunity Fellowship, 1985-86, UC Berkeley

A.B. with General Honors, University of Chicago

Maroon Key Society, University of Chicago

Abram L. Harris Prize, 1978-79, 1979-80, University of Chicago

## **AFFILIATIONS**

Association for Public Policy Analysis & Management

American Economic Association

Editorial Board (and past Associate Editor), *Feminist Economics*

International Association for Feminist Economics (past and present board member)

Past editorial boards, *Sexuality Research and Social Policy*; *Sexuality & the Law (Social Science Research Network)*; *Law and Social Inquiry*

## **REFEREE:**

*Quarterly Journal of Economics*, *Industrial Relations*, *Journal of Human Resources*, *Feminist Economics*, *Journal of Policy Analysis & Mgmt.*, *Amer. Sociological Review*, *Review of Social Economy*, *Review of Economics and Statistics*, Columbia University Press, National Science Foundation, *Qualitative Sociology*, *Social Problems*, *Social Forces*, University of Wisconsin Press, *Journal of Population Economics*, Routledge Press, Princeton University Press, *Industrial and Labor Relations Review*, *Demography*, *American Journal of Sociology*, *Contemporary Economic Policy*, *Journal of Marriage and the Family*, *Cambridge Journal of Economics*, *Social Forces*, *Health Affairs*, and others

# **Exhibit 13**

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ARIF HYDER ALI



12 March 2017

**VIA E-MAIL**

Mr. Göran Marby President and Chief Executive Officer ICANN 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094	ICANN Board of Directors c/o Steve Crocker, Chair 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094
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Dear President Marby and Members of the Board:

We write on behalf of our client, dotgay LLC (“dotgay”), to inquire when the ICANN Board (the “Board”) will issue its final decision on the 26 June 2016 Recommendation of the Board Governance Committee (“BGC”) on dotgay’s Reconsideration Request 16-3 regarding the .GAY top-level domain (the “Reconsideration Request”).<sup>1</sup> We further write to protest ICANN’s lack of transparency in its treatment of dotgay’s application and ICANN’s failure to provide any sort of response to dotgay’s various inquiries about that status of its application. ICANN’s actions and inaction continues to cause harm to the gay community, which today more than ever is need of a safe space on the Internet to protect and promote the ideals, principles and interests of the community.

Dotgay submitted its Reconsideration Request *more than one year ago* and *nearly nine months* have passed since the BGC issued its Recommendation. As we noted in our most recent correspondence of 30 January 2017, we find ICANN’s protracted delays in reaching a decision on dotgay’s Reconsideration Request and ICANN’s continued lack of

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<sup>1</sup> Reconsideration Request 16-3 (17 February 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

responsiveness to dotgay's inquiries about the status of its request troubling, particularly in light of ICANN's commitments to transparency enshrined in its governing documents.<sup>2</sup>

Although we understand that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"<sup>3</sup> and that the BGC may have requested from the CPE provider "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports,"<sup>4</sup> ICANN cannot indefinitely delay resolving dotgay's Reconsideration Request. ICANN owes affected parties, like dotgay, a response to their inquiries regarding the nature and status of the independent review and information request. Again, we find ICANN's lack of communication disappointing and inconsistent with its duties of transparency.

With this letter, we renew our request that ICANN extend dotgay, and the global community that dotgay represents through its application, the common courtesy of a response to its inquiries regarding the anticipated resolution of dotgay's Reconsideration Request and disclosure of information about the nature of the independent review ICANN apparently has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. We are unaware of any rule of law, administrative procedure or corporate governance that would justify ICANN's silence and delays.

We look forward to your prompt response.

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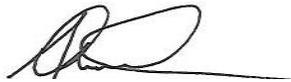
<sup>2</sup> See letter from Arif H. Ali, to Göran Marby, ICANN President and CEO, and the ICANN Board of Directors (30 January 2017).

<sup>3</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures (17 September 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>4</sup> Minutes of the Board Governance Committee (18 October 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

Dotgay reserves all of its rights at law or in equity before any court, tribunal, or forum of competent jurisdiction.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', with a long horizontal line extending to the right.

Arif Hyder Ali

cc: Krista Papac, ICANN Complaints Officer ([krista.papac@icann.org](mailto:krista.papac@icann.org))

# **Exhibit 14**



The Internet Corporation for Assigned Names and Numbers

26 April 2017

Re: Update on the Review of the New gTLD Community Priority Evaluation Process

Dear All Concerned:

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the Community Priority Evaluation (CPE) process. Recently, we discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board decided it would like to have some additional information related to how ICANN interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, we asked that the President and CEO, or his designee(s), undertake a review of the process by which ICANN has interacted with the CPE provider. ([Resolution 2016.09.17.01](#))

Further, during our 18 October 2016 meeting, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course.

The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests.



Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: [14-30](#) (.LLC), [14-32](#) (.INC), [14-33](#) (.LLP), [16-3](#) (.GAY), [16-5](#) (.MUSIC), [16-8](#) (.CPA), [16-11](#) (.HOTEL), and [16-12](#) (.MERCK).

For more information about CPE criteria, please see ICANN's [Applicant Guidebook](#), which serves as basis for how all applications in the New gTLD Program have been evaluated. For more information regarding Reconsideration Requests, please see ICANN's [Bylaws](#).

Sincerely,

A handwritten signature in black ink, which appears to read "Chris Disspain". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Chris Disspain  
Chair, ICANN Board Governance Committee

# **Exhibit 15**

ARIF HYDER ALI

Contact Information Redacted

18 May 2017

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning  
Community Priority Evaluation for .GAY Application ID 1-1713-23699**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by dotgay LLC ("dotgay") in relation to ICANN's .GAY Community Priority Evaluation ("CPE"). The .GAY CPE Report<sup>1</sup> found that dotgay's community-based Application should not prevail. Dotgay has provided ICANN with numerous independent reports identifying dotgay's compliance with the CPE criteria, as well as the human rights concerns with ICANN's denial of dotgay's application.<sup>2</sup>

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.<sup>3</sup> In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's*

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<sup>1</sup> .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>

<sup>2</sup> See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>

<sup>3</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

*Documentary Information Disclosure Policy (DIDP) Requests.*<sup>4</sup> According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP’s Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>5</sup> We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

#### **A. Context and Background**

Dotgay submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly a year has passed since dotgay delivered a presentation to the Board Governance Committee (the “BGC”).<sup>6</sup> Dotgay has sent several letters to ICANN noting that ICANN’s protracted delays in reaching a decision and ICANN’s continued lack of responsiveness to dotgay’s inquiries about the status of dotgay’s request represent a violation of ICANN’s commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting “an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider”<sup>7</sup> and that the BGC may have requested from the CPE provider “the materials and research

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<sup>4</sup> Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>5</sup> *Id.*

<sup>6</sup> <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf>; See also *dotgay’s* powerpoint presentation:

<sup>7</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>8</sup>

However, ICANN has not provided *any* details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Other community applicants have specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.<sup>9</sup> Dotgay endorses and shares those concerns which equally affect dotgay, and has already requested a full explanation.<sup>10</sup>

Dotgay has received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:<sup>11</sup>

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but

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<sup>8</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>9</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

<sup>10</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, 12 March 2017, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>

<sup>11</sup> Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Similarly, we received a letter from ICANN's attorney, Jeffrey A. LeVee, on 15 May 2017 purporting to provide a "status update on Reconsideration Request 16-3. . . ." <sup>12</sup> According to Mr. LeVee's letter:

As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials.

Accordingly, both the BGC Letter and Mr. LeVee's letter fail to provide *any* meaningful information besides that there is a review underway and that the RR is on hold.

## **B. Documentation Requested**

The documentation requested by dotgay in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway."<sup>13</sup> Further, dotgay requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

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<sup>12</sup> Letter to Arif H. Ali from Jeffrey A. LeVee, dated May 15, 2017

<sup>13</sup> Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

1. All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”<sup>14</sup>
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm (“the evaluator”) undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

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<sup>14</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>15</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

12. The most recent estimates provided by the evaluator for the completion of the investigation; and

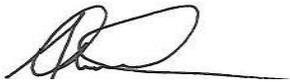
13. All materials provided to ICANN by the evaluator concerning the Review

dotgay reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

### **C. Conclusion**

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,



Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

# **Exhibit 16**



## **Community Priority Evaluation Process Review Update**

*2 June 2017*

The following is an update on the ongoing Community Priority Evaluation (CPE) process review.

### **Background on CPE Process Review**

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of CPE process, including certain concerns that some applicants have raised regarding the process. On [17 September 2016](#), the ICANN Board directed the President and CEO, or his designees, to undertake a review of the process by which ICANN has interacted with the CPE provider. In his [letter of 26 April 2017 to concerned parties](#), Chris Disspain, the Chair of the Board Governance Committee, provided additional information about the scope and status of the review. Below is additional information about the review, as well as the current status of the CPE process review.

### **CPE Process Review and Current Status**

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending [Requests for Reconsideration](#).

The review is being conducted in two parallel tracks by [FTI Consulting Inc.'s \(FTI\)](#) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists.

For more information about the CPE process, please visit <https://newgtlds.icann.org/en/applicants/cpe>.

# **Exhibit 17**

10 June 2017

**VIA E-MAIL**

Chris Disspain  
Chair, ICANN Board Governance  
Committee  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

Jeffrey A. LeVee, Esq.  
Jones Day  
555 South Flower Street  
Los Angeles, CA 90071 2300

**Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update**

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited (“DotMusic”) and dotgay LLC (“dotgay”), regarding ICANN’s 2 June 2017 Community Priority Evaluation Process Review Update (“CPE Process Review Update”).

Our review of ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.<sup>1</sup> As you are aware, after the ICANN Board announced in September 2016 that it is conducting “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider,”<sup>2</sup> we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization’s remit, the information it had been provided,

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<sup>1</sup> See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 (“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”); Art. I, Section 2 (8) (“Make decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

<sup>2</sup> Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

whether the evaluator will seek to consult with the affected parties, etc.<sup>3</sup> In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.<sup>4</sup> At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Waye. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic’s formal complaint with the Ombudsman that, *inter alia*, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain’s 28 April 2017 letter and Mr. LeVee’s 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—*after* DotMusic and dotgay filed their requests for documentary information<sup>5</sup> and *two weeks* before the investigator’s final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.”<sup>6</sup>

This is troubling for several reasons. ***First***, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

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<sup>3</sup> See *e.g.*, Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

<sup>4</sup> ICANN Madrid GDD Summit, May 9, 2017.

<sup>5</sup> See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

<sup>6</sup> 2 June 2017 CPE Process Review Update.

Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. **Second**, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in *very deeply* and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process," and that (ii) "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a *full look* at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."<sup>7</sup>

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

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<sup>7</sup> ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. [http://schr.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%20-en.pdf](http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf), pp. 10 – 14.

We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written in a cursive style.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (ombudsman@icann.org)

# Annex A

## DotMusic Limited

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### Key Documents

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	Description
1.	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
2.	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
3.	Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

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### Other Relevant Documents

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	Description
1.	Letter from Constantine Roussos to Christine Willet (12 July 2013)
2.	Letter from Christine Willet to Constantine Roussos (14 August 2013)
3.	Letter from Constantine Roussos to Christine Willet (8 October 2013)
4.	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	<b>Description</b>
<b>5.</b>	Reconsideration Request 14-8 (4 March 2014)
<b>6.</b>	Revised Reconsideration Request 14-8 (5 March 2014)
<b>7.</b>	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
<b>8.</b>	Reconsideration Request 14-28 (7 June 2014)
<b>9.</b>	Letter from Constantine Roussos to ICANN (13 June 2014)
<b>10.</b>	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
<b>11.</b>	Letter from Constantine Roussos to ICANN (1 July 2014)
<b>12.</b>	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
<b>13.</b>	Letter from Rich Bengloff to ICANN (7 March 2015)
<b>14.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
<b>15.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
<b>16.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
<b>17.</b>	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
<b>18.</b>	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	<b>Description</b>
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	<b>Description</b>
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	<b>Description</b>
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	<b>Description</b>
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	<b>Description</b>
77.	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
78.	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
79.	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
80.	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
81.	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
82.	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
83.	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
84.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
85.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
86.	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	<b>Description</b>
<b>87.</b>	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
<b>88.</b>	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
<b>89.</b>	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
<b>90.</b>	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

# **Annex B** **dotgay LLC**

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## **Key Documents**

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<b>Tab</b>	<b>Description</b>
1.	Chris LaHatte, former ICANN Ombudsman, Dot Gay Report (27 July 2016)
2.	Expert Opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
3.	Expert Opinion of Prof. M.V. Lee Badgett (17 October 2016)
4.	Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 November 2016)

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## **Other Relevant Documents**

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<b>Tab</b>	<b>Description</b>
1.	Letter from Centrelink to ICANN Board regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) (24 March 2011)
2.	Letter from Jamie Baxter to ICANN (10 October 2013)
3.	Letter from Centrelink to ICANN regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) under the community model submitted by dotgay LLC (7 March 2014)
4.	Letter from David Gudelunas to ICANN and the EIU Evaluators (30 April 2014)

Tab	Description
5.	Letter from Scott Seitz to ICANN regarding Background on Community gTLDs (5 May 2014)
6.	Letter from Scott Seitz to ICANN regarding Shared Concerns of the Gay Community (5 May 2014)
7.	Letter from Jamie Baxter to ICANN regarding Supporting Evidence (5 May 2014)
8.	Letter from Jamie Baxter to ICANN regarding Additional Endorsements (5 May 2014)
9.	Letter from Jamie Baxter to ICANN regarding Updated Endorsements (5 May 2014)
10.	Letter from Jamie Baxter to ICANN (7 May 2014)
11.	Letter from Jamie Baxter to ICANN (27 May 2014)
12.	Original Request 14-44, along with Annexes (22 October 2014)
13.	Letter from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (17 November 2014)
14.	Letter from National Gay & Lesbian Chamber of Commerce (NGLCC) (17 November 2014)
15.	Letter from Federation of Gay Games to ICANN and Board Governance Committee (28 November 2014)
16.	Revised Request 14-44 (29 November 2014) • Annexes (29 November 2014)
17.	Letter from David Gudelunas to ICANN and Board Governance Committee (15 December 2014)

Tab	Description
18.	Letter from International Gay & Lesbian Travel Association (IGLTA) to ICANN and Board Governance Committee (18 December 2014)
19.	Letter from COC Nederland to ICANN and Board Governance Committee (14 January 2015)
20.	Letter from Durban Gay & Lesbian Film Festival (DGLFF) to ICANN and Board Governance Committee (15 January 2015)
21.	Letter from KwaZulu-Natal Gay and Lesbian Tourism Association (KZNGALTA) to ICANN and Board Governance Committee (18 January 2015)
22.	Letter from Gay Business Association (GBA) to ICANN and Board Governance Committee (18 January 2015)
23.	BGC Determination on Reconsideration Request 14-44 (20 January 2015)
24.	Letter from Kelley Daniel Mukwano to ICANN And the EIU (1 February 2015)
25.	Letter from Anne Stockwell to ICANN and the EIU (1 February 2015)
26.	Letter from Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings, Ltd. to ICANN Board Governance Committee (3 February 2015)
27.	Letter from Peter Prokopik to ICANN and the EIU (5 February 2015)
28.	Letter from Jamie Baxter to ICANN regarding Update on Expressed Opposition to dotgay LLC (5 February 2015)
29.	Letter from Jamie Baxter to ICANN regarding Comments for CPE Panel (5 February 2015)
30.	Letter from Jamie Baxter to ICANN regarding Contention Set Recognition of Nexus between GAY and LGBTQIA (5 February 2015)

Tab	Description
31.	Letter from Jamie Baxter to ICANN regarding Expert Opinion on GAY Community .GAY (5 February 2015)
32.	Letter from Jamie Baxter to ICANN regarding Clarifications for CPE Panel (5 February 2015)
33.	Letter from Jamie Baxter to ICANN (6 February 2015)
34.	Letter from Jamie Baxter to ICANN (14 April 2015)
35.	Letter from Jamie Baxter to ICANN (29 May 2015)
36.	Letter from Jamie Baxter to ICANN (22 June 2015)
37.	Letter from Jamie Baxter to ICANN (23 June 2015)
38.	Letter from Jamie Baxter to ICANN (24 June 2015)
39.	Letter from Jamie Baxter to ICANN (29 June 2015)
40.	Letter from Jamie Baxter to ICANN (18 August 2015)
41.	Letter from Jamie Baxter to ICANN (3 September 2015)
42.	Reconsideration Request 15-21 (22 October 2015)
43.	Letter from dotgay LLC to Board Governance Committee (28 October 2015)
44.	Letter from UN-GLOBE to ICANN and the Board Governance Committee (12 January 2016)

Tab	Description
45.	Letter from dotgay LLC to ICANN and the Board Governance Committee (13 January 2016)
46.	Board Governance Committee Determination on Reconsideration Request 15-21 (1 February 2016)
47.	Letter from Jay Boucher to Akram Atallah and Chris Disspain (3 February 2016)
48.	Reconsideration Request 16-3 (17 February 2016)
49.	Letter from Transgender Equality Uganda to ICANN Board Governance committee regarding outcome of community scoring evaluation (24 February 2016)
50.	Letter from Trans-Fuzja to ICANN and Board Governance Committee regarding concerns about dotgay application (6 March 2016)
51.	Dotgay's Presentation to the Board Governance Committee (15 May 2016)
52.	DotGay's Written Summary of Its Oral Presentation to the BGC (17 May 2016)
53.	DotGay's Written Summary of Renato Sabbadini's Statement to the BGC (17 May 2016)
54.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
55.	Letter from dotgay LLC to ICANN and Board Governance Committee Re: Reconsideration Request 16-3 (24 June 2016)
56.	Board Governance Committee Recommendation on Reconsideration Request 16-3 (26 June 2016)
57.	Letter from Renato Sabbadini to the ICANN Board (8 August 2016)

Tab	Description
58.	Letter from Michael Bach to the ICANN Board (8 August 2016)
59.	Letter from Michael Rogers to the ICANN Board (16 August 2016)
60.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN President & CEO Göran Marby (25 August 2016)
61.	Letter from Scott Seitz to Steve Crocker regarding Letter from United TLD Holdco Ltd., Top Level Domain Holdings, Ltd., and Top Level Design, LLC to ICANN dated August 24, 2016 (8 September 2016)
62.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
63.	Letter from Statton Hammock to the ICANN Board (12 October 2016)
64.	Letter from Arif Ali to Chairman Crocker and Members of the ICANN Board regarding Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699 (17 October 2016)
65.	Letter from Arif Ali to Chairman Crocker and Board of Directors re: Council of Europe Report DGI(2016) 17 - .GAY TLD (15 November 2016)
66.	ICANN Webinar moderated by Terri Agnew (18 January 2017)
67.	Letter from Arif Ali to President Marby and BGC regarding ICANN Board's failure to issue its final decision on the Board Governance Committee's Recommendation on Reconsideration Request 16-3 (30 January 2017)
68.	Letter from LGBT Denmark to ICANN Board Members regarding support to correct discriminatory treatment of .GAY (14 February 2017)
69.	Letter from Mario Paez to the ICANN Board (8 March 2017)

Tab	Description
70.	Letter from Arif Ali to President Marby and Members of the Board regarding inquiry about final decision on 26 June 2016 recommendation (12 March 2017)
71.	Email from Jamie Baxter to Steve Crocker regarding the Blog Post on the CPE Investigation (17 April 2017)
72.	Letter from Chris Disspain regarding update on the review of the new gTLD CPE process (26 April 2017)
73.	Letter from Jeffrey Levee to Arif Ali regarding Application of dotgay LLC (15 May 2017)
74.	Letter from Christine Willett to Scott Seitz and Jamie Baxter regarding Reconsideration Request 16-3 (16 May 2017)
75.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of dotgay (18 May 2017)

# **Exhibit 18**

# Dotgay's Presentation to the Board Governance Committee

15 May 2016

Dechert  
LLP

# The EIU Contradicted ICANN's Policies in Evaluating Dotgay's Application

# EIU is Bound by the AGB

- **Bylaws, Art. I, § 2(8)**

- “Making decisions by **applying documented policies neutrally and objectively, with integrity and fairness.**”

- **CPE Guidelines, p. 1**

- “The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB. The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.”

- **AGB, Module 1**

- “This Applicant Guidebook is the implementation of the Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.”

# EIU Egregiously Misapplied the AGB (I)

- The EIU **misapplied Module 4.2.3 of the AGB** by failing to truly consider whether the applied for string “matches the name of the community” as the “name by which the community is commonly known by **others.**”
- The EIU **misapplied Module 4.2.3 of the AGB** by failing to consider whether the applied-for string “closely describes **the community**” and not “the community members.”
- The EIU **misapplied Module 4.2.3 of the AGB** by adding a non-established nexus requirement, i.e., by requiring that the name of the community apply to each community member.

# EIU Egregiously Misapplied the AGB (II)

- The EIU **misapplied Module 4.2.3 of the AGB** by failing to distinguish the “community” from the “community members”, making clear that the string need not be applied to each community member, but simply “match the community name’ for a score of 3, or alternatively, closely “describe the community” for a score of 2.
- The EIU **misapplied Module 4.2.3 of the AGB** by altering the community endorsement criterion to require that the endorsing organization have community recognition beyond membership.
- The EIU **misapplied Module 4.2.3 of the AGB** by altering the community opposition criterion to include a local community center as an organization of non-negligible size when this community center is merely one out of hundreds of community centers that are members of a global organization that endorsed the Dotgay application.
- The EIU **misapplied Module 4.2.3 of the AGB** in relation to the letter of opposition filed by the Q Center, even though the Center had been influenced by a competing applicant for .GAY, and the EIU should have discounted it as “filed for the purpose of obstruction” within the meaning of the AGB.

# EIU is Prohibited from Discriminating

- **Bylaws, Art. II, § 3**

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

- **CPE Guidelines, p. 22**

- “The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and **non-discrimination**. Consistency of approach in scoring Applications will be of particular importance.”
- *See similarly* CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

# EIU Discriminated against Dotgay (I)

- The EIU **discriminated against Dotgay** by requiring that the name of the community apply to each community member when the EIU had found sufficient in other instances that a member self-identify as having a tie to the community. [E.g., .OSAKA]
- The EIU **discriminated against Dotgay** by requiring that the name of the community apply to each community member when the inclusion of other members “not automatically associated with the gTLD” did not prevent the EIU from establishing nexus in other instances. [E.g., .HOTEL and .RADIO]
- The EIU **discriminated against Dotgay** by rejecting the ILGA as a representative organization when the EIU had found in other instances that a community may have more than one such organization. [E.g., .HOTEL and .RADIO]
- The EIU **discriminated against Dotgay** by accepting that a local community center is an organization of non-negligible size when the EIU had found in the instance of the International Radio Emergency Support Coalition that it was not. [E.g., .RADIO]

# EIU Discriminated against Dotgay (II)

- The EIU **discriminated against Dotgay** by deeming it had insufficiently representative support despite support from equivalent organizations being sufficient for other community strings:
  - The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is a global organization dedicated to promoting gay rights composed of over 1,100 member organizations covering countless individuals in 125 countries. It is recognized by the United Nations. [.GAY]
  - The International Hotel & Restaurant Association (IH&RA) is an umbrella trade organization that is composed of national hotel and trade organizations for the hotel and restaurant industries in over 100 countries. It is recognized by the United Nations. [.HOTEL]
  - The World Broadcasting Unions (WBU) is an umbrella organization that is composed of eight regional broadcasting organizations and is dedicated to coordinating international broadcasting. [.RADIO]

# EIU's Discriminatory Treatment Denied Dotgay Community Priority Status (I)

- The EIU would have granted Dotgay Community Priority Status had it applied the same standard to .GAY that it applied to other Community Applications with equivalent facts:
  - .OSAKA received the maximum score for nexus despite the fact that the community was identified not only as those who are within the OSAKA geographical area, but those “who self-identify as having a tie to OSAKA, or the culture of OSAKA.” In the case of .GAY, the EIU applied a new and heightened standard for nexus in requiring the name of the community apply to each specific individual or sub-group to that may self-identify and use the applied-for string. It is irrelevant to the analysis that OSAKA is a geographic region.
  - .HOTEL was found to “closely describe the community, without overreaching substantially” despite the fact that the hotel community included entities that “may not be automatically associated with the gTLD,” such as marketing associations. If the same standard had been applied to .GAY, the outcome would have been different. The BGC cannot accept the EIU’s conclusion that “more than a small part” of the community would not be automatically associated with .GAY without further due diligence. It is clear that the EIU did not ask the right questions and made no efforts to quantify the part of the community that supposedly is not described as gay.

# EIU's Discriminatory Treatment Denied Dotgay Community Priority Status (II)

- .RADIO was found to “closely describe[s] the community, without overreaching substantially beyond the community” despite the EIU acknowledging that “the community, as defined in the application, also includes some entities that are only tangentially related to radio, such as companies providing specific services or products to radio broadcasting organizations.” The EIU further accepted that these companies “would not likely be associated with the word RADIO. However, these entities are considered to comprise only a small part of the community and . . . public will generally associate the string with the community as defined by the applicant.” If the EIU had asked whether the public generally associated the string with the community as defined by the applicant, .GAY would have been as successful as .RADIO.

# EIU is Bound to Act Fairly and Openly

- **Bylaws Art. I, § 2(8)**
  - “Making decisions by **applying documented policies [i.e. the AGB] neutrally and objectively, with integrity and fairness.**”
- **Bylaws, Art. III, § 1**
  - “ICANN and its constituent bodies shall operate to the **maximum extent feasible** in an **open and transparent manner** and **consistent with procedures designed to ensure fairness.**”
- **CPE Guidelines, p. 22**
  - “The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.”
  - *See similarly* CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

# EIU Acted Unfairly and Opaquely (I)

- The EIU **ignored the ICC Expert Determination** that found the name of the string .GAY matches Dotgay's definition of the gay community.
- The EIU **did not disclose any due diligence**, including any research, it may have conducted when evaluating the Application **nor did ICANN provide documents from the EIU in response to Dotgay's DIDP Requests.**
- The EIU presented no support for and made no quantification effort to justify its finding that the alleged overreach extends to “more than a small part” of the identified community.

# EIU Acted Unfairly And Opaquely (II)

- The EIU **asked only one clarifying question** unrelated to Nexus or Community Support/Opposition Criteria and **thus denied Dotgay the opportunity** to address EIU misunderstandings and mistakes.
- The EIU involved the same personnel in the Second CPE as in the First CPE, raising serious doubts as to who evaluated the application and giving rise to a potential **conflict of interest**.
- ICANN's refusal to disclose the names of the evaluators based on a confidentiality provision is not consistent with **ICANN's and the EIU's transparency obligations**.

# The Duties of the Board Governance Committee

# The Bylaws Demand the BGC to Ensure Correct Application of the AGB and Correct Finding of Material Facts

- **Bylaws, Art. IV, §2(1)**

“Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that he, she, or it have been adversely affected by: (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.”

# The Bylaws Demand the AGB to Independently Assess the CPE Report and Make a Recommendation to the Board

- **Bylaws, Art. IV. §2(3)**

“The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to: (a) evaluate requests for review or reconsideration; (b) summarily dismiss insufficient requests; (c) evaluate requests for urgent consideration; (d) conduct whatever factual investigation is deemed appropriate; (e) request additional written submissions from the affected party, or from other parties; (f) make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and (g) make a recommendation to the Board of Directors on the merits of the request, as necessary.”

# The Bylaws Demand that the BGC Conduct its Review with Care and Independent Judgment

- Duty to evaluate the due diligence performed by the EIU and independently conduct due diligence as appropriate.
- **Bylaws Art. I, § 2(8)**

“Making decisions by **applying documented policies neutrally and objectively, with integrity and fairness.**”
- **Bylaws, Art. IV, § 3(4)(b)**

“did the Board exercise **due diligence and care** in having a reasonable amount of facts in front of them?”
- **Bylaws, Art. IV, § 3(4)(c)**

“did the Board members exercise **independent judgment** in taking the decision... ?”

# IRP Panel Confirmed the BGC's Duty to Review Underlying Facts and Ensure Correct Application of ICANN policies

- *Despegar* IRP Panel, ¶ 69

“The Panel agrees that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. **The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.**”

# The BGC Must Ensure the Correct Application of the AGB and Correct Finding of Material Facts (I)

- Duty to **correct the EIU's misapplication** of the AGB in requiring the name of the community to apply to each community member in order for nexus to be established.
- Duty to ensure that the EIU determined nexus in **the precise manner** set out in the AGB and by **applying the standard set out in the AGB.**
- Duty to ensure the EIU **does not rewrite the AGB** by requiring support from an organization with “reciprocal recognition on the part of the community members of the organization’s authority to represent them” beyond membership in the organization.
- Duty to ensure the EIU **does not rewrite the AGB** by requiring support from a “single [] organization recognized by all of the defined community’s members as the representative of the defined community in its entirety.”

# The BGC Must Ensure Correct Application of the AGB and Correct Finding of Material Facts (II)

- Duty to **independently assess** the Determination of the ICC Expert, which found that the string .GAY matches Dotgay's definition of the gay community.
- Duty to **independently assess** whether a local gay community is an organization of "non-negligible size," particularly when the organization is a member of a global organization that supported the application, and to assess whether its opposition raises serious conflict of interest issues.

# The BGC Has the Duty to Ensure Non-Discrimination

- The BGC must ensure **non-discriminatory treatment** by applying the same standard for community support applied by other CPE Panels (e.g., .OSAKA, .HOTEL, .RADIO) for Dotgay.
- **Bylaws, Art. II, § 3**

“ICANN shall not apply its standards, policies, procedures, or practices **inequitably or single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.”
- ***Despegar* IRP Panel, ¶¶ 146-147**

“**ICANN itself has no quality review or control process** ....The Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations .... **[T]here needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.**”

# The BGC Must Ensure Procedural Fairness

- Duty to **ensure fairness in the CPE process** in light of the findings of the ICC Independent Expert that the string .GAY matches Dotgay’s definition of the gay community.
- ***ILGA v. Afilias* Expert Determination, ¶ 13:**

“ILGA's standing has not been doubted by Afilias and is not to be doubted. To have standing the objector has to be an established institution associated with a clearly delineated community (Module 3.2.2.4 of the Guidebook), i.e. with a group that is publicly recognized as a community at a local **and/or** global level and has formal boundaries that enable a determination of what persons or entities form the community (Module 3.5.4 of the Guidebook, first test). **The gay community is a clearly delineated community. It is publicly recognized as such in the language of the media, scholarship, and common usage, formed by millions of individuals whose gender identities and sexual orientations are outside of the societal norms for heterosexual behavior** and who, whether they are more or whether they are less organized, share the awareness of their special status. During the last century, the gay community has grown out of individuals with that special awareness into a community in its own right and is now a worldwide presence.”

# ICANN Has a Duty to Foster Diversity and Safety of the Internet Community

- **Articles of Incorporation, Art. IV**

“The Corporation shall operate **for the benefit of the Internet community as a whole . . . .**”

- **Bylaws Art. III, § 1**

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

# The Denial of a .GAY Community gTLD will Undermine Diversity and Public Interest

- ICANN has a **positive obligation to foster diversity** on the Internet. The Community gTLD program is an attempt to fulfil that obligation.
- This includes ensuring vulnerable and deserving communities are empowered and protected in the public interest.
- Dotgay is the **only applicant** for the **.GAY gTLD with Public Interest Commitments**, including:
  - Pledging to provide a minimum of **67% profits** from domain name registrations to a separate foundation to support gay community initiatives.
  - Appropriate **Authentication Policies** to ensure community-appropriate material.
  - Reserving key domain names as a community resource and support websites: **Rights.gay; HIV.gay; Safe.gay; Suicide.gay; Health.gay; Ally.gay; Transgender.gay, Lesbian.gay; Queer.gay; Pride.Gay.**

# The Bylaws and Articles Demand That the BGC Ensure Transparency

- **Articles of Incorporation, Art. IV**

“The Corporation shall operate for the benefit of the Internet community . . . **through open and transparent processes . . . .**”

- **Bylaws Art. III, § 1**

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

# IRP Panel and ICANN Board Confirmed Transparency Duty

- *Despegar* IRP Panel, ¶ 145

**“The Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and objects to be achieved by ICANN, transparency and administrative due process should be applicable.”**

- **Board Resolution dated 19 March 2016**

**“Board accepts the findings of the Panel’s Final Declaration . . . The Board also affirms that ICANN, as appropriate, will continue to ensure that its activities are conducted through open and transparent processes . . . .”**

# The BGC Must Ensure Transparency

- EIU and ICANN staff **have not disclosed** the underlying materials from the EIU analysis.
- The EIU withheld documents from both the BGC and Dotgay, preventing Dotgay from knowing how its Application was treated and the BGC from independently reviewing whether the principles of fairness and non-discrimination were satisfied.

**Subject:** Re: [reconsider] Reconsideration Request 17-3  
**Date:** Wednesday, July 19, 2017 at 5:17:22 AM Pacific Daylight Time  
**From:** Herb Waye (sent by reconsider-bounces@icann.org <reconsider-bounces@icann.org>)  
**To:** Reconsideration

Reconsideration Request 17-3

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 17.3.

Best regards,

Herb Waye  
ICANN Ombudsman

[https://www.icann.org/ombudsman\[icann.org\]](https://www.icann.org/ombudsman[icann.org])  
[https://www.facebook.com/ICANNOmbudsman\[facebook.com\]](https://www.facebook.com/ICANNOmbudsman[facebook.com])  
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

[https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf\[icann.org\]](https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf[icann.org])

Community Anti-Harassment Policy

[https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en\[icann.org\]](https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en[icann.org])

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

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**From:** Reconsideration <Reconsideration@icann.org>  
**Date:** Wednesday, July 19, 2017 at 1:41 AM  
**To:** Herb Waye <herb.waye@icann.org>  
**Cc:** Reconsideration <Reconsideration@icann.org>  
**Subject:** Reconsideration Request 17-3

Dear Herb,

ICANN recently received the Reconsideration Request 17-3 (Request 17-3), [https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en\[icann.org\]](https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en[icann.org]), which was submitted on 30 June 2017 by dotgay LLC seeking reconsideration of ICANN's response to the Requestor's DIDP. The Requestor's DIDP sought the disclosure of documents relating to the Community Priority Evaluation Process Review. The Board Governance Committee (BGC) has determined that Request 17-3 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BGC to determine if the request is sufficiently stated. Specifically, [Section 4.2 \(l\)\[icann.org\]](#) states:

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Governance Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Governance Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Governance Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 17-3 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Request 17-3 for evaluation, please note that your substantive evaluation must be provided to the BGC within 15 days of receipt of Request 17-3.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 17-3  
23 AUGUST 2017**

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The Requestor, dotgay LLC, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN organization violated its Core Values and policies established in the Bylaws concerning non-discriminatory treatment and transparency.<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with three other .GAY applications. The Requestor was invited to, and did, participate in CPE, but did not prevail.

On 22 October 2015, the Requestor sought reconsideration of the CPE report (Request 15-21). The BGC denied Request 15-21. On 17 February 2016, the Requestor sought reconsideration of the BGC's determination on Request 15-21 (Request 16-3).<sup>3</sup>

On 17 September 2016, the ICANN Board directed the President and CEO, or his designees, to undertake the CPE Process Review to review the process by which ICANN organization interacted with the CPE provider. On 18 October 2016, the Board Governance Committee (BGC) decided that the CPE Process Review should also include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation

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<sup>1</sup> Request 17-3, § 3, at Pg. 1.

<sup>2</sup> Request 17-3, § 10, at Pg. 16.

<sup>3</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

of the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending Requests for Reconsideration concerning CPE.<sup>4</sup> The BGC also placed the eight pending reconsideration requests relating to CPE on hold, including Request 16-3, pending completion of the CPE Process Review.

On 18 May 2017, the Requestor submitted the DIDP Request. The Requestor sought 13 categories of documents and information relating to the CPE Process Review.<sup>5</sup> On 18 June 2017, ICANN organization responded to the DIDP Request (DIDP Response) and explained that, with the exception of certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all the remaining documents responsive to eight (Items No. 4-7 and 9-12) of the 13 categories have already been published. The DIDP Response further explained that the documents responsive to Items No. 1-3, 8, and 13 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure. Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances

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<sup>4</sup> Prior to 22 July 2017, the Board Governance Committee was designated by the ICANN Board to review and consider Reconsideration Requests pursuant to Article 4, Section 4.2 of the Bylaws. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Pursuant to the amended Bylaws effective 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is designated to review and consider Reconsideration Requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

<sup>5</sup> Items No. 4-13 of the DIDP Request sought the same documents, in verbatim requests, as those requested in a DIDP Request filed by DotMusic Limited in May 2017. *Compare* DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>, with the DIDP Request. DotMusic Limited and the Requestor are represented by the same law firm, and that firm filed both DIDP Requests and filed Reconsideration Requests challenging both DIDP Requests. *See* Reconsideration Request 17-2; Request 17-3. Reconsideration Request 17-2 raises many of the same arguments that the Requestor raises in Request 17-3. *Compare* Reconsideration Request 17-2, with Request 17-3.

for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.

The Requestor thereafter filed the instant Reconsideration Request 17-3 (Request 17-3), which challenges certain portions of the DIDP Response. The Requestor claims that ICANN organization violated ICANN's Core Values and policies established in the DIDP and Bylaws concerning non-discriminatory treatment and transparency by: (1) determining not to produce certain documents responsive to Item No. 9; and (2) determining not to produce any documents responsive to Items No. 1-3, 8, and 13.<sup>6</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN organization transmitted Request 17-3 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>7</sup>

The BAMC has considered Request 17-3 and all relevant materials and recommends that the Board deny Request 17-3 because ICANN organization adhered to established policies and procedures in its response to the DIDP Request.

## **II. Facts.**

### **A. Background Facts.**

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with other .GAY applications. On 23 February 2014, the Requestor's Application was invited to participate in CPE.<sup>8</sup> The Requestor elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE provider, for evaluation.<sup>9</sup>

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<sup>6</sup> Request 17-3, § 3, at Pg. 3.

<sup>7</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 17-3, Pg. 1.

<sup>8</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>

<sup>9</sup> *See Id.*

On 6 October 2014, the CPE panel issued a “First CPE report,” concluding that the Application did not qualify for community priority.<sup>10</sup> The Requestor filed Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE report.<sup>11</sup> The BGC granted reconsideration on Request 14-44 on the grounds that the CPE provider had inadvertently failed to verify 54 letters of support for the Application.<sup>12</sup> At the BGC’s direction, the CPE provider conducted a “Second CPE” of the Application. The Application did not prevail in the Second CPE.<sup>13</sup>

On 22 October 2015, the Requestor sought reconsideration of the Second CPE report (Request 15-21).<sup>14</sup> On the same day, the Requestor filed a DIDP Request seeking the disclosure of 24 categories of documents relating to the Second CPE determination (2015 DIDP Request).<sup>15</sup> The 2015 DIDP Request sought, among other things, “policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered ‘policy’ under ICANN by-laws.”<sup>16</sup> ICANN organization responded to the 2015 DIDP Request on 21 November 2015, providing links to all the responsive, publicly available documents, furnishing an email not previously publicly

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<sup>10</sup> See CPE Report at 1.

<sup>11</sup> BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

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

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> DIDP Request No. 20151022-1, at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

<sup>16</sup> *Id.* at Pg. 2. The Requestor made an identical request in a 2014 DIDP Request. See DIDP Request No. 20141022-2 (2014 DIDP Request), at Pg. 2, <https://www.icann.org/en/system/files/files/lieben-request-22oct14-en.pdf>.

ICANN organization responded that to the extent it had documents responsive to that request, the documents were subject to certain identified Nondisclosure Conditions. Response to 2014 DIDP Request, <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

available, explaining that it did not possess documents responsive to several of the requests, and explaining that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.<sup>17</sup> On 4 December 2015, the Requestor revised Request 15-21 to challenge the response to the 2015 DIDP Request in addition to the Second CPE report.<sup>18</sup>

On 1 February 2016, the BGC denied Request 15-21.<sup>19</sup> On 17 February 2016, the Requestor filed a third reconsideration request (Request 16-3), seeking reconsideration of the BGC's determination on Request 15-21 concerning the CPE Report; the Requestor did not challenge the BGC's determination concerning the response to the 2015 DIDP Request.<sup>20</sup> On 26 June 2016, the BGC recommended that the Board deny Request 16-3.<sup>21</sup> The Board was scheduled to consider Request 16-3 on 17 September 2016. On 13 September 2016, the Requestor submitted an independent expert report for the Board's consideration as part of its evaluation of Request 16-3.<sup>22</sup> Accordingly, the Board deferred consideration of Request 16-3 to provide time for review of the report.<sup>23</sup>

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Specifically, the Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by

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<sup>17</sup> Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>,

<sup>18</sup> Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

<sup>19</sup> BGC Determination on Request 15-21, at Pg. 1

<sup>20</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>21</sup> BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>22</sup> Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>

<sup>23</sup> Minutes of ICANN Board, 15 September 2016, <https://www.icann.org/resources/board-material/minutes-2016-09-15-en#2.g>.

the Requestor on 15 May 2016 during its presentation to the BGC regarding Request 16-3, as well as issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.<sup>24</sup> As a result, on 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake the CPE Process Review, regarding the process by which ICANN organization interacted with the CPE provider.

On 18 October 2016, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in their evaluations of the community applications.<sup>25</sup> The BGC placed on hold the following reconsideration requests pending completion of the CPE Process Review: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>26</sup>

On 18 May 2017, the Requestor submitted the DIDP Request seeking the disclosure of the following categories of documentary information relating to the CPE Process Review:<sup>27</sup>

1. All documents relating to ICANN's request to "the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their

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<sup>24</sup> Dot Registry IRP Final Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>25</sup> 18 October 2016 Minutes of BGC Meeting, at Item 2, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>; 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>26</sup> 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>27</sup> DIDP Request at Pg. 4, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

- determinations with respect to certain pending CPE reports,” and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
  4. The identity of the individual or firm undertaking the CPE Process Review;
  5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
  6. The date of appointment of the evaluator;
  7. The terms of instructions provided to the evaluator;
  8. The materials provided to the evaluator by the EIU;
  9. The materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN’s Board or any subcommittee of the Board;
  10. The materials submitted by affected parties provided to the evaluator;
  11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
  12. The most recent estimates provided by the evaluator for the completion of the investigation; and
  13. All materials provided to ICANN by the evaluator concerning the CPE Process Review.<sup>28</sup>

Items No. 4-13 of the DIDP Request sought the same documents, in verbatim requests, as those requested in a DIDP Request filed by DotMusic Limited on 5 May 2017.<sup>29</sup> DotMusic Limited and the Requestor are represented by the same law firm, and that firm filed both DIDP Requests and filed Reconsideration Requests challenging the DIDP Requests.<sup>30</sup>

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<sup>28</sup> *Id.* at Pg. 5-6.

<sup>29</sup> Compare DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>, with the DIDP Request.

<sup>30</sup> See Reconsideration Request 17-2, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>; Request 17-3.

On 2 June 2017, ICANN organization published a status update on the CPE Process Review (Status Update).<sup>31</sup> The Status Update noted, among other things, that FTI Consulting Inc.'s Global Risk and Investigations Practice and Technology Practice (FTI) is conducting the CPE Process Review.<sup>32</sup> The Status Update explained that the CPE Process Review is occurring on two parallel tracks--the first track focuses on gathering information and materials from ICANN organization, including interviews and document collection, which was completed in March 2017; and the second track focuses on gathering information and materials from the CPE provider, and is ongoing.<sup>33</sup>

On 18 June 2017, ICANN organization responded to the DIDP Request.<sup>34</sup> As discussed below, the DIDP Response explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to eight (Items No. 4-7 and 9-12) of the 13 categories have already been published. The DIDP Response identified and provided hyperlinks to those publicly available responsive documents.<sup>35</sup> The DIDP Response further explained that all the documents responsive to Items No. 1-3, 8, and 13, and certain documents responsive to Item No. 9, were subject to Nondisclosure Conditions and were not appropriate for disclosure.<sup>36</sup> Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and

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<sup>31</sup> Status Update, <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

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

<sup>33</sup> *Id.*

<sup>34</sup> DIDP Response, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>

<sup>35</sup> *See generally id.*

<sup>36</sup> *Id.* at Pg. 3-7.

determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>37</sup>

On 30 June 2017, the Requestor filed Request 17-3, seeking reconsideration of ICANN organization's determination not to produce certain documents responsive to Item No. 9 and all documents responsive to Items. No. 1-3, 8, and 13 because they were subject to Nondisclosure Conditions.<sup>38</sup> The Requestor asserts that withholding the materials "has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency[,], and fairness of the CPE process." The Requestor also argues that denial of the DIDP is inappropriate because it "increases the likelihood of [community members] resorting to" IRP, which is "expensive and time-consuming."<sup>39</sup>

On 19 July 2017, the BGC concluded that Request 17-3 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.<sup>40</sup>

On 19 July 2017, ICANN organization transmitted Request 17-3 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. The Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN's Bylaws.<sup>41</sup> Accordingly, the BAMC reviews Request 17-3 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

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<sup>37</sup> DIDP Response at Pg. 7.

<sup>38</sup> The BAMC notes that the Requestor does not seek reconsideration of the response to Items No. 5, 7, or 11, although DotMusic, represented by the same counsel as the Requestor here, challenged ICANN organization's response to identical requests (to which ICANN organization provided an identical response to the one provided to the Requestor here) in Request 17-2. *See* Request 17-2, § 3, Pg. 9-10 (incorrectly marked 8-9).

<sup>39</sup> Request 17-3, § 6, at Pg. 6-8.

<sup>40</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l)(iii). As noted in footnote 4, ICANN's Bylaws were amended while Request 17-3 was pending. The BGC was tasked with reviewing Request 17-3 to determine if it was sufficiently stated, and it did so on 7 July 2017. Since that time, the BAMC is responsible for reviewing reconsideration requests, including Request 17-3.

<sup>41</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-3, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-response-ombudsman-19jul17-en.pdf>.

## B. Relief Requested

The Requestor asks the BAMC to “disclose the documents requested under Request Nos. 1-3, 8, 9, and 13.”<sup>42</sup>

## III. Issue.

The issues are as follows:

1. Whether ICANN organization complied with established ICANN policies in responding to the DIDP Request.
2. Whether ICANN organization complied with its Core Values, Mission, and Commitments.<sup>43</sup>

The BAMC notes that the Requestor indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-3 seeks reconsideration of staff and Board action or inaction.<sup>44</sup> The only subsequent discussion of Board action is the Requestor’s passing reference to its view that the BGC was required to provide materials it requested from CPE panels for use in its evaluation of pending reconsideration requests to the Requestor.<sup>45</sup> The Requestor makes no further arguments concerning the BGC’s actions or inactions, and does not ask ICANN organization to take any action concerning this issue. Rather, the Requestor focuses on ICANN organization’s response to the Requestor’s DIDP request.<sup>46</sup> Accordingly, the BAMC understands Request 17-3 to seek reconsideration of ICANN organization’s response to the Requestor’s DIDP Request, and *not* reconsideration of BGC action or inaction.<sup>47</sup>

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<sup>42</sup> Request 17-3, § 9, at Pg. 15.

<sup>43</sup> Request 17-3, § 3, at Pg. 3; *id.*, §§ 6-7, Pg. 5-8.

<sup>44</sup> Request 17-3, § 2, at Pg. 1.

<sup>45</sup> Request 17-3, § 6, at Pg. 5.

<sup>46</sup> Request 17-3, §§ 8-9, at Pg. 9-15.

<sup>47</sup> Further, we note that the BAMC has not completed its consideration of Request 16-3, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

#### **IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.**

##### **A. Reconsideration Requests**

Article 4, Section 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.<sup>48</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws that were in effect when Request 17-3 was filed, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>49</sup> That substantive provision did not change when ICANN's Bylaws regarding reconsideration were amended effective 22 July 2017, although the determination as to whether a reconsideration request is sufficiently stated now falls to the BAMC. Pursuant to the current Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>50</sup> Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC

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<sup>48</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

<sup>49</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l).

<sup>50</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>51</sup>

On 19 July 2017, the BGC determined that Request 17-3 is sufficiently stated and sent Request 17-3 to the Ombudsman for review and consideration.<sup>52</sup> The Ombudsman thereafter recused himself from this matter.<sup>53</sup> Accordingly, the BAMC has reviewed Request 17-3 and issues this Recommendation.

## **B. Documentary Information Disclosure Policy**

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization's operational activities. In that regard, ICANN organization publishes many categories of documents on its website as a matter of due course.<sup>54</sup> In addition to ICANN organization's practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN organization make public documentary information "concerning ICANN's operational activities, and within ICANN's possession, custody, or control," that is not already publicly available.<sup>55</sup> The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization's operational activities, and within ICANN organization's

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<sup>51</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>52</sup> Ombudsman Action Regarding Request 17-3, Pg. 1-2.

<sup>53</sup> Ombudsman Action Regarding Request 17-3, Pg. 1.

<sup>54</sup> See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>55</sup> *Id.*

possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.<sup>56</sup>

In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).<sup>57</sup> The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization’s website].”<sup>58</sup>

Pursuant to the DIDP, ICANN organization reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others:

- i. Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors’ Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- ii. Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which

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<sup>56</sup> *Id.*

<sup>57</sup> See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>58</sup> *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

ICANN cooperates by inhibiting the candid exchange of ideas and communications;

- iii. Confidential business information and/or internal policies and procedures; and
- iv. Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>59</sup>

Notwithstanding the above, information that falls within any of the Nondisclosure Conditions *may* still be made public if ICANN organization determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>60</sup>

## **V. Analysis and Rationale.**

### **A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The DIDP Request.**

#### **1. The DIDP Response Complies With Applicable Policies And Procedures.**

The DIDP Response identified documentary information responsive to nine of the 13 items. For Items No. 4 through 7 and 9 through 12, ICANN organization determined that most of the responsive documentary information had already been published on ICANN's website.<sup>61</sup> Although the DIDP does not require ICANN organization to respond to requests seeking information that is already publicly available,<sup>62</sup> ICANN organization identified and provided the hyperlinks to 18 publicly available categories of documents that contain information responsive to Items No. 4 through 7 and 9-12.<sup>63</sup>

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<sup>59</sup> DIDP.

<sup>60</sup> *Id.*

<sup>61</sup> *See generally* DIDP Response.

<sup>62</sup> DIDP <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>63</sup> DIDP Response at Pg. 4-7.

The DIDP Response also explained that some of the documents responsive to Item No. 9, as well as all documents responsive to Items No. 1-3, 8, and 13, were subject to certain identified Nondisclosure Conditions. The DIDP Response further explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>64</sup>

The Requestor claims that ICANN organization's responses to Items No. 1, 2, 3, 8, 9, and 13 violated established policies and procedures. However, the Requestor provides nothing to demonstrate that ICANN organization violated any established policy or procedure.<sup>65</sup> As demonstrated below, ICANN organization's responses to Items No. 1, 2, 3, 8, 9, and 13 adhered to established policies and procedures.

The DIDP Response Process provides that “[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested . . . , interviews . . . the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request.”<sup>66</sup> Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions.<sup>67</sup> If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.<sup>68</sup>

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<sup>64</sup> DIDP Response at Pg. 7.

<sup>65</sup> Request 17-3, § 3, Pg. 3.

<sup>66</sup> DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

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

<sup>68</sup> *Id.*

**a. ICANN organization’s response to Items No. 1, 2, 3, 8, and 13 adhered to established policies and procedures.**

Items No. 1, 2, 3, 8, and 13 sought the disclosure of documents relating to the CPE

Process Review, including:

- [D]ocuments relating to ICANN’s request to “the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports” (Item. No. 1);
- All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,” and (b) all communications between the EIU and ICANN regarding the request (Item No. 2);
- All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation (Item No. 3);
- The materials provided to the evaluator by [the CPE provider] (Item No. 8)
- The materials provided to ICANN by the evaluator concerning the review (Item No. 13)<sup>69</sup>

With respect to these Items, ICANN organization explained that documents responsive to the requests “are not appropriate for disclosure” based on certain Nondisclosure Conditions.<sup>70</sup>

Consistent with the DIDP Response Process, ICANN organization searched for and identified documents responsive to Items No. 1, 2, 3, 8, and 13, then reviewed those materials and determined that they were subject to certain Nondisclosure Conditions discussed below.<sup>71</sup>

Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the

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<sup>69</sup> Request 17-3, § 3, at Pg. 9 (marked 8).

<sup>70</sup> DIDP Response at Pg. 4.

<sup>71</sup> DIDP Response Process.

disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.<sup>72</sup>

**b. ICANN organization’s response to Item No. 9 adhered to established policies and procedures.**

Item No. 9 sought the disclosure of “materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN’s Board or any subcommittee of the Board.”<sup>73</sup> In response to Item No. 9, the DIDP Response identified 16 categories of documents that ICANN organization provided to the evaluator. All but one of those categories had already been published. The DIDP Response provided the hyperlinks to the publicly available documents. The DIDP Response also disclosed that ICANN organization provided the evaluator with correspondence between ICANN organization and the CPE provider regarding the evaluations; however, said correspondence were subject to certain Nondisclosure Conditions and were not appropriate for the same reasons identified in ICANN organization’s response to the 2015 DIDP Request, which sought the same documentary information.<sup>74</sup> The BGC previously denied the Requestor’s Request 16-7, which challenged ICANN organization’s response to the 2015 DIDP Request.<sup>75</sup>

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<sup>72</sup> DIDP Response at Pg. 7.

<sup>73</sup> DIDP Request at Pg. 5.

<sup>74</sup> DIDP Response at Pg. 5-6, *citing* Response to 2015 DIDP Request. The 2015 DIDP Request in turn cites the Response to the Requestor’s 2014 DIDP Request. *See* Response to 2015 DIDP Request, at Pg. 5; *see also* Response to 2014 DIDP Request, at Pg. 4-5.

As noted in footnote 5, ICANN organization previously provided the same response to DotMusic Limited’s DIDP request for the same documents. *See* DIDP Response to Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>75</sup> BGC Determination on Request 15-21, at Pg. 29-32 (reviewing challenge to the 2015 DIDP Request).

**2. ICANN Organization Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.**

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.<sup>76</sup> Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN organization must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.<sup>77</sup> In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the DIDP Response.

In response to Item No. 9, ICANN organization determined that the internal correspondence between ICANN organization and the CPE provider regarding the evaluations were not appropriate for disclosure because, as ICANN organization previously explained in response to the 2014 and 2015 DIDP Requests, they comprised:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which

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<sup>76</sup> DIDP.

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

ICANN cooperates by inhibiting the candid exchange of ideas and communications;

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement;
- Confidential business information and/or internal policies and procedures; or
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.<sup>78</sup>

It is easy to see why these Nondisclosure Conditions apply to the materials responsive to Item No. 9. Those items request correspondence between ICANN organization and the CPE Provider.<sup>79</sup> The Requestor previously challenged ICANN organization's determination that the correspondence between ICANN and the CPE provider were not appropriate for disclosure for the same reasons in Request 15-21 without success.<sup>80</sup> The BAMC recommends that Request 17-3 be similarly denied. Equally important, the DIDP specifically carves out documents containing proprietary information and confidential information as exempt from disclosure pursuant to the Nondisclosure Conditions because the potential harm of disclosing that private information outweighs any potential benefit of disclosure.

Items No. 1, 2, 3, 8, and 13 seek materials shared between FTI, EIU, and ICANN organization concerning the CPE Process Review. In response to Items No. 1, 2, 3, 8, and 13, ICANN organization noted that it was in possession of requests for documents and information prepared by the evaluator to ICANN organization and the CPE provider, but that these documents were not appropriate for disclosure because they comprised:

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<sup>78</sup> DIDP Response at Pg. 6, citing Response to 2015 DIDP Request at Pg. 6, <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

<sup>79</sup> DIDP Request at Pg. 5.

<sup>80</sup> BGC Determination on Request 15-21, at Pg. 29-32, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation; and
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.<sup>81</sup>

These materials certainly comprise information that may “compromise the integrity of” ICANN organization’s and FTI’s “deliberative and decision-making process” with respect to the CPE Process Review.

The Requestor argues that the determinations as to the applicability of the specified Nondisclosure Conditions warrant reconsideration because “ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.”<sup>82</sup> The Requestor’s arguments fail because ICANN organization *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling

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<sup>81</sup> DIDP Response at Pg. 4; *see also* ICANN Defined Conditions for Nondisclosure. <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>82</sup> Request 17-3, § 6, at Pg. 6.

reasons for not disclosing the materials.<sup>83</sup> There is no policy or procedure requiring that ICANN organization to provide *additional* justification for nondisclosure.

**3. ICANN Organization Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public’s Interest In Disclosing The Information.**

The DIDP states that documents subject to the Nondisclosure Conditions “may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”<sup>84</sup> In accordance with the DIDP Response Process, ICANN organization conducted a review of the responsive documents that fell within the Nondisclosure Conditions and determined that the potential harm outweighed the public interest in the disclosure of those documents.<sup>85</sup>

**B. The Requestor’s Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration of the DIDP Response.**

The Requestor argues that ICANN violated the following Commitments and Core Values in the DIDP Response:<sup>86</sup>

- Operating in a manner consistent with the [] Bylaws for the benefit of the Internet community as a whole;<sup>87</sup>
- Employing open and transparent policy development mechanisms;<sup>88</sup>
- Applying documented policies neutrally and objectively, with integrity and fairness;<sup>89</sup>

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<sup>83</sup> DIDP Response at Pg. 4-6; 2016 DIDP Response at Pg. 4-7.

<sup>84</sup> *See id.*

<sup>85</sup> DIDP Response at Pg. 6; 2016 DIDP Response at Pg. 2.

<sup>86</sup> Request 17-3, § 6, at 5).

<sup>87</sup> ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a).

<sup>88</sup> The Requestor cites ICANN Bylaws, 1 October 2016, Art. 3, Section 3.1 in support; that Bylaw states that ICANN “shall operate to the maximum extent feasible in an open and transparent manner . . . including implementing procedures to . . . “encourage fact-based policy development work.”

<sup>89</sup> ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a)(v).

- Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.<sup>90</sup>

However, the Requestor provides no explanation for how these Commitments and Core Values relate to the DIDP Response at issue in Request 17-3 or how ICANN organization has violated these Commitments and Core Values.<sup>91</sup> The Requestor has not established grounds for reconsideration through its list of Commitments and Core Values.

## **VI. Recommendation**

The BAMC has considered the merits of Request 17-3, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-3.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. Request 17-3 was submitted on 30 June 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 30 July 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-3 is 23 August 2017, which is within the requisite 90 days of receiving Request 17-3.<sup>92</sup>

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<sup>90</sup> ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a)(vi).

<sup>91</sup> See generally Request 17-3, § 10, Pg. 13-14.

<sup>92</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

ARIF HYDER ALI

Contact Information Redacted

10 June 2017

**VIA E-MAIL**

Chris Disspain  
Chair, ICANN Board Governance  
Committee  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

Jeffrey A. LeVee, Esq.  
Jones Day  
555 South Flower Street  
Los Angeles, CA 90071 2300

**Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update**

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited (“DotMusic”) and dotgay LLC (“dotgay”), regarding ICANN’s 2 June 2017 Community Priority Evaluation Process Review Update (“CPE Process Review Update”).

Our review of ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.<sup>1</sup> As you are aware, after the ICANN Board announced in September 2016 that it is conducting “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider,”<sup>2</sup> we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization’s remit, the information it had been provided,

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<sup>1</sup> See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 (“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”); Art. I, Section 2 (8) (“Make decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

<sup>2</sup> Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

whether the evaluator will seek to consult with the affected parties, etc.<sup>3</sup> In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.<sup>4</sup> At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Waye. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic's formal complaint with the Ombudsman that, *inter alia*, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain's 28 April 2017 letter and Mr. LeVee's 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—*after* DotMusic and dotgay filed their requests for documentary information<sup>5</sup> and *two weeks* before the investigator's final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection."<sup>6</sup>

This is troubling for several reasons. ***First***, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

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<sup>3</sup> See e.g., Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

<sup>4</sup> ICANN Madrid GDD Summit, May 9, 2017.

<sup>5</sup> See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

<sup>6</sup> 2 June 2017 CPE Process Review Update.

Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. **Second**, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in *very deeply* and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process," and that (ii) "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a *full look* at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."<sup>7</sup>

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

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<sup>7</sup> ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. [http://schr.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%20-en.pdf](http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf), pp. 10 – 14.

We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written in a cursive style.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (ombudsman@icann.org)

# Annex A

## DotMusic Limited

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### Key Documents

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	Description
1.	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
2.	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
3.	Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

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### Other Relevant Documents

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	Description
1.	Letter from Constantine Roussos to Christine Willet (12 July 2013)
2.	Letter from Christine Willet to Constantine Roussos (14 August 2013)
3.	Letter from Constantine Roussos to Christine Willet (8 October 2013)
4.	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	<b>Description</b>
<b>5.</b>	Reconsideration Request 14-8 (4 March 2014)
<b>6.</b>	Revised Reconsideration Request 14-8 (5 March 2014)
<b>7.</b>	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
<b>8.</b>	Reconsideration Request 14-28 (7 June 2014)
<b>9.</b>	Letter from Constantine Roussos to ICANN (13 June 2014)
<b>10.</b>	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
<b>11.</b>	Letter from Constantine Roussos to ICANN (1 July 2014)
<b>12.</b>	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
<b>13.</b>	Letter from Rich Bengloff to ICANN (7 March 2015)
<b>14.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
<b>15.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
<b>16.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
<b>17.</b>	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
<b>18.</b>	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	<b>Description</b>
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	<b>Description</b>
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	<b>Description</b>
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	<b>Description</b>
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	<b>Description</b>
77.	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
78.	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
79.	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
80.	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
81.	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
82.	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
83.	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
84.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
85.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
86.	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	<b>Description</b>
<b>87.</b>	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
<b>88.</b>	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
<b>89.</b>	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
<b>90.</b>	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

# **Annex B** **dotgay LLC**

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## **Key Documents**

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<b>Tab</b>	<b>Description</b>
1.	Chris LaHatte, former ICANN Ombudsman, Dot Gay Report (27 July 2016)
2.	Expert Opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
3.	Expert Opinion of Prof. M.V. Lee Badgett (17 October 2016)
4.	Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 November 2016)

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## **Other Relevant Documents**

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<b>Tab</b>	<b>Description</b>
1.	Letter from Centrelink to ICANN Board regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) (24 March 2011)
2.	Letter from Jamie Baxter to ICANN (10 October 2013)
3.	Letter from Centrelink to ICANN regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) under the community model submitted by dotgay LLC (7 March 2014)
4.	Letter from David Gudelunas to ICANN and the EIU Evaluators (30 April 2014)

Tab	Description
5.	Letter from Scott Seitz to ICANN regarding Background on Community gTLDs (5 May 2014)
6.	Letter from Scott Seitz to ICANN regarding Shared Concerns of the Gay Community (5 May 2014)
7.	Letter from Jamie Baxter to ICANN regarding Supporting Evidence (5 May 2014)
8.	Letter from Jamie Baxter to ICANN regarding Additional Endorsements (5 May 2014)
9.	Letter from Jamie Baxter to ICANN regarding Updated Endorsements (5 May 2014)
10.	Letter from Jamie Baxter to ICANN (7 May 2014)
11.	Letter from Jamie Baxter to ICANN (27 May 2014)
12.	Original Request 14-44, along with Annexes (22 October 2014)
13.	Letter from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (17 November 2014)
14.	Letter from National Gay & Lesbian Chamber of Commerce (NGLCC) (17 November 2014)
15.	Letter from Federation of Gay Games to ICANN and Board Governance Committee (28 November 2014)
16.	Revised Request 14-44 (29 November 2014) • Annexes (29 November 2014)
17.	Letter from David Gudelunas to ICANN and Board Governance Committee (15 December 2014)

Tab	Description
18.	Letter from International Gay & Lesbian Travel Association (IGLTA) to ICANN and Board Governance Committee (18 December 2014)
19.	Letter from COC Nederland to ICANN and Board Governance Committee (14 January 2015)
20.	Letter from Durban Gay & Lesbian Film Festival (DGLFF) to ICANN and Board Governance Committee (15 January 2015)
21.	Letter from KwaZulu-Natal Gay and Lesbian Tourism Association (KZNGALTA) to ICANN and Board Governance Committee (18 January 2015)
22.	Letter from Gay Business Association (GBA) to ICANN and Board Governance Committee (18 January 2015)
23.	BGC Determination on Reconsideration Request 14-44 (20 January 2015)
24.	Letter from Kelley Daniel Mukwano to ICANN And the EIU (1 February 2015)
25.	Letter from Anne Stockwell to ICANN and the EIU (1 February 2015)
26.	Letter from Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings, Ltd. to ICANN Board Governance Committee (3 February 2015)
27.	Letter from Peter Prokopik to ICANN and the EIU (5 February 2015)
28.	Letter from Jamie Baxter to ICANN regarding Update on Expressed Opposition to dotgay LLC (5 February 2015)
29.	Letter from Jamie Baxter to ICANN regarding Comments for CPE Panel (5 February 2015)
30.	Letter from Jamie Baxter to ICANN regarding Contention Set Recognition of Nexus between GAY and LGBTQIA (5 February 2015)

Tab	Description
31.	Letter from Jamie Baxter to ICANN regarding Expert Opinion on GAY Community .GAY (5 February 2015)
32.	Letter from Jamie Baxter to ICANN regarding Clarifications for CPE Panel (5 February 2015)
33.	Letter from Jamie Baxter to ICANN (6 February 2015)
34.	Letter from Jamie Baxter to ICANN (14 April 2015)
35.	Letter from Jamie Baxter to ICANN (29 May 2015)
36.	Letter from Jamie Baxter to ICANN (22 June 2015)
37.	Letter from Jamie Baxter to ICANN (23 June 2015)
38.	Letter from Jamie Baxter to ICANN (24 June 2015)
39.	Letter from Jamie Baxter to ICANN (29 June 2015)
40.	Letter from Jamie Baxter to ICANN (18 August 2015)
41.	Letter from Jamie Baxter to ICANN (3 September 2015)
42.	Reconsideration Request 15-21 (22 October 2015)
43.	Letter from dotgay LLC to Board Governance Committee (28 October 2015)
44.	Letter from UN-GLOBE to ICANN and the Board Governance Committee (12 January 2016)

Tab	Description
45.	Letter from dotgay LLC to ICANN and the Board Governance Committee (13 January 2016)
46.	Board Governance Committee Determination on Reconsideration Request 15-21 (1 February 2016)
47.	Letter from Jay Boucher to Akram Atallah and Chris Disspain (3 February 2016)
48.	Reconsideration Request 16-3 (17 February 2016)
49.	Letter from Transgender Equality Uganda to ICANN Board Governance committee regarding outcome of community scoring evaluation (24 February 2016)
50.	Letter from Trans-Fuzja to ICANN and Board Governance Committee regarding concerns about dotgay application (6 March 2016)
51.	Dotgay's Presentation to the Board Governance Committee (15 May 2016)
52.	DotGay's Written Summary of Its Oral Presentation to the BGC (17 May 2016)
53.	DotGay's Written Summary of Renato Sabbadini's Statement to the BGC (17 May 2016)
54.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
55.	Letter from dotgay LLC to ICANN and Board Governance Committee Re: Reconsideration Request 16-3 (24 June 2016)
56.	Board Governance Committee Recommendation on Reconsideration Request 16-3 (26 June 2016)
57.	Letter from Renato Sabbadini to the ICANN Board (8 August 2016)

Tab	Description
58.	Letter from Michael Bach to the ICANN Board (8 August 2016)
59.	Letter from Michael Rogers to the ICANN Board (16 August 2016)
60.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN President & CEO Göran Marby (25 August 2016)
61.	Letter from Scott Seitz to Steve Crocker regarding Letter from United TLD Holdco Ltd., Top Level Domain Holdings, Ltd., and Top Level Design, LLC to ICANN dated August 24, 2016 (8 September 2016)
62.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
63.	Letter from Statton Hammock to the ICANN Board (12 October 2016)
64.	Letter from Arif Ali to Chairman Crocker and Members of the ICANN Board regarding Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699 (17 October 2016)
65.	Letter from Arif Ali to Chairman Crocker and Board of Directors re: Council of Europe Report DGI(2016) 17 - .GAY TLD (15 November 2016)
66.	ICANN Webinar moderated by Terri Agnew (18 January 2017)
67.	Letter from Arif Ali to President Marby and BGC regarding ICANN Board's failure to issue its final decision on the Board Governance Committee's Recommendation on Reconsideration Request 16-3 (30 January 2017)
68.	Letter from LGBT Denmark to ICANN Board Members regarding support to correct discriminatory treatment of .GAY (14 February 2017)
69.	Letter from Mario Paez to the ICANN Board (8 March 2017)

Tab	Description
70.	Letter from Arif Ali to President Marby and Members of the Board regarding inquiry about final decision on 26 June 2016 recommendation (12 March 2017)
71.	Email from Jamie Baxter to Steve Crocker regarding the Blog Post on the CPE Investigation (17 April 2017)
72.	Letter from Chris Disspain regarding update on the review of the new gTLD CPE process (26 April 2017)
73.	Letter from Jeffrey Levee to Arif Ali regarding Application of dotgay LLC (15 May 2017)
74.	Letter from Christine Willett to Scott Seitz and Jamie Baxter regarding Reconsideration Request 16-3 (16 May 2017)
75.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of dotgay (18 May 2017)

To: Arif Ali on behalf of dotgay LLC and DotMusic Limited

Date: 10 July 2017

Re: Request No. 20170610-1

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Thank you for your request for documentary information dated 10 June 2017 (Request), which was submitted to the Internet Corporation for Assigned Names and Number's (ICANN) outside counsel on behalf of dotgay LLC (dotgay) and DotMusic Limited (DotMusic) (collectively Requestors). As the Request seeks the disclosure of documentary information, it is being addressed through ICANN's Documentary Information Disclosure Policy (DIDP). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

### **Response**

Your Request seeks information relating to the review of the CPE process initiated by the ICANN Board (the Review). ICANN's DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. As such, requests for information are not appropriate DIDP requests.

ICANN notes that it previously provided documentary information regarding the Review in response to the DIDP Requests submitted by DotMusic and dotgay. (See [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).) Rather than repeating the information here, ICANN refers to those DIDP Responses, which are incorporated into this Response.

#### Items 1 and 3

Item 1 seeks confirmation that FTI will review the materials submitted by DotMusic and dotgay in the course of their reconsideration requests, including all the documents identified in Annexes A and B to the Request. Item 3 seeks the disclosure of information regarding FTI's selection process and "the terms under which FTI currently operates for ICANN." The information responsive to Items 1 and 3 were previously provided in [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).

#### Items 2 and 4

Item 2 seeks the disclosure of the identities of "ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review." Item 4 requests "[c]onfirm[ation] that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review." As noted above, the DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the [26 April 2017 update from the Chair of the Board of the Governance Committee](#) and [2 June 2017 Community Priority Evaluation Process Review Update](#). This request for information is not an appropriate DIDP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

## **Rebuttal to the BAMC’s Recommendation on Reconsideration Request 17-3**

dotgay<sup>1</sup> submits this rebuttal to the Board Accountability Mechanisms Committee’s (“BAMC”) Recommendation on Request 17-3 (the “Recommendation”),<sup>2</sup> which concerns the reconsideration of ICANN’s refusal to disclose documents requested in dotgay’s DIDP Request.<sup>3</sup> The denied document requests all involve the disclosure of pre-existing documents and are not “unfettered information requests” or requests “to create or compile summaries of any documented information.”<sup>4</sup> Specifically, dotgay asked ICANN to disclose the following documents:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports.”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (1) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,” and (b) all communications between the EIU and ICANN regarding the request.

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation to any comments on the research or evaluation

Request No. 8: The materials provided to the evaluator by the EIU.

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board.

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<sup>1</sup> This rebuttal adopts the same exhibits and terms as in dotgay’s Reconsideration Request 17-3. *See* Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), <https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en>.

<sup>2</sup> *Id.*

<sup>3</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/resources/pages/didp-20170518-1-ali-request-2017-06-19-en>. As explained in the Request, ICANN refused to disclose documents related to Request Nos. 1-3, 8-9, and 13. *See* Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>4</sup> Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), p. 13, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf>.

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.<sup>5</sup>

As explained in Request 17-3,<sup>6</sup> ICANN improperly refused to disclose these documents because (1) its assertion that the responsive documents fall under the Defined Conditions of Nondisclosure are conclusory and unsupported by ICANN, (2) the public interest outweighs any reason for nondisclosure, and (3) the decision violates ICANN’s Commitments and Core Values.

Significantly, the Recommendation improperly implies that several Commitments and Core Values are not implicated in the DIDP Response, that dotgay made unsupported references to these policies, and that these policies do not support reconsideration of the DIDP Response.<sup>7</sup> These claims are unfounded.<sup>8</sup> To provide further clarity for both the BAMC and the ICANN Board, dotgay will now further clarify its position in this rebuttal to the Recommendation.

#### **1. The DIDP Response Must Adhere to ICANN’s Commitments and Core Values**

In issuing the DIDP Response, ICANN must comply with its Commitments and Core Values or violate its own Bylaws. ICANN, in performing its mission “to ensure the stable and secure operation of the Internet’s unique identifier systems,”<sup>9</sup> must “act in a manner consistent with [its] Bylaws”<sup>10</sup> and “in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values.”<sup>11</sup> There is no exception carved out for the DIDIP<sup>12</sup> and ICANN

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<sup>5</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), pp. 5-6, <https://www.icann.org/resources/pages/didp-20170518-1-ali-request-2017-06-19-en>.

<sup>6</sup> Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), <https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en>.

<sup>7</sup> Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), p. 21, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf>.

<sup>8</sup> See Exhibit 2, dotgay DIDP Request (May 18, 2017), pp. 5-8, <https://www.icann.org/resources/pages/didp-20170518-1-ali-request-2017-06-19-en>.

<sup>9</sup> ICANN Bylaws, Art. 1, § 1.1(a).

<sup>10</sup> *Id.* at Art. 1, § 1.2(a).

<sup>11</sup> *Id.* at Art. 1, § 1.2.

<sup>12</sup> See *id.*; see also ICANN Articles of Incorporation.

has not contested that its actions here are governed by these Commitments and Core Values.<sup>13</sup> In fact, the BAMC explained in the Recommendation that the DIDIP is the direct result of ICANN's Commitment to transparency:

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publically available a comprehensive set of materials covering ICANN organization's operational activities.<sup>14</sup>

ICANN's refusal to disclose several documents in response to the DIDP Request is thus in direct contravention of its Commitment to transparency, as well as other Commitments and Core Values.

## **2. ICANN Must Disclose the Requested Documents in Accordance with Its Commitments to Transparency and Openness**

The DIDP is clearly “[a] principal element of ICANN's approach to transparency and information disclosure.”<sup>15</sup> The principle of transparency “is one of the essential principles in ICANN's creation documents, and its name reverberated through its Articles and Bylaws.”<sup>16</sup> ICANN's Articles of Incorporation (the “Articles”) commit it to “operate in a manner consistent with [its] Articles and Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes.”<sup>17</sup> ICANN's Bylaws only reaffirm the same Commitment. The Bylaws explicitly state that “ICANN must operate in a manner consistent with [its] Bylaws for the

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<sup>13</sup> Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), p. 21-2, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf>.

<sup>14</sup> *Id.* at p. 12.

<sup>15</sup> Exhibit 21, ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>16</sup> Exhibit 6, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 101, <https://www.icann.org/en/system/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>17</sup> ICANN Articles of Incorporation, § 2.III.

benefit of the Internet community as a whole . . . through open and transparent processes.”<sup>18</sup> And, in addition to dedicating an entire Article on transparency,<sup>19</sup> the Bylaws further reaffirm that the processes for policy development, such as the use and evaluation of a CPE provider, must be “accountable and transparent.”<sup>20</sup>

However, ICANN did not adhere to its Commitment to openness and transparency when it denied dotgay’s requests for further information about the ongoing review of the CPE process. The CPE has affected several gTLD applicants,<sup>21</sup> and drawn criticism from legal experts<sup>22</sup> and venerable institutions, such as the Council of Europe.<sup>23</sup> And, even though concerns by both applicants and third parties led to ICANN’s initiation of an independent review of the CPE process, the review itself has been mired in secrecy since its inception.

This lack of transparency is evident upon a review of dotgay’s attempts to have the CPE for .GAY reevaluated by the BGC. On June 26, 2016, the BGC issued a recommendation regarding Request 16-3, which concerns dotgay’s community application for .GAY.<sup>24</sup> ICANN was subsequently silent regarding the status of Request 16-3 for nearly *nine months*, and even then

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<sup>18</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>19</sup> *See id.* at Art. 3 (“TRANSPARENCY”). Article 3 concerns ICANN’s Commitment to “operate to the maximum extent feasible in an open and transparent manner.” *Id.* at Art. 3, § 3.1.

<sup>20</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>21</sup> *See* Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>22</sup> *See* Exhibit 12, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>.

<sup>23</sup> *See* Exhibit 5, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>.

<sup>24</sup> *See* Exhibit 9, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

dotgay only learned that its application was “on hold” as the BGC reviewed the CPE process.<sup>25</sup> No other substantive information about the review was disclosed to dotgay for another *two months*, when dotgay and other community applicants finally learned the name of the independent evaluator that was conducting the review.<sup>26</sup>

ICANN, despite its Commitments to transparency and openness, still has not disclosed relevant information about the independent review. For instance, dotgay and the other applicants do not know (1) the documents being reviewed by FTI as part of its independent review, (2) the terms and scope of FTI’s work for ICANN, and (3) the documents relied on by the EIU during the CPE. The DIDP remains the only mechanism for applicants to obtain this information from ICANN by obtaining the relevant documents. In rejecting the DIDP Request, ICANN has closed-off this possibility in clear contradiction of its own stated Commitments and Core Values.

### **3. ICANN Must Disclose the Requested Documents Because of its Commitment to Fairness, Which Shows that the Public Interest Outweighs Nondisclosure**

This secretive review of the CPE process is clearly significant not only to dotgay, but also to other gTLD applicants. The results of the independent review may change how ICANN evaluates community applications for the foreseeable future, and many gTLD applicants currently have pending reconsideration requests concerning the CPE process.<sup>27</sup> This evaluation process, which is currently mired with complaints, has clearly disproportionately treated community gTLD

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<sup>25</sup> See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>26</sup> Exhibit 16, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

<sup>27</sup> See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017) (identifying seven other gTLD strings with pending reconsideration requests), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

applicants by inconsistently and unfairly applying criteria between applicants.<sup>28</sup> And, yet, ICANN summarily accepted the CPE determinations, and is only now reconsidering the CPE process through a secretive review process.

ICANN's refusal to disclose relevant documents through its DIDP not only fails to uphold its openness and transparency obligations but also fails to uphold the principle of fairness. ICANN has specifically stated that:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).<sup>29</sup>

It further made the Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”<sup>30</sup>

ICANN's refusal to disclose the requested documents is in clear violation of this Commitment. There is a clear problem with the CPE process, evident by the EIU's determinations and ICANN's own investigation of the process. Furthermore, the Minutes from ICANN's Board Governance Meeting of August 1, 2017 clearly show that the CPE Provider itself has been

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<sup>28</sup> See Exhibit 5, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>.

<sup>29</sup> ICANN Bylaws, Art. 3, § 3.1.

<sup>30</sup> *Id.* at Art. 1, § 1.2(a)(v).

uncooperative with ICANN, thus indicating that the CPE Provider may be seeking to intentionally obscure the defects in its review, perhaps aided and abetted by ICANN staff.<sup>31</sup> This problem not only affects all of the community gTLD applicants but also the entire Internet community, which will be indisputably affected by whether ICANN approves certain community gTLDs, such as .GAY. Despite the clear public interest in maintaining a fair CPE process, however, ICANN continues to unfairly exclude community applicants and the Internet community from the independent review process, even though the applicants will be and are affected by the improperly administered CPE, have continuously raised this issue before ICANN, and have contributed to the dialogue regarding the problem. Instead of welcoming their contributions to the review of an important gTLD process, ICANN has instead restricted their access to information regarding the independent review in a blatantly unfair decision that keeps affected applicants uninformed and raises several red flags regarding the integrity of the independent review itself.

ICANN's failure to provide the requested documents raises questions as to its credibility, reliability, and trustworthiness. It implies to the community applicants and the general public that there is something to hide regarding the independent review and CPE. In an attempt to defend its reluctance to disclose documents, ICANN has argued that these documents are covered by its Nondisclosure Policy. However, in both the DIDP Response and the Recommendation, neither ICANN nor the BAMC offer any explanation for this singular defense. Instead, both have simply made conclusory statements that the requested documents are covered by the nondisclosure policy

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<sup>31</sup> See Exhibit 22, Minutes of BGC Meeting (Aug. 1, 2017), <https://www.icann.org/resources/board-material/minutes-bgc-2017-08-01-en>. "This is in large part because, despite repeated requests from ICANN beginning in March 2017, the CPE provider failed to produce a single document until just very recently – four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced." *Id.*

without any explanation other than simply listing several conditions for nondisclosure, expecting dotgay to understand how these conditions apply to unknown documents.<sup>32</sup>

ICANN's actions are therefore in contravention of its commitments to transparency, openness, and its dedication to neutrality, objectiveness, integrity, and fairness. In all fairness, given the import of the review to the public, ICANN should disclose the documents to the public; it is clear that the public interest outweighs any nondisclosure policies.

#### **4. ICANN Must Disclose the Requested Documents to Remain Accountable to the Internet Community and Maintain its Effectiveness**

ICANN's refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community for a clearly flawed evaluation process in violation of its Commitments and Core Values. Through its Bylaws, ICANN has committed itself to “[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN's effectiveness.”<sup>33</sup> It has also adopted two significant Core Values: (1) “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;”<sup>34</sup> and (2) “[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community.”<sup>35</sup>

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<sup>32</sup> Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), pp. 16-9, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf>; Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), pp. 3-4, 6, <https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en>.

<sup>33</sup> ICANN Bylaws, Art. 1, § 1.2(a)(vi).

<sup>34</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>35</sup> *Id.* at Art. 1, § 1.2(b)(v).

The DIDP Response and the Recommendation support a decision that contradicts these Commitments and Core Values. As explained prior, ICANN has kept hidden details regarding the review process, prohibiting informed participation in the review by the Internet Community and avoiding all possibility of accountability for its actions during the review. In additions to violating its Bylaws, ICANN’s attempts to avoid accountability will prevent it from operating in a fully effective manner as it prevents a large community from offering advice and solutions for resolving the problems with the CPE process, and forces community applicants to continually seek information from ICANN that should have already been disclosed to the public.

## **5. Conclusion**

Therefore, it is clear that ICANN has failed to uphold its Commitments and Core Values in denying the DIDP Request. The BAMC has only further perpetuated this violation by recommending that the Board deny Request 17-3. In addition to the reasons stated in the Request 17-3,<sup>36</sup> then, the Board should grant Request 17-3 and produce the requested documents regarding the CPE independent review.



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Arif Hyder Ali

September 8, 2017

Date

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<sup>36</sup> Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), <https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en>.

# **Exhibit 19**

**dotgay LLC Reconsideration Request (“RR”)**

**1. Requester Information**

Requester:

**Name:** dotgay LLC (“dotgay”)

**Address:** Contact Information Redacted

**Email:** Jamie Baxter, Contact Information Redacted

Requester is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, Contact Information Redacted

**Email:** Contact Information Redacted

**2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

**3. Description of specific action you are seeking to have reconsidered.**

dotgay LLC (the “Requester”) seeks reconsideration of ICANN’s response to its DIDP Request, which denied the disclosure of certain categories of documents requested pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

On May 18, 2017, the Requester submitted a DIDP request seeking disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”)

review of the Community Priority Evaluation (“CPE”) process (the “DIDP Request”).<sup>1</sup>  
Specifically, the Requester submitted 13 document requests as follows:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

Request No. 4: The identity of the individual or firm (“the evaluator”) undertaking the Review;

Request No. 5: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

Request No. 7: The terms of instructions provided to the evaluator;

Request No. 8: The materials provided to the evaluator by the EIU;

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

Request No. 10: The materials submitted by affected parties provided to the evaluator;

Request No. 11: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

Request No. 12: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the

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<sup>1</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

Review.<sup>2</sup>

Subsequently, on June 18, 2017, ICANN responded to the Requester's DIDP Request by denying the Requester's (1) five document requests (Request Nos. 1-3, 8 and 13) in whole, and (2) one document request (Request No. 9) in part. ICANN reasoned that (1) the documents under Request Nos. 1-3, 8 and 13 are not appropriate for disclosure "based on . . . [the] DIDP Defined Conditions of Non-Disclosure;" and (2) the documents under Request No. 9 concerning "the correspondence between the ICANN organization and the CPE provider regarding the evaluations" are not appropriate for disclosure for "the same reasons identified in ICANN's response to the DIDP previous[ly] submitted by dotgay."<sup>3</sup>

**4. Date of action/inaction:**

ICANN acted on June 18, 2017 by issuing its response to the DIDP Request.

**5. On what date did you become aware of action or that action would not be taken?**

The Requester became aware of the action on June 18, 2017, when it received ICANN's response to the DIDP Request.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requester is materially affected by ICANN's refusal to disclose certain categories of documents concerning the BGC's review of the CPE process at issue in the DIDP Request.

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<sup>2</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>3</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>; *see* Exhibit 3, Request No. 20151022-1, ICANN DIDP Response (Oct. 21, 2015), <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

By way of background, the Requester filed a community-based generic Top-Level Domain (“gTLD”) application for the string “.GAY.” However, the CPE report, authored by the Economist Intelligence Unit (the “EIU”), recommended that ICANN reject the Requester’s application for the .GAY gTLD. As evident from the Requester’s submissions, including an independent expert report by Prof. William Eskridge of Yale Law School, the CPE report is fundamentally erroneous based on (1) interpretive errors created by misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (2) errors of inconsistency derived from the EIU’s failure to follow its own guidelines; (3) errors of discrimination, namely the EIU’s discriminatory treatment of dotgay’s application compared with other applications; and (4) errors of fact, as the EIU made several misstatements of the empirical evidence and demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States.<sup>4</sup>

In January 2017, ICANN retained an independent reviewer, FTI Consulting, Inc. (“FTI”), to review the CPE process and “the consistency in which the CPE criteria were applied” by the CPE provider. As part of the review, FTI is collecting information and materials from ICANN and the CPE provider. FTI will submit its findings to ICANN based on this underlying information.

FTI’s findings relating to “the consistency in which the CPE criteria were applied” will directly affect the outcome of the Requester’s Reconsideration Request 16-3 (“Request 16-3”), which is currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain’s April 26, 2017 letter to the Requester, which stated that FTI’s review “will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration

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<sup>4</sup> Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>

Requests related to CPE.” Thus, the Requester filed the DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process. In submitting this DIDP Request, the Requester expected ICANN to “operate in a manner consistent with [its] Bylaws” and “through open and transparent processes.”<sup>5</sup> ICANN failed to do so.

Specifically, according to Article 4 of ICANN’s Bylaws, “[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor.”<sup>6</sup> The Bylaws require that ICANN (1) “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;”<sup>7</sup> (2) “employ[ ] open and transparent policy development mechanisms;”<sup>8</sup> (3) “apply[ ] documented policies neutrally and objectively, with integrity and fairness;”<sup>9</sup> and (4) “[r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”<sup>10</sup>

The Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.<sup>11</sup> ICANN’s failure to provide complete responses to the Requester’s DIDP Request and failure to adhere to its own Bylaws raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for the Requester’s .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.<sup>12</sup>

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<sup>5</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>6</sup> *Id.*, Art. 4, § 4.2(o).

<sup>7</sup> *Id.*, Art. 1, § 1.2(a).

<sup>8</sup> *Id.*, Art. 3, § 3.1.

<sup>9</sup> *Id.*, Art. 1, § 1.2(v).

<sup>10</sup> *Id.*, Art. 1, § 1.2(vi).

<sup>11</sup> *See id.*, Arts. 1, 3-4.

<sup>12</sup> Exhibit 4, CPE Reconsideration Request 16-3 (Feb. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain categories of documents in the DIDP Request. Indeed, ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.<sup>13</sup> It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI’s findings and conclusions.

To prevent serious questions from arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to the Requester and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by the Requester that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure, and conflict check processes (Request No. 2) but also the underlying documents that substantiate ICANN’s claims.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN’s action materially affects the global gay community represented by the Requester. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and insecure operation of the identifiers managed by ICANN. Accountability, transparency, and

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<sup>13</sup> ICANN’s Documentary Information Disclosure Policy (last visited June 29, 2017) (“If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.”), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed and opaque ICANN damages the credibility, accountability, and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the Requester's BGC presentation and accompanying materials.<sup>14</sup> In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requester's community-based application for the .GAY string, in order to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.<sup>15</sup> This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>16</sup> ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that

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<sup>14</sup> See Exhibit 18, dotgay's Presentation to the Board Governance Committee (May 15, 2016), pp.2-3 <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

<sup>15</sup> See Exhibit 6, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>16</sup> ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. "), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including Request 16-3. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

## **8. Detail of Staff/Board Action/Inaction – Required Information**

### **8.1 Background**

The Requester elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant later that year – having only received 10 points.<sup>17</sup> In response, the Requester, supported by multiple community organizations, filed a Reconsideration Request with the BGC. The BGC granted the request, determining that the EIU did not follow procedure during the CPE process. As a result, the Requester’s application was sent to be re-evaluated by the EIU. However, the second CPE process produced the exact same results based on the same arguments.<sup>18</sup>

When this issue was brought before the BGC via another Reconsideration Request, though, the BGC excused the discriminatory conduct and the EIU’s policy and process violations. It refused to reconsider the CPE a second time. The Requester therefore filed a third Reconsideration Request, Request 16-3, on February 17, 2016 in response to the BGC’s non-response on many of

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<sup>17</sup> Exhibit 7, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>18</sup> See Exhibit 8, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

the issues highlighted in the second Reconsideration Request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.<sup>19</sup>

Almost a year later, and after numerous letters to ICANN,<sup>20</sup> on April 26, 2017, ICANN finally updated the Requester on the status of Request 16-3. The Requester received a letter from ICANN BGC Chair Chris Disspain indicating that Request 16-3 was “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>21</sup>

## 8.2 The DIDP Request

In response to this new information regarding the delay, on May 18, 2017, Arif Ali, on behalf of the Requester, filed the DIDP Request, in relation to the .GAY CPE.<sup>22</sup> The reason for

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<sup>19</sup> See Exhibit 9, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>20</sup> See Exhibit 10, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; Exhibit 12, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 14, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 13, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

<sup>21</sup> See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>22</sup> Exhibit 15, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

this request is twofold. *First*, the Requester sought to “ensure that information contained in documents concerning ICANN’s operational activities, within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>23</sup> *Second*, the Requester, like other gTLD applications, sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”<sup>24</sup> The Requester sought this information because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”<sup>25</sup>

As a result of this dearth of information from ICANN, the Requester made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, which are identified in **Question 3** above. The Requester concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”<sup>26</sup>

Prior to issuing its response to the DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to the DIDP Request.<sup>27</sup> ICANN explained that:

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

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

<sup>27</sup> Exhibit 16, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.<sup>28</sup>

No other information was provided to the Requester regarding the CPE Review Process at issue in its Request until ICANN issued its formal response to the DIDP Request on June 18, 2017.<sup>29</sup>

In response to ICANN's update on the CPE Review Process, and the lack of any additional information, the Requester sent ICANN a joint letter with DotMusic on June 10, 2017. The letter stated, *inter alia*, that:<sup>30</sup>

ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection." This is troubling for several reasons.

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<sup>28</sup> *Id.*

<sup>29</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>30</sup> Exhibit 17, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-leeve-10jun17-en.pdf>.

*First*, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

*Second*, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”

Accordingly, to ensure the integrity of FTI’s review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017.

### **8.3 ICANN’s Response to the Request**

However, on June 18, 2017, ICANN responded to the DIDP Request. ICANN issued a

response that provided the same information that had already been given to the Requester regarding the BGC's decision to review the CPE Process and to hire FTI in order to conduct an independent review.<sup>31</sup> ICANN further denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN's responses to these requests are as follows:

Request No. 1: All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"

*As stated in ICANN's Response to DIDP Request 20170505-1 that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:*

- *Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.*
- *Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.*
- *Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.*

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<sup>31</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

- *Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.*<sup>32</sup>

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

*ICANN provided the same response as for Item 1.*<sup>33</sup>

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

*ICANN provided the same response as for Item 1.*<sup>34</sup>

Request No. 8: The materials provided to the evaluator by the EIU;

*ICANN provided the same response as for Item 1.*<sup>35</sup>

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

*While ICANN provided a list of materials that it provided FTI, but also determined that the internal “documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previous submitted by dotgay.”*<sup>36</sup>

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.<sup>37</sup>

*ICANN provided the same response as for Item 1.*<sup>38</sup>

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

<sup>33</sup> *Id.*

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

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>38</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy as described in **Question 6** above.

**9. What are you asking ICANN to do now?**

The Requester asks ICANN to disclose the documents requested under Request Nos. 1-3, 8, 9, and 13.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, the Requester is a community applicant for .GAY and the organization that issued the DIDP Request to ICANN. It is materially affected by ICANN's decision to deny its Request for documents, especially since its gTLD application is at issue in the underling Request. And, further, the community it represents – the gay community – is materially affected by ICANN's failure to disclose the requested documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

This is not applicable.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



Arif Hyder Ali

June 30, 2017

Date

# **Exhibit 20**

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 17-3  
23 AUGUST 2017**

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The Requestor, dotgay LLC, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN organization violated its Core Values and policies established in the Bylaws concerning non-discriminatory treatment and transparency.<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with three other .GAY applications. The Requestor was invited to, and did, participate in CPE, but did not prevail.

On 22 October 2015, the Requestor sought reconsideration of the CPE report (Request 15-21). The BGC denied Request 15-21. On 17 February 2016, the Requestor sought reconsideration of the BGC's determination on Request 15-21 (Request 16-3).<sup>3</sup>

On 17 September 2016, the ICANN Board directed the President and CEO, or his designees, to undertake the CPE Process Review to review the process by which ICANN organization interacted with the CPE provider. On 18 October 2016, the Board Governance Committee (BGC) decided that the CPE Process Review should also include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation

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<sup>1</sup> Request 17-3, § 3, at Pg. 1.

<sup>2</sup> Request 17-3, § 10, at Pg. 16.

<sup>3</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

of the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending Requests for Reconsideration concerning CPE.<sup>4</sup> The BGC also placed the eight pending reconsideration requests relating to CPE on hold, including Request 16-3, pending completion of the CPE Process Review.

On 18 May 2017, the Requestor submitted the DIDP Request. The Requestor sought 13 categories of documents and information relating to the CPE Process Review.<sup>5</sup> On 18 June 2017, ICANN organization responded to the DIDP Request (DIDP Response) and explained that, with the exception of certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all the remaining documents responsive to eight (Items No. 4-7 and 9-12) of the 13 categories have already been published. The DIDP Response further explained that the documents responsive to Items No. 1-3, 8, and 13 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure. Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances

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<sup>4</sup> Prior to 22 July 2017, the Board Governance Committee was designated by the ICANN Board to review and consider Reconsideration Requests pursuant to Article 4, Section 4.2 of the Bylaws. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Pursuant to the amended Bylaws effective 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is designated to review and consider Reconsideration Requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

<sup>5</sup> Items No. 4-13 of the DIDP Request sought the same documents, in verbatim requests, as those requested in a DIDP Request filed by DotMusic Limited in May 2017. *Compare* DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>, with the DIDP Request. DotMusic Limited and the Requestor are represented by the same law firm, and that firm filed both DIDP Requests and filed Reconsideration Requests challenging both DIDP Requests. *See* Reconsideration Request 17-2; Request 17-3. Reconsideration Request 17-2 raises many of the same arguments that the Requestor raises in Request 17-3. *Compare* Reconsideration Request 17-2, with Request 17-3.

for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.

The Requestor thereafter filed the instant Reconsideration Request 17-3 (Request 17-3), which challenges certain portions of the DIDP Response. The Requestor claims that ICANN organization violated ICANN's Core Values and policies established in the DIDP and Bylaws concerning non-discriminatory treatment and transparency by: (1) determining not to produce certain documents responsive to Item No. 9; and (2) determining not to produce any documents responsive to Items No. 1-3, 8, and 13.<sup>6</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN organization transmitted Request 17-3 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>7</sup>

The BAMC has considered Request 17-3 and all relevant materials and recommends that the Board deny Request 17-3 because ICANN organization adhered to established policies and procedures in its response to the DIDP Request.

## **II. Facts.**

### **A. Background Facts.**

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with other .GAY applications. On 23 February 2014, the Requestor's Application was invited to participate in CPE.<sup>8</sup> The Requestor elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE provider, for evaluation.<sup>9</sup>

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<sup>6</sup> Request 17-3, § 3, at Pg. 3.

<sup>7</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 17-3, Pg. 1.

<sup>8</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>

<sup>9</sup> *See Id.*

On 6 October 2014, the CPE panel issued a “First CPE report,” concluding that the Application did not qualify for community priority.<sup>10</sup> The Requestor filed Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE report.<sup>11</sup> The BGC granted reconsideration on Request 14-44 on the grounds that the CPE provider had inadvertently failed to verify 54 letters of support for the Application.<sup>12</sup> At the BGC’s direction, the CPE provider conducted a “Second CPE” of the Application. The Application did not prevail in the Second CPE.<sup>13</sup>

On 22 October 2015, the Requestor sought reconsideration of the Second CPE report (Request 15-21).<sup>14</sup> On the same day, the Requestor filed a DIDP Request seeking the disclosure of 24 categories of documents relating to the Second CPE determination (2015 DIDP Request).<sup>15</sup> The 2015 DIDP Request sought, among other things, “policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered ‘policy’ under ICANN by-laws.”<sup>16</sup> ICANN organization responded to the 2015 DIDP Request on 21 November 2015, providing links to all the responsive, publicly available documents, furnishing an email not previously publicly

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<sup>10</sup> See CPE Report at 1.

<sup>11</sup> BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

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

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> DIDP Request No. 20151022-1, at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

<sup>16</sup> *Id.* at Pg. 2. The Requestor made an identical request in a 2014 DIDP Request. See DIDP Request No. 20141022-2 (2014 DIDP Request), at Pg. 2, <https://www.icann.org/en/system/files/files/lieben-request-22oct14-en.pdf>.

ICANN organization responded that to the extent it had documents responsive to that request, the documents were subject to certain identified Nondisclosure Conditions. Response to 2014 DIDP Request, <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

available, explaining that it did not possess documents responsive to several of the requests, and explaining that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.<sup>17</sup> On 4 December 2015, the Requestor revised Request 15-21 to challenge the response to the 2015 DIDP Request in addition to the Second CPE report.<sup>18</sup>

On 1 February 2016, the BGC denied Request 15-21.<sup>19</sup> On 17 February 2016, the Requestor filed a third reconsideration request (Request 16-3), seeking reconsideration of the BGC's determination on Request 15-21 concerning the CPE Report; the Requestor did not challenge the BGC's determination concerning the response to the 2015 DIDP Request.<sup>20</sup> On 26 June 2016, the BGC recommended that the Board deny Request 16-3.<sup>21</sup> The Board was scheduled to consider Request 16-3 on 17 September 2016. On 13 September 2016, the Requestor submitted an independent expert report for the Board's consideration as part of its evaluation of Request 16-3.<sup>22</sup> Accordingly, the Board deferred consideration of Request 16-3 to provide time for review of the report.<sup>23</sup>

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Specifically, the Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by

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<sup>17</sup> Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>,

<sup>18</sup> Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

<sup>19</sup> BGC Determination on Request 15-21, at Pg. 1

<sup>20</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>21</sup> BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>22</sup> Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>

<sup>23</sup> Minutes of ICANN Board, 15 September 2016, <https://www.icann.org/resources/board-material/minutes-2016-09-15-en#2.g>.

the Requestor on 15 May 2016 during its presentation to the BGC regarding Request 16-3, as well as issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.<sup>24</sup> As a result, on 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake the CPE Process Review, regarding the process by which ICANN organization interacted with the CPE provider.

On 18 October 2016, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in their evaluations of the community applications.<sup>25</sup> The BGC placed on hold the following reconsideration requests pending completion of the CPE Process Review: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>26</sup>

On 18 May 2017, the Requestor submitted the DIDP Request seeking the disclosure of the following categories of documentary information relating to the CPE Process Review:<sup>27</sup>

1. All documents relating to ICANN's request to "the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their

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<sup>24</sup> Dot Registry IRP Final Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>25</sup> 18 October 2016 Minutes of BGC Meeting, at Item 2, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>; 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>26</sup> 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>27</sup> DIDP Request at Pg. 4, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

- determinations with respect to certain pending CPE reports,” and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
  4. The identity of the individual or firm undertaking the CPE Process Review;
  5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
  6. The date of appointment of the evaluator;
  7. The terms of instructions provided to the evaluator;
  8. The materials provided to the evaluator by the EIU;
  9. The materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN’s Board or any subcommittee of the Board;
  10. The materials submitted by affected parties provided to the evaluator;
  11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
  12. The most recent estimates provided by the evaluator for the completion of the investigation; and
  13. All materials provided to ICANN by the evaluator concerning the CPE Process Review.<sup>28</sup>

Items No. 4-13 of the DIDP Request sought the same documents, in verbatim requests, as those requested in a DIDP Request filed by DotMusic Limited on 5 May 2017.<sup>29</sup> DotMusic Limited and the Requestor are represented by the same law firm, and that firm filed both DIDP Requests and filed Reconsideration Requests challenging the DIDP Requests.<sup>30</sup>

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<sup>28</sup> *Id.* at Pg. 5-6.

<sup>29</sup> Compare DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>, with the DIDP Request.

<sup>30</sup> See Reconsideration Request 17-2, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>; Request 17-3.

On 2 June 2017, ICANN organization published a status update on the CPE Process Review (Status Update).<sup>31</sup> The Status Update noted, among other things, that FTI Consulting Inc.'s Global Risk and Investigations Practice and Technology Practice (FTI) is conducting the CPE Process Review.<sup>32</sup> The Status Update explained that the CPE Process Review is occurring on two parallel tracks--the first track focuses on gathering information and materials from ICANN organization, including interviews and document collection, which was completed in March 2017; and the second track focuses on gathering information and materials from the CPE provider, and is ongoing.<sup>33</sup>

On 18 June 2017, ICANN organization responded to the DIDP Request.<sup>34</sup> As discussed below, the DIDP Response explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to eight (Items No. 4-7 and 9-12) of the 13 categories have already been published. The DIDP Response identified and provided hyperlinks to those publicly available responsive documents.<sup>35</sup> The DIDP Response further explained that all the documents responsive to Items No. 1-3, 8, and 13, and certain documents responsive to Item No. 9, were subject to Nondisclosure Conditions and were not appropriate for disclosure.<sup>36</sup> Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and

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<sup>31</sup> Status Update, <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

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

<sup>33</sup> *Id.*

<sup>34</sup> DIDP Response, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>

<sup>35</sup> *See generally id.*

<sup>36</sup> *Id.* at Pg. 3-7.

determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>37</sup>

On 30 June 2017, the Requestor filed Request 17-3, seeking reconsideration of ICANN organization's determination not to produce certain documents responsive to Item No. 9 and all documents responsive to Items. No. 1-3, 8, and 13 because they were subject to Nondisclosure Conditions.<sup>38</sup> The Requestor asserts that withholding the materials "has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency[,], and fairness of the CPE process." The Requestor also argues that denial of the DIDP is inappropriate because it "increases the likelihood of [community members] resorting to" IRP, which is "expensive and time-consuming."<sup>39</sup>

On 19 July 2017, the BGC concluded that Request 17-3 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.<sup>40</sup>

On 19 July 2017, ICANN organization transmitted Request 17-3 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. The Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN's Bylaws.<sup>41</sup> Accordingly, the BAMC reviews Request 17-3 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

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<sup>37</sup> DIDP Response at Pg. 7.

<sup>38</sup> The BAMC notes that the Requestor does not seek reconsideration of the response to Items No. 5, 7, or 11, although DotMusic, represented by the same counsel as the Requestor here, challenged ICANN organization's response to identical requests (to which ICANN organization provided an identical response to the one provided to the Requestor here) in Request 17-2. *See* Request 17-2, § 3, Pg. 9-10 (incorrectly marked 8-9).

<sup>39</sup> Request 17-3, § 6, at Pg. 6-8.

<sup>40</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l)(iii). As noted in footnote 4, ICANN's Bylaws were amended while Request 17-3 was pending. The BGC was tasked with reviewing Request 17-3 to determine if it was sufficiently stated, and it did so on 7 July 2017. Since that time, the BAMC is responsible for reviewing reconsideration requests, including Request 17-3.

<sup>41</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-3, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-response-ombudsman-19jul17-en.pdf>.

## B. Relief Requested

The Requestor asks the BAMC to “disclose the documents requested under Request Nos. 1-3, 8, 9, and 13.”<sup>42</sup>

## III. Issue.

The issues are as follows:

1. Whether ICANN organization complied with established ICANN policies in responding to the DIDP Request.
2. Whether ICANN organization complied with its Core Values, Mission, and Commitments.<sup>43</sup>

The BAMC notes that the Requestor indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-3 seeks reconsideration of staff and Board action or inaction.<sup>44</sup> The only subsequent discussion of Board action is the Requestor’s passing reference to its view that the BGC was required to provide materials it requested from CPE panels for use in its evaluation of pending reconsideration requests to the Requestor.<sup>45</sup> The Requestor makes no further arguments concerning the BGC’s actions or inactions, and does not ask ICANN organization to take any action concerning this issue. Rather, the Requestor focuses on ICANN organization’s response to the Requestor’s DIDP request.<sup>46</sup> Accordingly, the BAMC understands Request 17-3 to seek reconsideration of ICANN organization’s response to the Requestor’s DIDP Request, and *not* reconsideration of BGC action or inaction.<sup>47</sup>

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<sup>42</sup> Request 17-3, § 9, at Pg. 15.

<sup>43</sup> Request 17-3, § 3, at Pg. 3; *id.*, §§ 6-7, Pg. 5-8.

<sup>44</sup> Request 17-3, § 2, at Pg. 1.

<sup>45</sup> Request 17-3, § 6, at Pg. 5.

<sup>46</sup> Request 17-3, §§ 8-9, at Pg. 9-15.

<sup>47</sup> Further, we note that the BAMC has not completed its consideration of Request 16-3, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

#### **IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.**

##### **A. Reconsideration Requests**

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.<sup>48</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws that were in effect when Request 17-3 was filed, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>49</sup> That substantive provision did not change when ICANN’s Bylaws regarding reconsideration were amended effective 22 July 2017, although the determination as to whether a reconsideration request is sufficiently stated now falls to the BAMC. Pursuant to the current Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>50</sup> Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC

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<sup>48</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

<sup>49</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l).

<sup>50</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>51</sup>

On 19 July 2017, the BGC determined that Request 17-3 is sufficiently stated and sent Request 17-3 to the Ombudsman for review and consideration.<sup>52</sup> The Ombudsman thereafter recused himself from this matter.<sup>53</sup> Accordingly, the BAMC has reviewed Request 17-3 and issues this Recommendation.

## **B. Documentary Information Disclosure Policy**

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization's operational activities. In that regard, ICANN organization publishes many categories of documents on its website as a matter of due course.<sup>54</sup> In addition to ICANN organization's practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN organization make public documentary information "concerning ICANN's operational activities, and within ICANN's possession, custody, or control," that is not already publicly available.<sup>55</sup> The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization's operational activities, and within ICANN organization's

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<sup>51</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>52</sup> Ombudsman Action Regarding Request 17-3, Pg. 1-2.

<sup>53</sup> Ombudsman Action Regarding Request 17-3, Pg. 1.

<sup>54</sup> See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>55</sup> *Id.*

possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.<sup>56</sup>

In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).<sup>57</sup> The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization’s website].”<sup>58</sup>

Pursuant to the DIDP, ICANN organization reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others:

- i. Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors’ Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- ii. Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which

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<sup>56</sup> *Id.*

<sup>57</sup> See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>58</sup> *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

ICANN cooperates by inhibiting the candid exchange of ideas and communications;

- iii. Confidential business information and/or internal policies and procedures; and
- iv. Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>59</sup>

Notwithstanding the above, information that falls within any of the Nondisclosure Conditions *may* still be made public if ICANN organization determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>60</sup>

## **V. Analysis and Rationale.**

### **A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The DIDP Request.**

#### **1. The DIDP Response Complies With Applicable Policies And Procedures.**

The DIDP Response identified documentary information responsive to nine of the 13 items. For Items No. 4 through 7 and 9 through 12, ICANN organization determined that most of the responsive documentary information had already been published on ICANN's website.<sup>61</sup> Although the DIDP does not require ICANN organization to respond to requests seeking information that is already publicly available,<sup>62</sup> ICANN organization identified and provided the hyperlinks to 18 publicly available categories of documents that contain information responsive to Items No. 4 through 7 and 9-12.<sup>63</sup>

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<sup>59</sup> DIDP.

<sup>60</sup> *Id.*

<sup>61</sup> *See generally* DIDP Response.

<sup>62</sup> DIDP <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>63</sup> DIDP Response at Pg. 4-7.

The DIDP Response also explained that some of the documents responsive to Item No. 9, as well as all documents responsive to Items No. 1-3, 8, and 13, were subject to certain identified Nondisclosure Conditions. The DIDP Response further explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>64</sup>

The Requestor claims that ICANN organization's responses to Items No. 1, 2, 3, 8, 9, and 13 violated established policies and procedures. However, the Requestor provides nothing to demonstrate that ICANN organization violated any established policy or procedure.<sup>65</sup> As demonstrated below, ICANN organization's responses to Items No. 1, 2, 3, 8, 9, and 13 adhered to established policies and procedures.

The DIDP Response Process provides that “[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested . . . , interviews . . . the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request.”<sup>66</sup> Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions.<sup>67</sup> If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.<sup>68</sup>

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<sup>64</sup> DIDP Response at Pg. 7.

<sup>65</sup> Request 17-3, § 3, Pg. 3.

<sup>66</sup> DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

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

<sup>68</sup> *Id.*

**a. ICANN organization’s response to Items No. 1, 2, 3, 8, and 13 adhered to established policies and procedures.**

Items No. 1, 2, 3, 8, and 13 sought the disclosure of documents relating to the CPE

Process Review, including:

- [D]ocuments relating to ICANN’s request to “the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports” (Item. No. 1);
- All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,” and (b) all communications between the EIU and ICANN regarding the request (Item No. 2);
- All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation (Item No. 3);
- The materials provided to the evaluator by [the CPE provider] (Item No. 8)
- The materials provided to ICANN by the evaluator concerning the review (Item No. 13)<sup>69</sup>

With respect to these Items, ICANN organization explained that documents responsive to the requests “are not appropriate for disclosure” based on certain Nondisclosure Conditions.<sup>70</sup>

Consistent with the DIDP Response Process, ICANN organization searched for and identified documents responsive to Items No. 1, 2, 3, 8, and 13, then reviewed those materials and determined that they were subject to certain Nondisclosure Conditions discussed below.<sup>71</sup>

Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the

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<sup>69</sup> Request 17-3, § 3, at Pg. 9 (marked 8).

<sup>70</sup> DIDP Response at Pg. 4.

<sup>71</sup> DIDP Response Process.

disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.<sup>72</sup>

**b. ICANN organization’s response to Item No. 9 adhered to established policies and procedures.**

Item No. 9 sought the disclosure of “materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN’s Board or any subcommittee of the Board.”<sup>73</sup> In response to Item No. 9, the DIDP Response identified 16 categories of documents that ICANN organization provided to the evaluator. All but one of those categories had already been published. The DIDP Response provided the hyperlinks to the publicly available documents. The DIDP Response also disclosed that ICANN organization provided the evaluator with correspondence between ICANN organization and the CPE provider regarding the evaluations; however, said correspondence were subject to certain Nondisclosure Conditions and were not appropriate for the same reasons identified in ICANN organization’s response to the 2015 DIDP Request, which sought the same documentary information.<sup>74</sup> The BGC previously denied the Requestor’s Request 16-7, which challenged ICANN organization’s response to the 2015 DIDP Request.<sup>75</sup>

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<sup>72</sup> DIDP Response at Pg. 7.

<sup>73</sup> DIDP Request at Pg. 5.

<sup>74</sup> DIDP Response at Pg. 5-6, *citing* Response to 2015 DIDP Request. The 2015 DIDP Request in turn cites the Response to the Requestor’s 2014 DIDP Request. *See* Response to 2015 DIDP Request, at Pg. 5; *see also* Response to 2014 DIDP Request, at Pg. 4-5.

As noted in footnote 5, ICANN organization previously provided the same response to DotMusic Limited’s DIDP request for the same documents. *See* DIDP Response to Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>75</sup> BGC Determination on Request 15-21, at Pg. 29-32 (reviewing challenge to the 2015 DIDP Request).

**2. ICANN Organization Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.**

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.<sup>76</sup> Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN organization must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.<sup>77</sup> In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the DIDP Response.

In response to Item No. 9, ICANN organization determined that the internal correspondence between ICANN organization and the CPE provider regarding the evaluations were not appropriate for disclosure because, as ICANN organization previously explained in response to the 2014 and 2015 DIDP Requests, they comprised:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which

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<sup>76</sup> DIDP.

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

ICANN cooperates by inhibiting the candid exchange of ideas and communications;

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement;
- Confidential business information and/or internal policies and procedures; or
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.<sup>78</sup>

It is easy to see why these Nondisclosure Conditions apply to the materials responsive to Item No. 9. Those items request correspondence between ICANN organization and the CPE Provider.<sup>79</sup> The Requestor previously challenged ICANN organization's determination that the correspondence between ICANN and the CPE provider were not appropriate for disclosure for the same reasons in Request 15-21 without success.<sup>80</sup> The BAMC recommends that Request 17-3 be similarly denied. Equally important, the DIDP specifically carves out documents containing proprietary information and confidential information as exempt from disclosure pursuant to the Nondisclosure Conditions because the potential harm of disclosing that private information outweighs any potential benefit of disclosure.

Items No. 1, 2, 3, 8, and 13 seek materials shared between FTI, EIU, and ICANN organization concerning the CPE Process Review. In response to Items No. 1, 2, 3, 8, and 13, ICANN organization noted that it was in possession of requests for documents and information prepared by the evaluator to ICANN organization and the CPE provider, but that these documents were not appropriate for disclosure because they comprised:

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<sup>78</sup> DIDP Response at Pg. 6, citing Response to 2015 DIDP Request at Pg. 6, <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

<sup>79</sup> DIDP Request at Pg. 5.

<sup>80</sup> BGC Determination on Request 15-21, at Pg. 29-32, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation; and
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.<sup>81</sup>

These materials certainly comprise information that may “compromise the integrity of” ICANN organization’s and FTI’s “deliberative and decision-making process” with respect to the CPE Process Review.

The Requestor argues that the determinations as to the applicability of the specified Nondisclosure Conditions warrant reconsideration because “ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.”<sup>82</sup> The Requestor’s arguments fail because ICANN organization *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling

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<sup>81</sup> DIDP Response at Pg. 4; *see also* ICANN Defined Conditions for Nondisclosure. <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>82</sup> Request 17-3, § 6, at Pg. 6.

reasons for not disclosing the materials.<sup>83</sup> There is no policy or procedure requiring that ICANN organization to provide *additional* justification for nondisclosure.

**3. ICANN Organization Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public’s Interest In Disclosing The Information.**

The DIDP states that documents subject to the Nondisclosure Conditions “may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”<sup>84</sup> In accordance with the DIDP Response Process, ICANN organization conducted a review of the responsive documents that fell within the Nondisclosure Conditions and determined that the potential harm outweighed the public interest in the disclosure of those documents.<sup>85</sup>

**B. The Requestor’s Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration of the DIDP Response.**

The Requestor argues that ICANN violated the following Commitments and Core Values in the DIDP Response:<sup>86</sup>

- Operating in a manner consistent with the [] Bylaws for the benefit of the Internet community as a whole;<sup>87</sup>
- Employing open and transparent policy development mechanisms;<sup>88</sup>
- Applying documented policies neutrally and objectively, with integrity and fairness;<sup>89</sup>

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<sup>83</sup> DIDP Response at Pg. 4-6; 2016 DIDP Response at Pg. 4-7.

<sup>84</sup> *See id.*

<sup>85</sup> DIDP Response at Pg. 6; 2016 DIDP Response at Pg. 2.

<sup>86</sup> Request 17-3, § 6, at 5).

<sup>87</sup> ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a).

<sup>88</sup> The Requestor cites ICANN Bylaws, 1 October 2016, Art. 3, Section 3.1 in support; that Bylaw states that ICANN “shall operate to the maximum extent feasible in an open and transparent manner . . . including implementing procedures to . . . “encourage fact-based policy development work.”

<sup>89</sup> ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a)(v).

- Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.<sup>90</sup>

However, the Requestor provides no explanation for how these Commitments and Core Values relate to the DIDP Response at issue in Request 17-3 or how ICANN organization has violated these Commitments and Core Values.<sup>91</sup> The Requestor has not established grounds for reconsideration through its list of Commitments and Core Values.

## **VI. Recommendation**

The BAMC has considered the merits of Request 17-3, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-3.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. Request 17-3 was submitted on 30 June 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 30 July 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-3 is 23 August 2017, which is within the requisite 90 days of receiving Request 17-3.<sup>92</sup>

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<sup>90</sup> ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a)(vi).

<sup>91</sup> See generally Request 17-3, § 10, Pg. 13-14.

<sup>92</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

# **Exhibit 21**

# ICANN (Internet Corporation for Assigned Names and Numbers) Documentary Information Disclosure Policy

*NOTE: With the exception of personal email addresses, phone numbers and mailing addresses, DIDP Requests are otherwise posted in full on ICANN (Internet Corporation for Assigned Names and Numbers)'s website, unless there are exceptional circumstances requiring further redaction.*

ICANN (Internet Corporation for Assigned Names and Numbers)'s Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN (Internet Corporation for Assigned Names and Numbers)'s operational activities, and within ICANN (Internet Corporation for Assigned Names and Numbers)'s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.

A principal element of ICANN (Internet Corporation for Assigned Names and Numbers)'s approach to transparency and information disclosure is the identification of a comprehensive set of materials that ICANN (Internet Corporation for Assigned Names and Numbers) makes available on its website as a matter of course.

Specifically, ICANN (Internet Corporation for Assigned Names and Numbers) has:

- Identified many of the categories of documents that are already made public as a matter of due course
- Developed a time frame for responding to requests for information not already publicly available
- Identified specific conditions for nondisclosure of information
- Described the mechanism under which requestors may appeal a denial of disclosure

## Public Documents

ICANN (Internet Corporation for Assigned Names and Numbers) posts on its website at [www.icann.org](http://www.icann.org), numerous categories of documents in due course. A list of those categories follows:

- Annual Reports – <http://www.icann.org/en/about/annual-report>  
([/en/about/annual-report](http://www.icann.org/en/about/annual-report))
- Articles of Incorporation – <http://www.icann.org/en/about/governance/articles>  
([/en/about/governance/articles](http://www.icann.org/en/about/governance/articles))

- Board Meeting Transcripts, Minutes and Resolutions – <http://www.icann.org/en/groups/board/meetings> (/en/groups/board/meetings)
- Budget – <http://www.icann.org/en/about/financials> (/en/about/financials)
- Bylaws (current) – <http://www.icann.org/en/about/governance/bylaws> (/en/about/governance/bylaws)
- Bylaws (archives) – <http://www.icann.org/en/about/governance/bylaws/archive> (/en/about/governance/bylaws/archive)
- Correspondence – <http://www.icann.org/correspondence/> (/correspondence/)
- Financial Information – <http://www.icann.org/en/about/financials> (/en/about/financials)
- Litigation documents – <http://www.icann.org/en/news/litigation> (/en/news/litigation)
- Major agreements – <http://www.icann.org/en/about/agreements> (/en/about/agreements)
- Monthly Registry reports – <http://www.icann.org/en/resources/registries/reports> (/en/resources/registries/reports)
- Operating Plan – <http://www.icann.org/en/about/planning> (/en/about/planning)
- Policy documents – <http://www.icann.org/en/general/policy.html> (/en/general/policy.html)
- Speeches, Presentations & Publications – <http://www.icann.org/presentations> (/presentations)
- Strategic Plan – <http://www.icann.org/en/about/planning> (/en/about/planning)
- Material information relating to the Address Supporting Organization (Supporting Organization) (ASO (Address Supporting Organization)) – <http://aso.icann.org/docs> (<http://aso.icann.org/docs/>) including ASO (Address Supporting Organization) policy documents, Regional Internet Registry (RIR (Regional Internet Registry)) policy documents, guidelines and procedures, meeting agendas and minutes, presentations, routing statistics, and information regarding the RIRs
- Material information relating to the Generic Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) – <http://gns0.icann.org> (<http://gns0.icann.org>) – including correspondence and presentations, council resolutions, requests for comments, draft documents, policies, reference documents (see <http://gns0.icann.org/reference-documents.htm> (<http://gns0.icann.org/reference-documents.htm>)), and council

administration documents (see <http://gnso.icann.org/council/docs.shtml> (<http://gnso.icann.org/council/docs.shtml>)).

- Material information relating to the country code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) – <http://ccnso.icann.org> (<http://ccnso.icann.org>) – including meeting agendas, minutes, reports, and presentations
- Material information relating to the At Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee)) – <http://atlarge.icann.org> (<http://atlarge.icann.org>) – including correspondence, statements, and meeting minutes
- Material information relating to the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) – <http://gac.icann.org/web/index.shtml> (<http://gac.icann.org/web/index.shtml>) – including operating principles, gTLD (generic Top Level Domain) principles, ccTLD (Country Code Top Level Domain) principles, principles regarding gTLD (generic Top Level Domain) Whois issues, communiqués, and meeting transcripts, and agendas
- Material information relating to the Root Server Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) – <http://www.icann.org/en/groups/rssac> ([/en/groups/rssac](http://www.icann.org/en/groups/rssac)) – including meeting minutes and information surrounding ongoing projects
- Material information relating to the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) – <http://www.icann.org/en/groups/ssac> ([/en/groups/ssac](http://www.icann.org/en/groups/ssac)) – including its charter, various presentations, work plans, reports, and advisories

## Responding to Information Requests

If a member of the public requests information not already publicly available, ICANN (Internet Corporation for Assigned Names and Numbers) will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN (Internet Corporation for Assigned Names and Numbers) will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN (Internet Corporation for Assigned Names and Numbers) denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.

## Defined Conditions for Nondisclosure

ICANN (Internet Corporation for Assigned Names and Numbers) has identified the following set of conditions for the nondisclosure of information:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship with that party.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN (Internet Corporation for Assigned Names and Numbers)'s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN (Internet Corporation for Assigned Names and Numbers) Directors, ICANN (Internet Corporation for Assigned Names and Numbers) Directors' Advisors, ICANN (Internet Corporation for Assigned Names and Numbers) staff, ICANN (Internet Corporation for Assigned Names and Numbers) consultants, ICANN (Internet Corporation for Assigned Names and Numbers) contractors, and ICANN (Internet Corporation for Assigned Names and Numbers) agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates by inhibiting the candid exchange of ideas and communications.
- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.
- Information provided to ICANN (Internet Corporation for Assigned Names and Numbers) by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Confidential business information and/or internal policies and procedures.

- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.
- Trade secrets and commercial and financial information not publicly disclosed by ICANN (Internet Corporation for Assigned Names and Numbers).
- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Information that falls within any of the conditions set forth above may still be made public if ICANN (Internet Corporation for Assigned Names and Numbers) determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to deny disclosure of information under conditions not designated above if ICANN (Internet Corporation for Assigned Names and Numbers) determines that the harm in disclosing the information outweighs the public interest in disclosing the information.

ICANN (Internet Corporation for Assigned Names and Numbers) shall not be required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.

## Appeal of Denials

To the extent a requestor chooses to appeal a denial of information from ICANN (Internet Corporation for Assigned Names and Numbers), the requestor may follow the Reconsideration Request procedures or Independent Review procedures, to the extent either is applicable, as set forth in Article IV, Sections 2 and 3 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, which can be found at [http://www.icann.org/en/about/governance/bylaws \(/en/about/governance/bylaws\)](http://www.icann.org/en/about/governance/bylaws (/en/about/governance/bylaws)).

## DIDP Requests and Responses

Request submitted under the DIDP and [ICANN \(Internet Corporation for Assigned Names and Numbers\)](http://www.icann.org/en/about/transparency) responses are available here:

[http://www.icann.org/en/about/transparency \(/en/about/transparency\)](http://www.icann.org/en/about/transparency)

## Guidelines for the Posting of Board Briefing Materials

The posting of Board Briefing Materials on the Board Meeting Minutes page (at [http://www.icann.org/en/groups/board/meetings \(/en/groups/board/meetings\)](http://www.icann.org/en/groups/board/meetings (/en/groups/board/meetings))) is guided by the application of the DIDP. The Guidelines for the Posting of Board Briefing Materials are available at [http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm \(/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm\)](http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm (/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm)).

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To submit a request, send an email to [didp@icann.org \(mailto:didp@icann.org\)](mailto:didp@icann.org)

# **Exhibit 22**

# Minutes | Board Governance Committee (BGC) Meeting

01 Aug 2017

BGC Attendees: Cherine Chalaby, Chris Disspain (Chair), Markus Kummer, Ram Mohan, and Mike Silber

BGC Member Apologies: Rinalia Abdul Rahim and Asha Hemrajani

Other Board Member Attendees: Becky Burr, Steve Crocker, and Ron da Silva

ICANN (Internet Corporation for Assigned Names and Numbers) Organization

Attendees: Michelle Bright (Board Content Senior Manager), John Jeffrey (General Counsel and Secretary), Vinciane Koenigsfeld (Board Training & Content Senior Manager), Elizabeth Le (Associate General Counsel), Wendy Profit (Manager, Board Operations), and Amy Stathos (Deputy General Counsel)

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The following is a summary of discussions, actions taken, and actions identified:

- **Update on Community Priority Evaluation Process Review (Review)** - The BGC received a briefing on the status of the CPE process review. The second track of the Review, which focuses on gathering information and materials from the CPE provider, is still ongoing. This is in large part because, despite repeated requests from ICANN (Internet Corporation for Assigned Names and Numbers) beginning in March 2017, the CPE provider failed to produce a single document until just very recently – four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced. FTI is in the process of reviewing the documents that have been produced. The BGC discussed the importance of bring the work on the second track to a closure within a definitive time period so that the FTI can conclude their work.
  - Action:
    - ICANN (Internet Corporation for Assigned Names and Numbers) organization to follow up with FTI on what documents are outstanding from the CPE provider in response to FTI's document request.
    - ICANN (Internet Corporation for Assigned Names and Numbers) organization to continue providing the BGC with updates on the status of the review, and publish update(s) as appropriate.
- **Board Committee and Leadership Selection Procedures** - The BGC reviewed and discussed proposed revisions to the Board Committee and Leadership Selection Procedures (Procedures). The BGC agreed that

Committee members should review revisions and provide further edits, if any, by the next BGC meeting, whereupon the Committee will revisit the issue.

- Action:

- BGC members to provide comments and further edits to the Procedures via email by the next BGC meeting.

- **Discussion of Board Committees and Working Groups Slate** – The BGC discussed the Board Committees and Working Group slates based upon the preferences indicated by the Board members. The BGC also discussed standardizing the Committee charters to specify a minimum and maximum number of Committee members but allow flexibility for the composition of Committee within that range.

- Action:

- ICANN (Internet Corporation for Assigned Names and Numbers) organization to revise the Committee charters in accordance with the discussion regarding composition of the Committees for consideration by the BGC at its next meeting.

- **Any Other Business**

- Nominating Committee (NomCom) 2018 Chair and Chair-Elect Leadership – The BGC noted that it is anticipated that the interview process for the NomCom 2018 Chair and Chair-Elect Leadership will be completed by the next BGC meeting and that the BGC will discuss its recommendations at the meeting.

Published on 24 August 2017.

## REFERENCE MATERIALS – BOARD PAPER NO. 2017.09.23.2b

**TITLE:** **Consideration of Reconsideration Request 17-3**

### **Document/Background Links**

The following attachments are relevant to the Board's consideration of Reconsideration Request 17-3.

Attachment A is [Reconsideration Request 17-3](#), submitted on 30 June 2017.

Attachment B are [Exhibits 1 to 18](#) in support of Reconsideration Request 17-3, submitted on 30 June 2017.

Attachment C is the [Ombudsman Action on Request 17-3](#), dated 19 July 2017.

Attachment D is the [BAMC Recommendation on Request 17-3](#), issued 23 August 2017.

Attachment E is the [request](#) submitted by dotgay LLC pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), dated 18 May 2017.

Attachment F is the [response](#) to dotgay LLC's DIDP request, dated 18 June 2017.

Attachment G is the [Rebuttal](#) and [Exhibits 19 to 22](#) in support of Request 17-3, submitted on 8 September 2017.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 11 September 2017

Email: amy.stathos@icann.org

# **Exhibit 5**

13 DECEMBER 2017

# COMPILATION OF THE REFERENCE MATERIAL RELIED UPON BY THE CPE PROVIDER IN CONNECTION WITH THE EVALUATIONS WHICH ARE THE SUBJECT OF PENDING RECONSIDERATION REQUESTS

PREPARED FOR JONES DAY

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## I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the New gTLD Program.<sup>1</sup> The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.<sup>2</sup>

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.<sup>3</sup> The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).<sup>4</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization to conduct the CPE Process Review.

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<sup>1</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>2</sup> *Id.*

<sup>3</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>4</sup> *Id.*

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.<sup>5</sup> Among other things, he identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.<sup>6</sup> On 2 June 2017, ICANN organization issued a status update.<sup>7</sup> ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.<sup>8</sup> The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

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<sup>5</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>6</sup> See *id.* The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

<sup>7</sup> <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

<sup>8</sup> <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

This report addresses Scope 3 of the CPE Process Review. FTI was asked to identify and compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of the following Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),<sup>9</sup> 14-32 (.INC),<sup>10</sup> 14-33 (.LLP), 16-3 (.GAY),<sup>11</sup> 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

## II. Executive Summary

In connection with Scope 3, FTI analyzed each CPE report prepared by the CPE Provider and published by ICANN organization for the evaluations that are the subject of pending Reconsideration Requests. FTI then analyzed the CPE Provider's working papers associated with each evaluation. The CPE Provider's working papers were comprised of information inputted by the CPE Provider into a database, spreadsheets prepared by the core team for each evaluation and which reflect the initial scoring decisions, notes, reference material,<sup>12</sup> and every draft of each CPE report.

In the course of its review and investigation, FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in

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<sup>9</sup> Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>.

<sup>10</sup> Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

<sup>11</sup> After completion by the CPE Provider of the first CPE in October 2014, through the Reconsideration process, a procedural error in the CPE was identified and the BGC determined that the application should be re-evaluated. See <https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>. At the BGC's direction, the CPE Provider then conducted a new CPE of the application ("second .GAY evaluation" and "second final CPE report," cited as "GAY 2 CPE report"). For purposes of Scope 3 of the CPE Process Review, the second .GAY evaluation is subject to a pending Reconsideration Request and thus is the relevant evaluation.

<sup>12</sup> The CPE Provider's working papers associated with some evaluations contained the actual reference material relied upon by the CPE Provider, as compared to citations to reference material that appeared in the other working papers.

the CPE Provider's working papers to the extent that such material was not otherwise cited in the final CPE report.

Of the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the report. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider's working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI's investigation, FTI finds that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider's working papers associated with the first .GAY evaluation.

Ultimately, FTI observed that the CPE Provider routinely relied upon reference material in connection with the CPE Provider's evaluation of three CPE criteria: (i) Community Establishment (Criterion 1); (ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4). Each example of the reference material identified by FTI is attached to this report in Appendix A. FTI observed no citations to reference material in connection with the CPE Provider's

evaluation of the Registration Policies criterion (Criterion 3) for any of the eight relevant evaluations.<sup>13</sup>

### III. Methodology

In Scope 3 of the CPE Process Review, FTI was asked to identify and compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of the following Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),<sup>14</sup> 14-32 (.INC),<sup>15</sup> 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Reconsideration is an accountability mechanism available under ICANN organization's Bylaws and involves a review process administered by the BGC.<sup>16</sup> Since the commencement of the New gTLD Program, more than 20 Reconsideration Requests have been filed where the requestor sought reconsideration of CPE results. FTI reviewed in detail these requests and the corresponding BGC recommendations and/or determinations, as well as the Board's actions associated with these requests.<sup>17</sup>

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<sup>13</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-10-4-17 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>14</sup> Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>.

<sup>15</sup> Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

<sup>16</sup> Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2 (e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2 (e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

<sup>17</sup> *Id.*

Several requestors made claims that are relevant to Scope 3 of the CPE Process Review.

In particular, as noted in Mr. Disspain's letter of 26 April 2017:

[C]ertain complainants [have] requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE Provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs.<sup>18</sup>

To complete its investigation, FTI first reviewed publicly available documents pertaining to CPE to gain a comprehensive understanding of the relevant background facts concerning CPE. The publicly available documents reviewed by FTI, and which informed FTI's investigation for Scope 3, are identified in FTI's reports addressing Scope 1 and Scope 2 of the CPE Process Review. FTI also interviewed relevant ICANN organization and CPE Provider personnel. These interviews are described in further detail in FTI's reports addressing Scopes 1 and 2 of the CPE Process Review.

In the context of Scope 3, following FTI's review of relevant background materials and interviews of relevant personnel, FTI reviewed each CPE report prepared by the CPE Provider and published by ICANN organization for the evaluations that are the subject of pending Reconsideration Requests. FTI then analyzed the CPE Provider's working papers associated with each evaluation.

FTI then identified each instance where the CPE Provider referenced research and provided a citation to that research in the eight relevant evaluations. FTI also identified each instance where the CPE provider referenced research but did not include citations to such research in the final CPE report. Finally, FTI identified each additional instance where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. For each reference material

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<sup>18</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

identified, FTI catalogued the CPE criterion and sub-criterion with which the reference material was associated.

In instances where the CPE Provider's final CPE report referenced research but did not provide a supporting citation, FTI undertook a review of the CPE Provider's working papers to determine if the referenced research was reflected in those materials. For example, if the final CPE report referenced research without providing a supporting citation in connection with sub-criterion 2-A, Nexus, FTI then reviewed the working papers for the relevant evaluation and determined if those materials reflected research associated with sub-criterion 2-A, Nexus. If the working papers provided citations to research undertaken in connection with the sub-criterion at issue, i.e., Nexus in this example, then FTI determined that the citations corresponded to the research referenced without citation in the final CPE report.<sup>19</sup>

FTI did not rely upon the substance of the reference material. Nor did FTI assess the propriety or reasonableness of the research undertaken by the CPE Provider. Both analyses are beyond the purview of Scope 3.

FTI defined "reference material" in a manner consistent with the CPE Panel Process Document.<sup>20</sup> Specifically, according to the CPE Panel Process Document, the CPE

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<sup>19</sup> The reference materials that were recorded in the working papers are URLs to websites that the CPE Provider visited or the URLs of research queries conducted by the CPE Provider. The working papers did not include a static rendering of webpages as they existed at the time of access by the CPE Provider. At times, FTI observed that some URLs cited in the CPE Provider's working papers were no longer active, which is not surprising because FTI received the CPE Provider's working papers long after the CPE Provider had completed the CPE process. As a result, FTI is not able to determine if the links were not active at the time they were accessed by the CPE Provider or if they were de-activated after the CPE Provider's evaluation process concluded. Similarly, in some instances, FTI observed that the URLs cited in the working papers contained typographical errors; however, FTI is not able to determine if the typographical errors appeared in the URLs at the time that the URLs were accessed by the CPE Provider or if they were incorrectly cited by the CPE Provider.

<sup>20</sup> See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>). The CPE Panel Process Document explains that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions. The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including

Provider’s evaluators provided individual evaluation results based on their assessment of the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines, application materials, and “secondary research without any influence from core team members.”<sup>21</sup> Further, “[i]f the core team so decides, additional research may be carried out to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures.”<sup>22</sup> FTI considered both the evaluators’ “secondary research” and any “additional research” conducted at the request of the core team to be within scope.

## IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.<sup>23</sup> CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.<sup>24</sup> CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all

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scoring rubrics, definitions of key terms, and specific questions to be scored. See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>). The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process. The methodology that the CPE Provider undertook to evaluate the CPE criteria is further detailed in FTI’s report addressing Scope 2 of the CPE Process Review.

<sup>21</sup> CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

<sup>22</sup> *Id.*

<sup>23</sup> See Applicant Guidebook, Module 4.2 at Pgs. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>24</sup> See Applicant Guidebook, Module 4.2 at Pgs. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).<sup>25</sup>

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.<sup>26</sup> The CPE Provider personnel interviewed by FTI stated that they were strict constructionists and used the Applicant Guidebook as their “bible.” Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

During its investigation, FTI learned that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, "Is the community clearly delineated?"; the same question appears in the CPE Guidelines. The “Answer” field had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a "yes" or "no" response. In the “Evidence” field, the evaluator provided his/her reasoning for his/her answer. In the “Source” field, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including, but not limited to, the application (or sections thereof), reference material, or letters of support or opposition.

FTI observed that reference material was cited in the “Source” field of the database, spreadsheets generated by the Project Coordinator and core team for each evaluation and which reflect the scoring decisions, memoranda drafted by the evaluators, draft

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<sup>25</sup> *Id.*

<sup>26</sup> <https://newgtlds.icann.org/en/applicants/agb>.

reports, and in the final CPE reports. FTI observed that the Project Coordinator at times requested that the member of the core team responsible for drafting the CPE report incorporate citations to the evaluator(s)' reference material into the draft report to strengthen the rationale with respect to a particular point.

FTI interviewed both ICANN organization and CPE Provider personnel about the CPE process and interviewees from both organizations stated that ICANN organization played no role in whether or not the CPE Provider conducted research or accessed reference material in any of the evaluations. That ICANN organization was not involved in the CPE Provider's research process was confirmed by FTI's review of relevant email communications (including attachments) provided by ICANN organization, inasmuch as FTI observed no instance where ICANN organization suggested that the CPE Provider undertake (or not undertake) research. Instead, research was conducted at the discretion of the CPE Provider.<sup>27</sup> Further, FTI observed that when ICANN organization commented on a draft report, it was only to suggest amplifying rationale based on materials already reviewed and analyzed by the CPE Provider.

## V. The CPE Provider Performed Research in the Eight Evaluations Which are the Subject of Pending Reconsideration Requests.

With respect to the eight evaluations which are the subject of pending Reconsideration Requests, FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider's working papers to the extent such materials were not otherwise cited in the final CPE report.

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<sup>27</sup> See Applicant Guidebook Module 4.2.3 at 4-9 ("The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.")  
(<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

The following chart provides the total number of citations to research or reference material in the final CPE report and working papers for each of the eight relevant evaluations, broken down by relevant CPE criterion:

String	<u>Criterion 1:</u> Community Establishment	<u>Criterion 2:</u> Nexus between Proposed String and Community	<u>Criterion 3:</u> Registration Policies	<u>Criterion 4:</u> Community Endorsement	Additional Research Materials Associated with String	<b>Total</b>
.LLC	18	5	0	11	2	36
.INC	13	4	0	6	0	23
.LLP	21	8	0	9	1	39
.GAY (Reevaluation)	27	51	0	9	1	88
.MUSIC (DotMusic Ltd.)	20	2	0	1	0	23
.CPA (Australia)	26	18	0	2	0	46
.HOTEL	42	3	0	12	6	63
.MERCK KGaA	6	8	0	2	0	16
<b>Total</b>	173	99	0	52	10	334

Below, FTI lists each reference material relied upon by the CPE Provider for the eight relevant evaluations, organized by criterion and sub-criterion. By comparing the final CPE reports to the CPE Provider’s working papers, FTI determined that some of the reference material that the CPE Provider relied upon during the CPE process was not cited in the final CPE report, but instead was only reflected in the CPE Provider’s working papers. As a result, below FTI identifies the reference material reflected in the final CPE reports as well as the reference material reflected in the working papers associated with those evaluations.

As detailed below, of the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL,

and .MERCCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider’s working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the report. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance, in the second .GAY final CPE report, FTI observed that while the final report referenced research, the citations supporting such research were not included in the final report or the working papers for the second .GAY evaluation. However, based on FTI’s review of the CPE Provider’s working papers associated with the first .GAY evaluation, FTI finds that the citations supporting the research referenced in the second .GAY final CPE report may have been cited in those materials.

### **Brief Note on CPE Criteria Definitions**

FTI’s report addressing Scope 2 of the CPE Process Review extensively details the CPE criteria and FTI incorporates that discussion for purposes of this report. For the reader’s benefit, the following summary is provided:

- **Criterion 1: Community Establishment.** The Community Establishment criterion evaluates “the community as explicitly identified and defined according to statements in the application.”<sup>28</sup> The Community Establishment criterion is measured by two sub-criterion: (i) 1-A, “Delineation;” and (ii) 1-B, “Extension.”<sup>29</sup>

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<sup>28</sup> *Id.*

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

- **Criterion 2: Nexus between Proposed String and Community.** The Nexus criterion evaluates “the relevance of the string to the specific community that it claims to represent.”<sup>30</sup> The Nexus criterion is measured by two sub-criterion: (i) 2-A, “Nexus”; and (ii) 2-B, “Uniqueness.”<sup>31</sup>
- **Criterion 3: Registration Policies.** The Registration Policies criterion evaluates the registration policies set forth in the application on four elements, each of which is worth one point: (i) 3-A, “Eligibility”; (ii) 3-B, “Name Selection”; (iii) 3-C, “Content and Use”; and (iv) 3-D, “Enforcement.”<sup>32</sup>
- **Criterion 4: Community Endorsement.** The Community Endorsement criterion evaluates community support for and/or opposition to an application.”<sup>33</sup> The Community Endorsement criterion is measured by two sub-criterion: (i) 4-A, “Support”; and (ii) 4-B, “Opposition.”<sup>34</sup>

## CPE Reports Subject to Pending Reconsideration Requests

As noted above, the following evaluations are the subject of Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),<sup>35</sup> 14-32 (.INC),<sup>36</sup> 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK). The analysis below addresses each evaluation in the foregoing

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<sup>30</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>31</sup> *Id.* at Pgs. 4-12 and 4-13.

<sup>32</sup> See *id.* at Pgs. 4-14-4-15.

<sup>33</sup> See *id.* at Pgs. 4-17.

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

<sup>35</sup> Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>

<sup>36</sup> Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

order, which is the order in which the relevant Reconsideration Requests were submitted.

## A. .LLC

### 1. Criterion 1: Community Establishment

#### 1-A Delineation

The final CPE report makes one reference to the CPE Panel’s research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 1-A, Delineation.<sup>37</sup> The final CPE report states:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLC. Based on the Panel’s research, there is no evidence of LLCs from different sectors acting as a community.<sup>38</sup>

The CPE Provider is referring to the Applicant Guidebook’s requirement that the community demonstrate “an awareness and recognition of a community among its members.”<sup>39</sup>

Because the final CPE report does not provide citations supporting the research undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion.

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<sup>37</sup> .LLC CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

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

<sup>39</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise reflected in the final CPE report: 1) the Wikipedia page for “Limited Liability Company,”<sup>40</sup> 2) the “LLC” webpage on [www.sba.com](http://www.sba.com),<sup>41</sup> and 3) the “corporation” webpage on [www.sba.com](http://www.sba.com).<sup>42</sup> Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain 13 citations to research or reference material for this sub-criterion, 1-A, Delineation, that were not otherwise cited in the final CPE report.<sup>43</sup>

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<sup>40</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_company](http://en.wikipedia.org/wiki/Limited_liability_company). According to Wikipedia: About, “Anyone with Internet access can write and make changes to Wikipedia articles, except in limited cases where editing is restricted to prevent disruption or vandalism.” See <https://en.wikipedia.org/wiki/Wikipedia:About>. Further, “Unlike printed encyclopedias, Wikipedia is continually created and updated.” *Id.* For purposes of this report, FTI referenced Wikipedia pages as they appear now and not as they may have appeared at the time of review by the CPE Provider.

<sup>41</sup> <http://www.sba.com/legal/llc/>.

<sup>42</sup> <http://www.sba.gov/content/corporation>.

<sup>43</sup> They are:

[http://en.wikipedia.org/wiki/Limited\\_liability\\_company](http://en.wikipedia.org/wiki/Limited_liability_company);

<http://www.sba.com/legal/llc/>;

<http://www.sba.gov/content/corporation> (cited two times);

<http://dotregistry.org/>;

<http://dotregistry.org/about/who-is-dot-registry>;

<http://dotregistry.org/corporate-tlds/llc-domains> (cited two times);

<http://www.nass.org/>;

<http://www.nass.org/nass-committees/nassbusiness-services-committee/> (cited two times and referenced as “Nass Business Services Committee website” one time without providing the URL) (This is no longer an active link); and

<http://www.llc-reporter.com/16.htm> (This is no longer an active link).

### 1-B Extension

The final CPE report makes two references to the Panel’s research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 1-B, Extension.<sup>44</sup> The final report states twice:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLC. Based on the Panel’s research, there is no evidence of LLCs from different sectors acting as a community.<sup>45</sup>

Although this statement appears in both the “Size” and “Longevity” sub-sections of the CPE Panel’s discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel’s reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the research undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the Wikipedia page for “Limited Liability Company,”<sup>46</sup> 2) the “LLC” webpage on

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<sup>44</sup> .LLC CPE Report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

<sup>45</sup> *Id.*

<sup>46</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_company](http://en.wikipedia.org/wiki/Limited_liability_company).

www.sba.com,<sup>47</sup> and 3) the “corporation” webpage on www.sba.com.<sup>48</sup> Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain two citations to research or reference material for sub-criterion 1-B, Extension, that were not otherwise cited in the final CPE report.<sup>49</sup>

## 2. Criterion 2: Nexus between Proposed String and Community

### 2-A Nexus

The final CPE report makes one reference to the Panel’s research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 2-A, Nexus.<sup>50</sup> The final report states—without indicating the source of the information—that “[w]hile the string identifies the name of the community, it captures a wider geographical remit than the community has, as the corporate identifier is used in other jurisdictions

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<sup>47</sup> <http://www.sba.com/legal/llc/>.

<sup>48</sup> <http://www.sba.gov/content/corporation>.

<sup>49</sup> They are:

<http://www.llc-reporter.com/16.htm> (This is no longer an active link); and

<http://www.sba.gov/content/limited-liability-companyllc> (This is no longer an active link).

<sup>50</sup> .LLC CPE Report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>). FTI understands that in Reconsideration Request 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), the Requestor made the following claim: “The Panel also states that its decision to not award any points to the .LLC Community Application for 2-A Nexus is based on “[t]he Panel’s research [which] indicates that while other jurisdictions use LLC as a corporate identifier, their definitions are quite different and there are no other known associations or definitions of LLC in the English language.” Reconsideration Request 14-30 (<https://www.icann.org/en/system/files/files/request-dotregistry-redacted-25jun14-en.pdf>), Pg. 7. The language the Requestor quoted from the CPE report is contained in a block quote that the CPE report states came from the “application documentation,” and drafts of the report indicate that the block quote originally said “Our research indicates that . . . .” .LLC CPE Report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf> and drafts). FTI therefore finds it reasonable to conclude that the statement references the *applicant’s* research, not the Panel’s research.

(outside the US).<sup>51</sup> The CPE Panel is referring to the Applicant Guidebook’s requirement that the string “closely describes the community or the community members, without over-reaching substantially beyond the community.”<sup>52</sup> This requirement is a component of sub-criterion 2-A, Nexus.<sup>53</sup>

Because the final CPE report does not provide citations supporting the research purportedly undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Nexus sub-criterion. Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references: 1) the Wikipedia page for LLCs,<sup>54</sup> 2) a “Web search on [REDACTED],” and 3) the “International equivalents” sub-page for the Wikipedia page for LLCs.<sup>55</sup> Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

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<sup>51</sup> .LLC CPE Report Pg. 5 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

<sup>52</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>53</sup> See *id.*

<sup>54</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_company](http://en.wikipedia.org/wiki/Limited_liability_company).

<sup>55</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_company#International\\_equivalents](http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents) (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”).

Including the citations listed above, the working papers reflect three references to research or reference material for this sub-criterion, which may be related to the research discussed in the final CPE report.<sup>56</sup>

### 2-B Uniqueness

The final CPE report does not contain any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain one citation to research or reference material for this sub-criterion.<sup>57</sup>

## 3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

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<sup>56</sup> They are:

[http://en.wikipedia.org/wiki/Limited\\_liability\\_company](http://en.wikipedia.org/wiki/Limited_liability_company); and

[http://en.wikipedia.org/wiki/Limited\\_liability\\_company#International\\_equivalents](http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents) (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”); this document may relate to the statement in the final CPE report that LLC “is used in other jurisdictions (outside the US).”

FTI notes that the CPE Provider referenced a “Web search on [REDACTED]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the three references to research in this sub-criterion.

<sup>57</sup> The working papers cite:

[http://en.wikipedia.org/wiki/Limited\\_liability\\_company#International\\_equivalents](http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents) in a discussion of Uniqueness (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”).

## 4. Criterion 4: Community Endorsement

### 4-A Support

The final CPE report does not contain any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect ten references to research or reference material for this sub-criterion.<sup>58</sup>

### 4-B Opposition

The final CPE report does not contain any references to research or reference material for sub-criterion 4-B, Opposition, but the working papers reflect one reference to research or reference material for this sub-criterion.<sup>59</sup>

### Additional Research Materials Associated with .LLC

The working papers include two documents not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its research concerning the .LLC CPE application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.<sup>60</sup>

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<sup>58</sup> They are:

[http://icannwiki.com/index.php/Dot\\_Registry\\_LLC](http://icannwiki.com/index.php/Dot_Registry_LLC);

Six references to <http://dotregistry.org/> or to the “Applicant website” without providing the full URL. FTI included each reference to the “Applicant website” as one of the ten references to research in this sub-criterion.

FTI notes that the CPE Provider made three references to “Web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for these searches. FTI included each of these searches as one of the ten references to research in this sub-criterion.

<sup>59</sup> FTI notes that the CPE Provider referenced the “Applicant website” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as the one reference to research in this sub-criterion.

<sup>60</sup> The documents are:

A one-page Adobe PDF file named “businessRegisterStatisticsFeb2014.pdf” containing weekly data for the month of February, 2014 concerning registrations, liquidations, and dissolutions of companies

## B. .INC

### 1. Criterion 1: Community Establishment

#### 1-A Delineation

The final CPE report makes one reference to the CPE Panel’s research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-A, Delineation.<sup>61</sup> The final CPE report states:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an INC. Based on the Panel’s research, there is no evidence of INCs from different sectors acting as a community.<sup>62</sup>

The CPE Provider is referring to the Applicant Guidebook’s requirement that the community demonstrate “an awareness and recognition of a community among its members.”<sup>63</sup>

Because the final CPE report does not provide citations supporting the CPE Provider’s research, FTI analyzed the CPE Provider’s working papers in an effort to determine if the working papers reflected research concerning the Delineation sub-criterion. FTI observed that the CPE Provider’s working papers reflect such research. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following

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in the United Kingdom. This document may relate to the CPE Provider’s assertion, in sub-criterion 2-A, that “[t]he [LLC] corporate identifier is used in other jurisdictions (outside the US).”

A Microsoft Excel file named “Orbis\_Export\_1 (LLC).xls” containing data about the number of companies and their operating revenue in each of over 100 countries for the “last avai[able] year.”

<sup>61</sup> .INC CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

<sup>62</sup> *Id.*

<sup>63</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the “corporation” page for the United States Small Business Association,<sup>64</sup> and 2) the website for the National Association of Secretaries of State.<sup>65</sup> Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers reflect eight references to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.<sup>66</sup>

### 1-B Extension

The final CPE report makes two references to the CPE Panel’s research, but does not provide citations or otherwise indicate the nature of that research, for sub-criterion 1-B, Extension.<sup>67</sup> The final CPE report states twice:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research

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<sup>64</sup> <http://www.sba.gov/content/corporation>.

<sup>65</sup> <http://www.nass.org/>.

<sup>66</sup> They are:

<http://www.companieshouse.gov.uk/links/usaLink.shtml> (cited three times);

<http://www.sba.gov/content/corporation> (cited two times);

<http://www.nass.org/>;

<http://www.nass.org/nasscommittees/nass-business-servicescommittee/> (This is no longer an active link).

FTI notes that the CPE Provider referenced “[t]he NASS website . . . section on corporate registration” in the working papers. The working papers do not provide a full citation or identify the URL for the website. FTI included this website as one of the eight references to research in this sub-criterion.

<sup>67</sup> .INC CPE report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an INC. Based on the Panel's research, there is no evidence of INCs from different sectors acting as a community.<sup>68</sup>

Although this statement appears in both the "Size" and "Longevity" sub-sections of the CPE Panel's discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel's reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the referenced research, FTI analyzed the CPE Provider's working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider's working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: "Question 1.1.1: Is the community clearly delineated?" FTI observed that the corresponding "Source" field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the "corporation" page for the United States Small Business Association,<sup>69</sup> and 2) the website for the National Association of Secretaries of State.<sup>70</sup> Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain two citations to research or reference material for sub-criterion 1-B, Extension, that are not otherwise cited in the final CPE report.<sup>71</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> <http://www.sba.gov/content/corporation>.

<sup>70</sup> <http://www.nass.org/>.

<sup>71</sup> They are:  
<http://www.companieshouse.gov.uk/links/usaLink.shtml>; and

## 2. Criterion 2: Nexus between Proposed String and Community

### 2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain two citations to research or reference material.<sup>72</sup>

### 2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain two citations to research or reference material relating to this sub-criterion.<sup>73</sup>

## 3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

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<http://en.wikipedia.org/wiki/Corporation>.

<sup>72</sup> They are:

[http://en.wikipedia.org/wiki/Types\\_of\\_business\\_entity](http://en.wikipedia.org/wiki/Types_of_business_entity); and  
<http://en.wikipedia.org/wiki/Inc>.

<sup>73</sup> They are:

[http://en.wikipedia.org/wiki/Types\\_of\\_business\\_entity](http://en.wikipedia.org/wiki/Types_of_business_entity); and  
<http://en.wikipedia.org/wiki/Inc>.

## 4. Criterion 4: Community Endorsement

### 4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain six citations to research or reference material for this sub-criterion.<sup>74</sup>

### 4-B Opposition

Neither the final CPE report nor the working papers reflect any reference to research or reference material for sub-criterion 4-B, Opposition.

## C. .LLP

### 1. Criterion 1: Community Establishment

#### 1-A Delineation

The final CPE report makes one reference to the Panel's research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-A, Delineation.<sup>75</sup> The final report states that:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLP. Based on

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<sup>74</sup> <http://www.companieshouse.gov.uk/links/usaLink.shtml>;  
[http://icannwiki.com/index.php/Dot\\_Registry\\_LL\\_C](http://icannwiki.com/index.php/Dot_Registry_LL_C);  
<http://dotregistry.org/> (cited three times); and  
<https://www.cscglobal.com/global/web/csc/home>.

<sup>75</sup> .LLP CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

the Panel's research, there is no evidence of LLPs from different sectors acting as a community.<sup>76</sup>

The CPE Provider is referring to the Applicant Guidebook's requirement that the community demonstrate "an awareness and recognition of a community among its members."<sup>77</sup>

Because the final CPE report does not provide citations supporting the CPE Provider's research, FTI analyzed the CPE Provider's working papers to determine if the working papers reflected research concerning the Delineation sub-criterion. FTI observed that the CPE Provider's working papers reflect such research. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: "Question 1.1.1: Is the community clearly delineated?" FTI observed that the corresponding "Source" field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the Wikipedia page for "Limited Liability Partnership" (specifically, the sub-page for "United States"),<sup>78</sup> and 2) the "LLP" webpage on [www.sba.com](http://www.sba.com).<sup>79</sup> Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain eleven citations to research or reference material for this sub-criterion.<sup>80</sup>

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

<sup>77</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>78</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership#United\\_States](http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States).

<sup>79</sup> <http://www.sba.com/legal/llp/>.

<sup>80</sup> They are:

<http://www.nass.org/nass-committees/nass-business-servicescommittee/> (cited two times) (This is no longer an active link);

<http://dotregistry.org/about/who-is-dot-registry> (cited two times);

<http://dotregistry.org/>;

### 1-B Extension

The final CPE report makes two references to the Panel’s research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-B, Extension.<sup>81</sup> The final report states twice that:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLP. Based on the Panel’s research, there is no evidence of LLPs from different sectors acting as a community.<sup>82</sup>

Although this statement appears in both the “Size” and “Longevity” sub-sections of the CPE Panel’s discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel’s reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the research, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were

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<http://www.biztree.com/company/>;  
[http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership#United\\_States](http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States) (cited two times);  
[http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership](http://en.wikipedia.org/wiki/Limited_liability_partnership);  
<http://www.sba.com/legal/llp/>; and  
<http://dotregistry.org/corporate-tlds/llp-domains>.

<sup>81</sup> .LLP CPE report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

<sup>82</sup> *Id.*

not otherwise cited in the final CPE report: 1) the Wikipedia page for “Limited Liability Partnership” (specifically, the sub-page for “United States,”<sup>83</sup> and 2) the “LLP” webpage on [www.sba.com](http://www.sba.com).<sup>84</sup> Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain seven citations to research or reference material for sub-criterion 1-B, Extension, that are not otherwise cited in the final CPE report.<sup>85</sup>

## 2. Criterion 2: Nexus between Proposed String and Community

### 2-A Nexus

The final CPE report does not directly reference any research or reference material for sub-criterion 2-A, Nexus, but it states—without indicating the source of the information—that “[t]he applied-for-string (.LLP) over-reaches substantially . . . [because it] captures a wider geographical remit than the community has, as the corporate identifier is used in Poland, the UK, Canada and Japan, amongst others.”<sup>86</sup> The CPE Panel is referring to the Applicant Guidebook’s requirement that the string “closely describes the community or the community members, without over-reaching

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<sup>83</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership#United\\_States](http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States).

<sup>84</sup> <http://www.sba.com/legal/llp/>.

<sup>85</sup> They are:

[http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership#United\\_States](http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States) (cited two times);

[http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership](http://en.wikipedia.org/wiki/Limited_liability_partnership);

<http://www.sba.com/legal/llp/> (cited two times);

<http://www.biztree.com/?a=biztree&s=google&c=ustop&gclid=CJPnqb6SwL0CFUNo7Aodtl8A8g>; and <https://www.google.com/search> Confidential Business Information

<sup>86</sup> .LLP CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

substantially beyond the community.”<sup>87</sup> This requirement is a component of sub-criterion 2-A, Nexus.<sup>88</sup>

Because the final CPE report does not provide citations supporting the research purportedly undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Nexus sub-criterion.

Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references: 1) the Applicant’s website,<sup>89</sup> 2) the Wikipedia page for LLPs (cited three times),<sup>90</sup> 3) a British government webpage answering Frequently Asked Questions about LLPs,<sup>91</sup> and 4) a Google search for **Confidential Business Information**.<sup>92</sup> Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

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<sup>87</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>88</sup> See *id.*

<sup>89</sup> <http://dotregistry.org/corporate-tlds/llp-domains>.

<sup>90</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership](http://en.wikipedia.org/wiki/Limited_liability_partnership).

<sup>91</sup> <http://www.companieshouse.gov.uk/infoAndGuide/faq/llpFAQ.shtml>.

<sup>92</sup> <https://www.google.com/search> **Confidential Business Information**

Including the citations listed above, the working papers contain six citations to research or reference material for this sub-criterion.<sup>93</sup>

### 2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain one citation to research or reference material for this sub-criterion.<sup>94</sup>

## 3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

## 4. Criterion 4: Community Endorsement

### 4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect nine references to research or reference material.<sup>95</sup>

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<sup>93</sup> They are:

[http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership](http://en.wikipedia.org/wiki/Limited_liability_partnership) (cited three times);

<http://www.companieshouse.gov.uk/infoAndGuide/faq/llpFAQ.shtml>;

<https://www.google.com/search> Confidential Business Information

and

<http://dotregistry.org/corporate-tlds/llp-domains>.

<sup>94</sup> One working paper cites [http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership](http://en.wikipedia.org/wiki/Limited_liability_partnership) in its consideration of this sub-criterion.

<sup>95</sup> They are:

<http://dotregistry.org/#http://dotregistry.org/about>;

#### 4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, opposition.

#### Additional Research Materials Associated with .LLP

The working papers include one document that was not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its research concerning the .LLP CPE application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.<sup>96</sup>

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FTI notes that the CPE Provider referenced a “Google search” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion;

FTI notes that the CPE Provider referenced three “Web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion; and

FTI notes that the CPE Provider made four references to the “Applicant[’s] website” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion.

<sup>96</sup> The document is a one-page Adobe PDF file named “BusinessRegisterStatistics.pdf” containing weekly data for the month of February 2014 concerning registrations, liquidations, and dissolutions of companies in the United Kingdom.

## D. Second .GAY Evaluation<sup>97</sup>

### 1. Criterion 1: Community Establishment

#### 1-A Delineation

The second final CPE report contains ten citations to research or reference material for sub-criterion 1-A, Delineation.<sup>98</sup>

The working papers contain ten citations to research or reference material for this sub-criterion that are not otherwise cited in the second final CPE report.<sup>99</sup>

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<sup>97</sup> After completion by the CPE Provider of the first CPE in October 2014, through the Reconsideration process, a procedural error in the CPE was identified and the BGC determined that the application should be re-evaluated. See <https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>. At the BGC's direction, the CPE Provider then conducted a new CPE of the application ("second .GAY evaluation" and "second final CPE report," cited as ".GAY 2 CPE report"). For purposes of Scope 3 of the CPE Process Review, the second .GAY evaluation is subject to a pending Reconsideration Request and thus is the relevant evaluation.

<sup>98</sup> They are:  
<http://www.hrc.org/campaigns/coming-out-center>;  
[http://www.lalgbtcenter.org/coming\\_out\\_support](http://www.lalgbtcenter.org/coming_out_support);  
<http://www.glaad.org/form/come-outas-ally-join-allynetwork-today>;  
<http://www.hrc.org/resources/entry/straight-guide-to-lgbt-americans>;  
<http://community.pflag.org/page.aspx?pid=539> (This is no longer an active link);  
<http://www.apa.org/topics/lgbt/orientation.pdf> (the CPE report notes that the applicant cited this as well);  
<http://www.cnn.com/2013/06/27/world/asia/china-gay-lesbian-marriage/>;  
<http://www.gaystarnews.com/article/guyana-urged-to-end-ban-on-gay-sex-at-un-human-rights-commission/>;  
[http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage\\_n\\_1018536.html](http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage_n_1018536.html); and  
a reference to "ILGA's website" without specifying the URL or a webpage within the website.

<sup>99</sup> They are:  
<http://dotgay.com>;  
<http://ilga.org/about-us/>;  
<http://ilga.org/what-we-do/>;  
[http://en.wikipedia.org/wiki/International\\_Lesbian,\\_Gay,\\_Bisexual,\\_Trans\\_and\\_Intersex\\_Association](http://en.wikipedia.org/wiki/International_Lesbian,_Gay,_Bisexual,_Trans_and_Intersex_Association);

### 1-B Extension

The second final CPE report contains two citations to research or reference material for sub-criterion 1-B, Extension.<sup>100</sup>

Additionally, the second final CPE report makes one reference to the CPE Provider's verification of data submitted by the Applicant but does not contain a corresponding citation in the report. The second final CPE report states: "The Panel has verified the applicant's estimates of the defined community's size and compared it with other estimates. Even smaller estimates constitute a substantial number of individuals especially when considered globally."<sup>101</sup> The CPE Provider is referring to the Applicant Guidebook's requirement that the community be of considerable size.<sup>102</sup> Size is a component of sub-criterion 1-B, Extension.<sup>103</sup>

Because the second final CPE report does not provide a citation in support of the referenced research conducted by the CPE Provider to verify and compare the referenced estimates,<sup>104</sup> FTI analyzed the CPE Provider's working papers for the second .GAY evaluation to determine if the working papers reflected such research.

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[http://en.wikipedia.org/wiki/Gay\\_and\\_Lesbian\\_International\\_Sport\\_Association](http://en.wikipedia.org/wiki/Gay_and_Lesbian_International_Sport_Association);  
[http://en.wikipedia.org/wiki/International\\_Gay\\_and\\_Lesbian\\_Travel\\_Association](http://en.wikipedia.org/wiki/International_Gay_and_Lesbian_Travel_Association);  
<http://en.wikipedia.org/wiki/Gay>;  
<http://en.wikipedia.org/wiki/LGBT>;  
[http://en.wikipedia.org/wiki/LGBT\\_history](http://en.wikipedia.org/wiki/LGBT_history); and  
[http://en.wikipedia.org/wiki/Timeline\\_of\\_LGBT\\_history](http://en.wikipedia.org/wiki/Timeline_of_LGBT_history).

<sup>100</sup> They are:

Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000; and  
<http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>.

<sup>101</sup> .GAY 2 CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

<sup>102</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

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

<sup>104</sup> .GAY 2 CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

Based on FTI's investigation, FTI observed that the CPE Provider's working papers did not reflect research undertaken in connection with the Extension sub-criterion for the second .GAY evaluation. Specifically, with respect to sub-criterion 1-B, Extension, the database contains the following: "Question 1.2.1: Is the community of considerable size?" FTI observed no references to research or reference material in the corresponding "Source" field for this question.

However, because the CPE Provider performed two evaluations for the .GAY application, out of an abundance of caution, FTI also reviewed the CPE Provider's working papers associated with the first .GAY evaluation to determine if the referenced research was reflected in those materials. Based upon FTI's investigation, FTI finds that the supporting research may have been cited in the working papers associated with the first .GAY evaluation. FTI observed in the working papers for the first .GAY evaluation that the CPE Provider recorded two references in the database's "Source" field for Question 1.2.1.<sup>105</sup> Both citations addressed the size of the gay community nationally and worldwide, which may have been used by the CPE Provider to verify the size of the community defined in the application. Based on the similarity between the two evaluations, FTI finds it reasonable to conclude that the research referenced without citation in the second .GAY evaluation may have been the same research that was cited in the working papers associated with the first .GAY evaluation.

Finally, the working papers associated with the second .GAY evaluation contain four citations to research or reference material for this sub-criterion that were not otherwise cited in the second final CPE report.<sup>106</sup>

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<sup>105</sup> They are:

[www.census.gov/popclock](http://www.census.gov/popclock) (This is no longer an active link. The correct link to the United States Census Bureau U.S. and World Population Clock is <https://www.census.gov/popclock/>);  
<http://en.wikipedia.org/wiki/InterPride>.

<sup>106</sup> They are:

## 2. Criterion 2: Nexus between Proposed String and Community

### 2-A Nexus

The second final CPE report contains 14 citations to research or reference material for sub-criterion 2-A, Nexus.<sup>107</sup>

Additionally, the second final CPE report makes one reference to the CPE Panel's research and four references to the Panel's "survey" or "review of representative samples" of media and news articles, but does not provide the corresponding citation to the media, articles, and research reviewed.<sup>108</sup> These references are contained in three excerpts of the second final CPE report, each of which addresses whether the proposed

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<http://en.wikipedia.org/wiki/Gay>;  
<http://en.wikipedia.org/wiki/LGBT>;  
[http://en.wikipedia.org/wiki/LGBT\\_history](http://en.wikipedia.org/wiki/LGBT_history); and  
[http://en.wikipedia.org/wiki/Timeline\\_of\\_LGBT\\_history](http://en.wikipedia.org/wiki/Timeline_of_LGBT_history).

<sup>107</sup> They are:

"gay, adj., adv., and n." OED Online. Oxford University Press, June 2015. Web. 19 August 2015;  
<http://time.com/135480/transgender-tipping-point/>;  
<http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>;  
<http://transgenderlawcenter.org/>;  
<http://srlp.org/>;  
<http://transequality.org/>;  
<http://transequality.org/issues/resources/transgender-terminology>;  
<http://oii-usa.org/1144/ten-misconceptions-intersex>;  
[http://dotgay.com/the-dotgay-team/#section=Jamie\\_Baxter](http://dotgay.com/the-dotgay-team/#section=Jamie_Baxter) (This is no longer an active link);  
<http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marches-or-clever-substitutes-pride-and-prejudice>;  
<http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html>;  
<http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>;  
<http://www.glaad.org/transgender/transfaq>; and  
<http://www.glaad.org/about/history>.

<sup>108</sup> .GAY 2 CPE report Pgs. 5-8 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

string identifies all members of the identified community. Because the references relate to the same sub-criterion, FTI analyzed all three excerpts together for this review.

First, the second final CPE report states:

The Panel has also conducted its own research. The Panel has determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider “gay” to be their “most common” descriptor, as the applicant claims. These groups are most likely to use words such as “transgender,” “trans,” “intersex,” or “ally” because these words are neutral to sexual orientation, unlike “gay”.<sup>109</sup>

In a footnote to the above text, the Panel added that: “While a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the data in the applicant’s own analysis as well as on the Panel’s own representative samples of media.”<sup>110</sup>

Second, the second final CPE report states that: “organizations within the defined community, when they are referring to groups that specifically include transgender, intersex or ally individuals, are careful not to use only the descriptor ‘gay,’ preferring one of the more inclusive terms.”<sup>111</sup> The supporting footnote states: “While a survey of all LGBTQIA individuals and organizations globally would be impossible, the Panel has relied for its research on many of the same media organizations and community organizations that the applicant recognizes.”<sup>112</sup>

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<sup>109</sup> *Id.* at Pgs. 5-6.

<sup>110</sup> *Id.* at Pg. 6 n.10. This footnote is repeated at page 7, note 19.

<sup>111</sup> *Id.* at Pg. 6.

<sup>112</sup> *Id.* at Pg. 6 n.12.

Third, the second final CPE report states that “researching sources from the same periods as the applicant’s analysis for the terms ‘transgender’ or ‘intersex’ shows again that these terms refer to individuals and communities not identified by ‘gay.’”<sup>113</sup> The supporting footnote states: “[t]he Panel reviewed a representative sample of articles from the same time periods” as LexisNexis search results provided by the applicant.<sup>114</sup>

As noted, each of these references relates to whether the string “closely describes the community or the community members, without over-reaching substantially beyond the community.”<sup>115</sup> The CPE Provider is referring to the requirement that “the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.”<sup>116</sup>

Because the second final CPE report does not provide citations for the Panel’s research, FTI analyzed the CPE Provider’s working papers for the second .GAY evaluation to determine if the working papers reflected such research. Based on FTI’s investigation, FTI observed that the CPE Provider’s working papers reflect the research referenced in the final report.

Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) a Google search on [REDACTED]; (2) the Wikipedia page for “Coming out”; (3) a Google search on

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<sup>113</sup> *Id.* at Pgs. 7-8.

<sup>114</sup> *Id.* at Pg. 8 n.22.

<sup>115</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (cited in .GAY 2 CPE report Pg. 5) (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

<sup>116</sup> See *id.* at Module 4.2.3 at Pgs. 4-13.

██████; (4) a second Google search on ██████ which included; (5) the Wikipedia page for “GAY” (cited two times).

Accordingly, FTI finds it reasonable to conclude that the research referenced in the second final CPE report refers to the research reflected in the working papers for the second .GAY evaluation identified above.

FTI observed 23 references to research or reference materials in a working paper entitled, “nexus research notes,” which also addresses this sub-criterion, that were not otherwise cited in the second final CPE report.<sup>117</sup>

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<sup>117</sup> They are:

<http://www.glaad.org/reference/transgender;>

[http://www.transpeoplespeak.org/trans-101/;](http://www.transpeoplespeak.org/trans-101/)

<http://www.out.com/news-opinion/2015/6/29/watch-john-olivers-breakdown-how-far-trans-rights-still-have-go;>

<http://www.lambdalegal.org/issues/transgender-rights;>

<https://www.aclu.org/issues/lgbt-rights/transgender-rights;>

[http://www.nytimes.com/2015/05/04/opinion/the-quest-for-transgender-equality.html?\\_r=1;](http://www.nytimes.com/2015/05/04/opinion/the-quest-for-transgender-equality.html?_r=1;)

<http://www.newrepublic.com/article/politics/magazine/90519/transgender-civil-rights-gay-lesbian-lgbtq;>

[https://en.wikipedia.org/wiki/LGBT\\_community;](https://en.wikipedia.org/wiki/LGBT_community)

[http://www.tgijp.org/;](http://www.tgijp.org/)

[http://transgenderlawcenter.org/about/mission.](http://transgenderlawcenter.org/about/mission)

FTI notes that the CPE Provider referenced six “NYTimes” searches in the working papers. The CPE Provider described the searches in the working papers as follows: ██████ in year 2010: 16 results, ██████ Year 2014: 311 results, ██████ 2014: 106 results, “Gay community” 2010: 51 results, ██████ 2010: 4 results, “LGBT community” 2014: 88 results. The working papers do not provide a full citation for the searches. FTI included the six searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced two searches in the Washington Post in the working papers. The CPE Provider described the searches in the working papers as follows: ██████ (174 results in past 12 months, 529 results since 2005), ██████ (77 results in past 12 months, 632 results since 2005). The working papers do not provide a full citation for the searches. FTI included the two searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced two searches in the “UK Guardian” in the working papers. The CPE provider described the searches in the working papers as follows: ██████ (7160 results) and ██████ (6120 results). The working papers do not provide

## 2-B Uniqueness

The second final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers reflect three references to research or reference material for this sub-criterion.<sup>118</sup>

## 3. Criterion 3: Registration Policies

Neither the second final CPE report nor the working papers for the second .GAY evaluation reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

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a full citation for the searches. FTI included the two searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced “HRC” in the working papers. The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider made one reference to the “Trans Advocacy Network” in the working papers. The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion; and

FTI further notes that the CPE Provider stated in the working papers that “The Panel’s research shows that there is a robust network of advocacy, support, and general organizations addressing issues specific to the intersex and transgender communities themselves.” The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion.

<sup>118</sup> They are:

<http://en.wikipedia.org/wiki/Gay> (cited two times).

FTI notes that the CPE Provider referenced a “Google Search on [REDACTED]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the three references to research in this sub-criterion.

## 4. Criterion 4: Community Endorsement

### 4-A Support

The second final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers for the second .GAY evaluation reflect six references to research or reference material for this sub-criterion.<sup>119</sup>

### 4-B Opposition

The second final CPE report does not reflect any references to research or reference material for sub-criterion 4-B, Opposition, but the working papers for the second .GAY evaluation contain three citations to research or reference material for this sub-criterion.<sup>120</sup>

### Additional Research Materials Associated with .GAY

The working papers for the second .GAY evaluation include one document that was not otherwise cited in the final CPE report that the CPE Provider appears to have collected in the course of its evaluation process. Based on its examination, FTI could not discern

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<sup>119</sup> They are:

<http://www.spimarketing.com/team>;

<http://dotgay.com/faq/>; and

<http://dotgay.com/endorsements/> (This is no longer an active link) (cited three times).

FTI notes that the CPE Provider made one reference to “Organisation websites, including ILGA: <http://ilga.org/about-us/>” in the working papers. The working papers do not provide full citations or identify the URLs for the “Organisation websites” other than ILGA. FTI treated this reference as one of the six references to research in this sub-criterion.

<sup>120</sup> They are:

<http://www.pdxqcenter.org/about/>;

<http://www.pdxqcenter.org/interim-board-appointed-to-stabilize-q-center-engage-community-about-centers-future/>; and

<http://www.pqmonthly.com/new-era-begins-q-center-basic-rights-oregon-provides-financial-stability/21355>.

if the CPE Provider intended this document to pertain to any particular criterion or sub-criterion.<sup>121</sup>

## E. .MUSIC (DotMusic Ltd.)

### 1. Criterion 1: Community Establishment

#### 1-A Delineation

The final CPE report reflects one citation to reference material for sub-criterion 1-A, Delineation.<sup>122</sup>

Additionally, the final CPE report makes three references to the CPE Panel’s research, but does not provide citations to, or otherwise indicate the nature of, that research.<sup>123</sup>

First, the final CPE report states: “The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the [Applicant Guidebook] calls ‘cohesion.’”<sup>124</sup> The CPE Provider is referring to the Applicant Guidebook’s requirement that a “community” demonstrate “more of cohesion than a mere commonality of interest.”<sup>125</sup>

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<sup>121</sup> The document is a copy of an article titled “They do: Same-sex couples are choosing marriage over civil partnership,” *The Economist*, 27 June 2015, <http://www.economist.com/news/britain/21656197-same-sex-couples-are-choosing-marriage-over-civil-partnership-they-do2/> (This link does not lead to the *Economist* article cited by the CPE Provider).

<sup>122</sup> The CPE report cites “Oxford dictionaries” for the definition of “cohesion.” .MUSIC (DotMusic Ltd.) CPE report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) Pg. 3.

<sup>123</sup> .MUSIC (DotMusic Ltd.) CPE report Pg. 3 (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

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

<sup>125</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

Because the final CPE report does not provide citations supporting the “further research,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such “further research.” FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion.

Specifically, as noted above, the database sets forth questions for each CPE sub-criterion. With respect to sub-criterion 1-A, Delineation, the database contains the following: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the U.S. Census Bureau’s North American Industry Classification System (NAICS) codes;<sup>126</sup> (2) the United Nations International Standard Industrial Classification (ISIC) system;<sup>127</sup> and (3) the Wikipedia page for “Music.”<sup>128</sup> Accordingly, FTI finds it reasonable to conclude that the “further research” referenced in the final CPE report refers to the research reflected in the working papers.

Second, the final CPE report states:

based on the Panel’s research, there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories. Research showed that those organizations that do exist represent members of the defined community only in a limited geographic area or only in certain fields within the community.<sup>129</sup>

The final CPE report also states: “based on . . . the Panel’s research, there is no entity that organizes the community defined in the application in all the breadth of categories

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<sup>126</sup> <http://www.census.gov/eos/www/naics/>.

<sup>127</sup> [http://unstats.un.org/unsd/publication/seriesM/seriesm\\_4rev4e.pdf](http://unstats.un.org/unsd/publication/seriesM/seriesm_4rev4e.pdf).

<sup>128</sup> <https://en.wikipedia.org/wiki/Music>.

<sup>129</sup> .MUSIC (DotMusic Ltd.) CPE report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) Pg. 3.

explicitly defined.”<sup>130</sup> In both instances, the CPE Provider is referring to the Applicant Guidebook’s requirement that a community be organized, which the Applicant Guidebook defines to mean that “there is at least one entity mainly dedicated to the community, with documented evidence of community activities.”<sup>131</sup> Organization is a component of Delineation,<sup>132</sup> and this reference to “the Panel’s research” is noted in the final CPE report’s sub-section on “[o]rganization.”<sup>133</sup>

Because the final CPE report does not provide citations supporting the “Panel’s research,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected the referenced research. FTI observed that the CPE Provider’s working papers reflect research undertaken in connection with the organization prong of the Delineation sub-criterion. Specifically, the database contains the following question: “Question 1.1.2: Is there at least one entity mainly dedicated to the community?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the website for the International Federation of Arts Councils and Culture Agencies (IFACCA);<sup>134</sup> (2) the Wikipedia page for “Music;”<sup>135</sup> (3) the Wikipedia page for “Recording Industry Association of America;”<sup>136</sup> and (4) the Wikipedia page for “American Federation of

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<sup>130</sup> *Id.*

<sup>131</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

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

<sup>133</sup> .MUSIC (DotMusic Ltd.) CPE report Pg. 3 (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

<sup>134</sup> [http://www.ifacca.org/vision\\_and\\_objectives/](http://www.ifacca.org/vision_and_objectives/) (This is no longer an active link).

<sup>135</sup> <https://en.wikipedia.org/wiki/Music>.

<sup>136</sup> [https://en.wikipedia.org/wiki/Recording\\_Industry\\_Association\\_of\\_America](https://en.wikipedia.org/wiki/Recording_Industry_Association_of_America).

Musicians.”<sup>137</sup> Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain 13 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.<sup>138</sup>

### 1-B Extension

The final CPE report does not reflect any references to research or reference material for sub-criterion 1-B, Extension, but the working papers contain three citations to research or reference material for this sub-criterion.<sup>139</sup>

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<sup>137</sup> [https://en.wikipedia.org/wiki/American\\_Federation\\_of\\_Musicians](https://en.wikipedia.org/wiki/American_Federation_of_Musicians).

<sup>138</sup> They are:

<https://en.wikipedia.org/wiki/Music> (cited three times);

<http://www.census.gov/eos/www/naics/>;

[http://unstats.un.org/unsd/publication/seriesM/seriesm\\_4rev4e.pdf](http://unstats.un.org/unsd/publication/seriesM/seriesm_4rev4e.pdf);

[https://en.wikipedia.org/wiki/Recording\\_Industry\\_Association\\_of\\_America](https://en.wikipedia.org/wiki/Recording_Industry_Association_of_America) (cited two times);

[https://en.wikipedia.org/wiki/American\\_Federation\\_of\\_Musicians](https://en.wikipedia.org/wiki/American_Federation_of_Musicians) (cited two times);

[http://www.ifacca.org/vision\\_and\\_objectives/](http://www.ifacca.org/vision_and_objectives/) (This is no longer an active link);

[http://media.ifacca.org/files/IFACCA\\_Stratplan\\_english\\_web\\_July2015FINAL.pdf](http://media.ifacca.org/files/IFACCA_Stratplan_english_web_July2015FINAL.pdf);

[http://www.ifacca.org/ifacca\\_events/](http://www.ifacca.org/ifacca_events/) (This is no longer an active link); and

[https://en.wikipedia.org/wiki/History\\_of\\_music](https://en.wikipedia.org/wiki/History_of_music).

<sup>139</sup> They are:

[https://en.wikipedia.org/wiki/History\\_of\\_music](https://en.wikipedia.org/wiki/History_of_music) (cited two times); and

[http://media.ifacca.org/files/IFACCA\\_Stratplan\\_english\\_web\\_July2015FINAL.pdf](http://media.ifacca.org/files/IFACCA_Stratplan_english_web_July2015FINAL.pdf).

## 2. Criterion 2: Nexus between Proposed String and Community

### 2-A Nexus

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 2-A, Nexus.

### 2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain two citations to research or reference material for this sub-criterion.<sup>140</sup>

## 3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

## 4. Criterion 4: Community Endorsement

### 4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain one citation to research or reference material for this sub-criterion.<sup>141</sup>

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<sup>140</sup> They are:  
[https://en.wikipedia.org/wiki/Definition\\_of\\_music](https://en.wikipedia.org/wiki/Definition_of_music); and  
Oxford English Reference Dictionary.

<sup>141</sup> It is: <http://music.us/about/>.

#### 4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

### F. .CPA (Australia)

#### 1. Criterion 1: Community Establishment

##### 1-A Delineation

The final CPE report contains four citations to research or reference material in sub-criterion 1-A, Delineation.<sup>142</sup>

The working papers contain 14 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.<sup>143</sup>

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<sup>142</sup> They are:

<https://www.cpaaustralia.com.au/member-services/fees/australia>;  
<https://www.cpaaustralia.com.au/training-and-events>;  
<https://www.cpaaustralia.com.au/training-and-events/conferences>; and  
<https://www.cpaaustralia.com.au/about-us/ourhistory/archives> (This is no longer an active link).

<sup>143</sup> They are:

<http://www.cpaaustralia.com.au/> (cited three times);  
<https://www.cpaaustralia.com.au/about-us> (cited two times);  
<https://www.cpaaustralia.com.au/about-us/ourhistory> (This is no longer an active link);  
<https://www.cpaaustralia.com.au/about-us/ourhistory/our-timeline> (cited two times) (This is no longer an active link);  
<https://www.cpaaustralia.com.au/member-services>;  
<http://www.cpaaustralia.com.au/member-services/renew-my-membership>;  
[http://en.wikipedia.org/wiki/CPA\\_Australia](http://en.wikipedia.org/wiki/CPA_Australia) (cited three times); and  
<http://www.cimaglobal.com/Members/Membershipinformation/> (identified as the result of “A web search on [REDACTED]” (This is no longer an active link).

### 1-B Extension

The final CPE report contains three citations to research or reference material in sub-criterion 1-B, Extension.<sup>144</sup>

The working papers contain five citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.<sup>145</sup>

## 2. Criterion 2: Nexus between Proposed String and Community

### 2-A Nexus

The final CPE report contains two citations to research or reference material in sub-criterion 2-A, Nexus.<sup>146</sup>

The working papers contain seven citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.<sup>147</sup>

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<sup>144</sup> They are:

<https://www.cpaaustralia.com.au/about-us>; and

[http://docs.employment.gov.au/system/files/doc/other/2211accountantaus\\_1.pdf](http://docs.employment.gov.au/system/files/doc/other/2211accountantaus_1.pdf) (cited two times)  
(This is no longer an active link).

<sup>145</sup> They are:

[http://en.wikipedia.org/wiki/CPA\\_Australia](http://en.wikipedia.org/wiki/CPA_Australia) (cited two times);

<https://www.cpaaustralia.com.au/about-us/ourhistory/our-timeline> (cited two times) (This is no longer an active link); and

<https://www.cpaaustralia.com.au/training-andevents/conferences> (This is no longer an active link).

<sup>146</sup> They are:

<http://www.forbes.com/sites/peterjreilly/2013/06/26/enrolled-agents-deserve-more-respect/>; and

<http://nasba.org/blog/2010/01/07/january-2010-nasba-addresses-aicpa-sec-conference/>.

<sup>147</sup> They are:

<http://www.cpaaustralia.com.au/about-us>;

<http://www.cpaaustralia.com.au/become-a-cpa/about-the-program> (This is no longer an active link);

[http://en.wikipedia.org/wiki/CPA\\_Australia](http://en.wikipedia.org/wiki/CPA_Australia);

## 2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for criterion 2-B, Uniqueness, but the working papers reflect nine references to research or reference material for this sub-criterion.<sup>148</sup>

## 3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

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<http://www.cimaglobal.com/Members/Membershipinformation/Global-alliances/CIMA-into-CPA/> (This is no longer an active link);

<http://www.aicpa.org/Pages/default.aspx>;

<http://www.acpa.org.uk>; and

<http://www.aicpa.org/About/Pages/About.aspx/> (This is no longer an active link).

<sup>148</sup> They are:

<http://www.cpahq.org/cpahq/Main/Home/Main/Home.aspx?hkey=98e6b3f2-25d9-4d37-8f03-9ac0745ce845>;

<http://www.cpa.org.au/>;

<https://www.cdnpay.ca/> (This is no longer an active link);

<http://www.cpa-acp.ca/>;

<http://www.cpa.gov.cy/CPA/page.php?pageID=31&langID=0>;

<http://www.cpa.de/en/products.htm> (This link does not lead to the “Products” page of CPA SoftwareConsult GmbH’s website);

[http://en.wikipedia.org/wiki/Certified\\_Public\\_Accountant](http://en.wikipedia.org/wiki/Certified_Public_Accountant); and

<http://en.wikipedia.org/wiki/CPA>;

FTI notes that the CPE Provider referenced a “Google Search on [REDACTED]” in one of the working papers. The working paper does not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion.

## 4. Criterion 4: Community Endorsement

### 4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain two citations to research or reference material for this sub-criterion.<sup>149</sup>

### 4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

## G. .HOTEL

### 1. Criterion 1: Community Establishment

#### 1-A Delineation

The final CPE report reflects one reference to research or reference material in sub-criterion 1-A, Delineation.<sup>150</sup> Additionally, the final CPE report states that the Panel observed documented evidence of community activities on the International Hotel and Restaurant Association (“IH&RA”) website and “information on other hotel association websites,” without identifying the websites referenced. The CPE Provider is addressing the Applicant Guidebook’s provision that states that “‘organized’ implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.”<sup>151</sup>

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<sup>149</sup> They are:

<http://www.aicpa.org/Pages/default.aspx>; and

[http://www.aicpa.org/about/leadership/pages/melancon\\_bio.aspx](http://www.aicpa.org/about/leadership/pages/melancon_bio.aspx).

<sup>150</sup> The final CPE report references “International Hotel & Restaurant Association’s website.” International Hotel & Restaurant Association’s website is <http://ih-ra.com>, and is cited three times in the working papers.

<sup>151</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

Because the final CPE report does not provide citations for the “other hotel association websites,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected the “other hotel association websites.” FTI observed that the CPE Provider’s working papers reflect research concerning hotel association websites in connection with the Delineation sub-criterion.

Specifically, with respect to sub-criterion 1-A, Delineation, FTI observed that the database contains the following: “Question 1.1.3: Does the entity . . . have documented evidence of community activities?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the Applicant’s website,<sup>152</sup> (2) a webpage on the IH&RA website,<sup>153</sup> (3) four websites for HOTREC,<sup>154</sup> which the working papers identify as an organization of European hotels and restaurants; (4) a press release from the United Nations World Tourism Organization about its Memorandum of Understanding with IH&RA,<sup>155</sup> (5) a webpage from ETurbo news<sup>156</sup> which, according to the working papers, indicates that HOTREC signed a Memorandum with IH&RA; (6) the Hotel News Resource website;<sup>157</sup> and (7) the website for Green Hotelier,<sup>158</sup> which the working papers indicate is the

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<sup>152</sup> <http://www.dothotel.info/>.

<sup>153</sup> <http://ih-ra.com/achievements-in-advocacy/>.

<sup>154</sup> They are:

<http://www.hospitalitynet.org/news/4064407.html>;

<http://www.hotrec.eu/newsroom/press-releases-1714/hotrec-and-ihra-signmemorandum-of-understanding.aspx> (This is no longer an active link);

<http://www.hotrec.eu/policy-issues/tourism.aspx>; and

<http://www.hotrec.eu/publications-positions.aspx>.

<sup>155</sup> <http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-signmemorandum-Understanding>.

<sup>156</sup> <http://www.eturbonews.com/44710/hotrec-and-ihra-sign-memorandumunderstanding> (This is no longer an active link).

<sup>157</sup> <http://www.hotelnewsresource.com/article70606.html>.

<sup>158</sup> <http://www.greenhotelier.org/category/our-destinations/>.

magazine for the International Tourism Partnership. Accordingly, FTI finds it reasonable to conclude that the “other hotel association websites” referenced in the final CPE report refer to the websites listed in the working papers.

Including the citations listed above, the working papers contain 29 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.<sup>159</sup>

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<sup>159</sup> They are:

<http://ehotelier.com/directory/?associations> (cited two times)  
<http://www.gha.com/> (cited three times)  
[http://www.theindependents.co.uk/en/hotel/location/united\\_kingdom](http://www.theindependents.co.uk/en/hotel/location/united_kingdom) (cited two times)  
<http://hotel-tld.de/> (cited two times)  
[http://en.wikipedia.org/wiki/International\\_Hotel\\_%26\\_Restaurant\\_Association](http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association) (cited two times)  
<http://ih-ra.com/who-are-our-members/>;  
<http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding>;  
<http://www.eturbonews.com/44710/hotrec-and-ihra-sign-memorandum-understanding>;  
<http://www.hotelnewsresource.com/article70606.html>;  
<http://www.greenhotelier.org/category/our-destinations/>;  
<http://www.dothotel.info/> (cited three times);  
<http://ih-ra.com/ihra-today/>;  
<http://www.hospitalitynet.org/organization/17000749.html>;  
<http://ih-ra.com/achievements-in-advocacy/>;  
<http://www.hospitalitynet.org/news/4064407.html>;  
<http://www.hotrec.eu/newsroom/press-releases-1714/hotrec-and-ihra-sign-memorandum-of-understanding.aspx>;  
<http://www.hotrec.eu/policy-issues/tourism.aspx>;  
<http://www.hotrec.eu/publications-positions.aspx>;  
<http://ih-ra.com/ihra-history/>;  
<http://en.wikipedia.org/wiki/Hotel#History>; and  
<http://en.wikipedia.org/wiki/Hotel>.

### 1-B Extension

The final CPE report did not reflect any references to research or reference material for sub-criterion 1-B, Extension, but the working papers contain ten citations to research or reference material for this sub-criterion.<sup>160</sup>

## 2. Criterion 2: Nexus between Proposed String and Community

### 2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain one citation to research or reference material for this sub-criterion.<sup>161</sup>

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<sup>160</sup> They are:

<http://www.dothotel.info/> (cited two times);

<http://hotel-tld.de/>;

<http://ih-ra.com/ihra-today/>;

[http://en.wikipedia.org/wiki/International\\_Hotel\\_%26\\_Restaurant\\_Association](http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association);

<http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding>;

<http://www.tnooz.com/article/how-many-hotels-in-the-world-are-there-anyway-booking-com-keeps-adding-them/>;

[http://wiki.answers.com/Q/How\\_many\\_hotels\\_exist\\_in\\_the\\_world?#slide=1](http://wiki.answers.com/Q/How_many_hotels_exist_in_the_world?#slide=1);

<http://travel.usatoday.com/hotels/post/2012/04/worldwide-hotel-rooms-2012-smith-travel-research/677093/1> (This is an active link to the website of USA Today, but it leads directly to the publication's "Travel" section, rather than to hotel-related content); and

<http://en.wikipedia.org/wiki/Hotel>.

<sup>161</sup> The working papers cite <http://hotel-tld.de/>.

## 2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers reflect two references to research or reference material for this sub-criterion.<sup>162</sup>

## 3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

## 4. Criterion 4: Community Endorsement

### 4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect 12 references to research or reference material for this sub-criterion.<sup>163</sup>

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<sup>162</sup> They are:

<http://en.wikipedia.org/wiki/Hotel>; and

FTI notes that the CPE Provider stated in the working papers that an “Internet search on [REDACTED] and [REDACTED] turns up mainly sites discussing the domain name and actual hotels, hotel chains etc[.]” The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the two references to research in this sub-criterion.

<sup>163</sup> They are:

<http://www.dothotel.info/> (cited three times);

<http://ih-ra.com/ihra-today/>;

<http://domainincite.com/10101-big-hotel-chains-pick-a-side-in-hotel-gtld-fight>;

<http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding>;

[http://en.wikipedia.org/wiki/International\\_Hotel\\_%26\\_Restaurant\\_Association](http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association);

<http://ih-ra.com/message-from-the-ihra-president/>;

<http://www.tnooz.com/article/how-many-hotels-in-the-world-are-there-anyway-booking-com-keeps-adding-them/>; and

#### 4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

#### Additional Research Materials Associated with .HOTEL

The working papers provided to FTI by the CPE Provider include six documents that were not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its evaluation of the Hotel application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.<sup>164</sup>

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<http://www.otusco.com/Otus%20Hotel%20Analyst%20Size%20and%20Structure%201.pdf>.

FTI notes that the CPE Provider referenced two “web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for the searches. FTI included these searches as two of the 12 references to research in this sub-criterion.

<sup>164</sup> The documents are five Adobe PDF files and one Microsoft Excel file:

A report by Mintel Group Limited: Hotel Trends – TTA. No. 1 February 2014;

A printout of [www.marketline.com](http://www.marketline.com)'s report on “Global Hotels & Motels October 2012”;

A printout of [www.marketline.com](http://www.marketline.com)'s report on “Global Hotels, Resorts & Cruise Lines July 2013”;

A printout of <http://www.eturbonews.com/22544/nepal-host-international-hotelioers-meets>, “International Hotel and Restaurant Association World Congress: Nepal to Host International Hoteliers’ Meets,” April 28, 2011 (This link does not lead to the article entitled Nepal’s hosting of international hoteliers);

A page which appears to be from a book published by the American Hotel and Lodging Association describing the history and current status of that association; and

A Microsoft Excel spreadsheet named “20140521 hotels research.xls” containing market information about the global and national hotel businesses.

## H. .MERCK (KGaA)

### 1. Criterion 1: Community Establishment

#### 1-A Delineation

The final CPE report does not reflect any references to research or reference material for sub-criterion 1-A, Delineation, but the working papers contain three citations to research or reference material for this sub-criterion.<sup>165</sup>

#### 1-B Extension

The final CPE report reflects two references to research or reference material for sub-criterion 1-B, Extension.<sup>166</sup>

The working papers contain one citation to research or reference material for this sub-criterion that is not otherwise cited in the final CPE report.<sup>167</sup>

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<sup>165</sup> The working papers cite <http://www.merckgroup.com/en/index.html> three times under this sub-criterion.

<sup>166</sup> They are:

[http://www.emdgroup.com/m.group.us/emd/images/Merck-Infographic-USA\\_v3\\_tcm2252\\_143783.pdf?Version=](http://www.emdgroup.com/m.group.us/emd/images/Merck-Infographic-USA_v3_tcm2252_143783.pdf?Version=); and

“Applicant’s website.”

<sup>167</sup> It is: [www.who.int/trade/glossary/story073/en/](http://www.who.int/trade/glossary/story073/en/) (This is no longer an active link).

FTI notes that the working papers also reflect one reference to Merck KGaA’s “company website,” which FTI understands to be synonymous with the “Applicant’s website” referenced in the final CPE report. Because the final CPE report references Merck KGaA’s website, FTI included that citation in its analysis of the final CPE report (even though the Panel did not include the URL in the final report); therefore, this reference to the company website was referenced in the final CPE report.

## 2. Criterion 2: Nexus between Proposed String and Community

### 2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain four citations to research or reference material for this sub-criterion.<sup>168</sup>

### 2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain four citations to research or reference material for this sub-criterion.<sup>169</sup>

## 3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

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<sup>168</sup> They are:

[https://en.wikipedia.org/wiki/Merck\\_%26\\_Co](https://en.wikipedia.org/wiki/Merck_%26_Co) (cited two times);  
[https://en.wikipedia.org/wiki/Merck\\_Group](https://en.wikipedia.org/wiki/Merck_Group); and  
<http://www.merckgroup.com/en/index.html>.

<sup>169</sup> They are:

<http://www.bloomberg.com/news/articles/2014-02-10/a-tale-of-two-mercks-as-protesters-takeonwrong-company> (This is no longer an active link);  
[https://en.wikipedia.org/wiki/Merck\\_%26\\_Co](https://en.wikipedia.org/wiki/Merck_%26_Co);  
[https://en.wikipedia.org/wiki/Merck\\_Group](https://en.wikipedia.org/wiki/Merck_Group); and  
<http://www.merck.com/index.html>.

## 4. Criterion 4: Community Endorsement

### 4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain two citations to research or reference material for this sub-criterion.<sup>170</sup>

### 4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

## VI. Conclusion

FTI observed that of the eight relevant CPE reports, two (.CPA and .MERCCK) contained citations in the report for each reference to research. For all eight evaluations, FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.MUSIC, .HOTEL, .GAY, .INC, .LLP, and .LLC), FTI observed instances where the CPE Provider referenced research but did not include citations to such research. FTI then reviewed the CPE Provider's working papers associated with the relevant evaluation to determine if the referenced research was reflected in those materials. In all instances except one, FTI found material within the working papers that corresponded with the research referenced in the final CPE report. In one instance (the second .GAY evaluation), research was referenced in the second final CPE report, but no corresponding citation was found within the working papers. However, based on FTI's observations, it is possible that the research being referenced

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<sup>170</sup> They are:

[www.merckgroup.com/](http://www.merckgroup.com/); and

[https://en.wikipedia.org/wiki/Merck\\_Group](https://en.wikipedia.org/wiki/Merck_Group).

was cited in the CPE Provider's working papers associated with the first .GAY evaluation.

# **Exhibit 6**

To: Arif Ali on behalf of dotgay LLC

Date: 14 February 2018

Re: Request No. 20180115-1

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Thank you for your request for documentary information dated 15 January 2018 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers' (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (dotgay). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the CPE Process Review or the Review):

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”
6. All draft CPE Reports concerning .GAY, both with and without comments;
7. All draft CPE Reports concerning .GAY in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;

8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey;"
9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, and Christine Willett;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. The original Request for Proposal (RFP) pertaining to the FTI's review of the CPE process;
12. All of the "CPE Provider's working papers associated with" dotgay's CPE;
13. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"
15. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"
16. FTI's investigative plan used during its independent review;
17. FTI's "follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;"
18. All communications between ICANN and FTI regarding FTI's independent review;
19. All communications between ICANN and the CPE Provider regarding FTI's independent review; and
20. All communications between FTI and the CPE Provider regarding FTI's independent review.
21. All documents and communications regarding the scope of FTI's independent review.

## **Response**

### The CPE Process Review

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications. ([Applicant Guidebook](#), Module 4.2 at Pg.

4-7; see also <https://newgtlds.icann.org/en/applicants/cpe>.) CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set. ([Applicant Guidebook](#) at Module 4.2 at Pg. 4-7.) CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process.

CPE is performed by an independent provider (CPE Provider). As part of the evaluation process, the CPE panels review and score a community application submitted to CPE against four criteria: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement.

Consistent with ICANN organization's Mission, Commitments, and Core Values set forth in the Bylaws, and specifically in an effort to operate to the maximum extent feasible in an open and transparent manner, ICANN organization provided added transparency into the CPE process by establishing a CPE webpage on the New gTLD microsite, at <http://newgtlds.icann.org/en/applicants/cpe>, which provides detailed information about CPEs. In particular, the following information can be accessed through the CPE webpage:

- CPE results, including information regarding to the Application ID, string, contention set number, applicant name, CPE invitation date, whether the applicant elected to participate in CPE, and the CPE status.  
(<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- CPE Panel Process Document  
(<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>)
- CPE Provider Contract and Statement of Work Information (SOW)  
(<http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>)
- CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>)
- Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf>)
- Community Feedback on Draft CPE Guidelines  
(<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- Updated CPE Frequently Asked Questions  
(<http://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>)

- CPE Processing Timeline (<http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>)

On 17 September 2016, the Board directed the President and CEO, or his designees, to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the Board’s oversight of the New gTLD Program (Scope 1). (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.) The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process.

Thereafter, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3). (<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.) Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30 (.LLC),<sup>1</sup> 14-32 (.INC),<sup>2</sup> 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCCK). ([Letter from Chris Disspain, 26 April 2017](#).)

In November 2016, FTI Consulting Inc.’s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE Process Review following consultation with various candidates. On 13 January 2017, FTI was retained by ICANN’s outside counsel, Jones Day, to perform the review. ([CPE Process Review Update, 2 June 2017](#).)

On 2 June 2017, in furtherance of its effort to operate to the maximum extent feasible in an open and transparent manner, and to provide additional transparency on the progress of the CPE Process Review, ICANN organization issued a status update. ([CPE Process Review Update, 2 June 2017](#).) Among other things, ICANN organization informed the community that FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI’s GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. (See [CPE Process Review Update, 2 June 2017](#).)

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<sup>1</sup> Reconsideration Request 14-30 was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf>.

<sup>2</sup> Reconsideration Request 14-32 was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

The [2 June 2017 update](#) also provided the community with additional information regarding the CPE Process Review, including that it was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN organization issued the 2 June 2017 status update. (See [CPE Process Review Update, 2 June 2017.](#))

On 1 September 2017, ICANN organization issued a second update on the CPE Process Review. ICANN organization advised that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed. ([CPE Process Review Update, 1 September 2017.](#)) The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 1 September 2017.](#)) On 4 October 2017, FTI completed its investigative process relating to the second track. (See [Minutes of BGC Meeting, 27 Oct. 2017.](#))

On 13 December 2017, consistent with its commitment to transparency, ICANN organization published FTI's three reports on the CPE Process Review (CPE Process Review Reports or the Reports) on the CPE webpage, and issued an announcement advising the community that the Reports were available. (<https://newgtlds.icann.org/en/applicants/cpe#process-review>; <https://www.icann.org/news/announcement-2017-12-13-en>.)

For Scope 1, "FTI conclude[d] that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process....While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization." ([Scope 1 Report](#), Pg. 4.)

For Scope 2, "FTI conclude[d] that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE." ([Scope 2 Report](#), Pg. 3.)

For Scope 3, "[o]f the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL),

FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the reports. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider’s working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI’s investigation, FTI found that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider’s working papers associated with the first .GAY evaluation.” ([Scope 3 Report](#), Pg. 4.)

### dotgay’s DIDP Request

dotgay’s DIDP Request seeks the disclosure of documentary information concerning the CPE Process Review. First, as a preliminary matter, the Request seeks many of the same categories of documents that it previously requested in prior DIDPs, to which ICANN has responded, and 17 of the 21 categories of documents requested are identical to categories of documents requested by Mr. Ali on behalf of DotMusic Limited on 10 January 2018.<sup>3</sup> (See Requests [20141022-1](#), [20151022-1](#), [20170518-1](#) (all on behalf of dotgay), [20170610-1](#) (on behalf of dotgay and DotMusic Limited), and [20180110-1](#) (on behalf of DotMusic Limited).) Further, the Request seeks documentary information which ICANN organization has already made publicly available. As ICANN organization explained in its responses to dotgay’s previous Requests, and as further discussed below, ICANN organization has provided extensive updates concerning the CPE Process Review on the CPE webpage. ([CPE Webpage, New gTLD microsite](#).) ICANN organization provided updates concerning the CPE Process Review in April 2017, June 2017, and September 2017, and published all three of FTI’s Reports in December 2017. ([CPE Webpage, New gTLD microsite](#).) Additionally, a September 2016 Board resolution and October 2016 BGC minutes, both available on ICANN organization’s website ([Board Resolution 2016.09.17.01](#), [BGC Minutes dated 18 October 2016](#)) reflect more information about the status and direction of the CPE Process Review. Many of the Items sought in the Request were addressed in these publications.

Second, in addition to having been previously requested, many of the Items within the instant Request are overlapping and seek the same information. For example, and as discussed below, Item 1, which seeks emails among relevant ICANN organization

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<sup>3</sup> Items 1 through 5 of Request 20180110-1 and the instant Request are identical. Items 6 and 7 seek “draft CPE Reports concerning” .GAY in the instant Request and .MUSIC in Request 20180110-1. Items 8 through 10 and 12 through 20 of the instant Request are identical to Items 8 through 19 of Request 20180110-1. Items 11 and 21 of the instant Request were not included in Request 20180110-1.

personnel relating to the CPE process and evaluations, Item 2, which seeks emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations, and Item 5, which seeks three categories of emails provided to FTI, are all encompassed by Item 4, which requests all emails provided to FTI by ICANN organization. Thus, in responding to the Requests, ICANN organization grouped the Items that are overlapping.

Third, dotgay's blanket assertion that none of the DIDP Defined Conditions of Nondisclosure (Nondisclosure Conditions) apply because ICANN's commitment to transparency under the Articles of Incorporation and Bylaws requires the disclosure of the materials used by FTI in the CPE Process Review misstates the DIDP Process and misapplies ICANN organization's Mission, Commitments, and Core Values, and adopting it would render the Nondisclosure Conditions meaningless. (See Request at Pgs.1-2.)

The DIDP exemplifies ICANN organization's Commitments and Core Values supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN organization's operations and within ICANN organization's possession, custody, or control that are not already publicly available are made available unless there is a compelling reason for confidentiality. ([DIDP](#).) Consistent with its commitment to operating to the maximum extent feasible in an open and transparent manner, ICANN organization has published process guidelines for responding to requests for documents submitted pursuant to DIDP (DIDP Response Process). (See [DIDP Response Process](#).) The DIDP Response Process provides that following the collection of potentially responsive documents, "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization's website]." ([DIDP Response Process](#); see also [Nondisclosure Conditions](#).) Thereafter, if ICANN organization concludes that a document falls within a Nondisclosure Condition, "a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure." ([DIDP Response Process](#).) "Information that falls within any of the [Nondisclosure Conditions] may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure." ([DIDP](#).)

Moreover, the Nondisclosure Conditions, and the entire DIDP, were developed through an open and transparent process involving the broader community. The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN organization, which included extensive public comment and community input. (See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Following the completion of the independent review of standards of accountability and transparency in 2007, ICANN organization sought public comment on the resulting recommendations, and summarized and posted publicly the community feedback. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Based on the community's feedback, ICANN organization proposed changes to its frameworks and

principles to “outline, define and expand upon the organisation’s accountability and transparency,” (<https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>), and sought additional community input on the proposed changes before implementing them. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.)

However, neither the DIDP nor ICANN organization’s Commitments and Core Values supporting transparency and accountability obligates ICANN organization to make public every document in ICANN organization’s possession. The DIDP sets forth circumstances (Nondisclosure Conditions) for which those other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public consultation, that the community has agreed are presumed not to be appropriate for public disclosure (and the *Amazon EU S.A.R.L.* Independent Review Process Panel confirmed are consistent with ICANN’s Articles of Incorporation and Bylaws). The public interest balancing test in turn allows ICANN organization to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN organization may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without contravening its commitment to transparency.

As the Amazon EU S.A.R.L. Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

([Amazon EU S.A.R.L. v. ICANN, ICDR Case No. 01-16-000-7056, Procedural Order](#) (7 June 2017), at Pg. 3.) ICANN organization’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that “in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN’s Mission.” (ICANN Bylaws, 22 July 2017, [Art. 1, Section 1.2\(c\)](#).)

Indeed, a critical competing Core Value here is ICANN organization’s Core Value of operating with efficiency and excellence (ICANN Bylaws, at [Art. 1, Section 1.2\(b\)\(v\)](#))) by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider’s Confidential Information. ICANN organization’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN organization is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.” (New gTLD Program Consulting

Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.) Confidential Information includes “all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information.” (<https://newgtlds.icann.org/en/applicants/cpe>.) The materials that the CPE Provider shared with ICANN organization, ICANN organization’s counsel, and FTI reflect the CPE Provider’s Confidential Information, including confidential information relating to its operations, products, and services (i.e. its methods and procedures for conducting CPE analyses), and Personal Information (i.e., its employees’ personally identifying information).

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, ICANN seeks consent from the contractor to release information.<sup>4</sup> (See, e.g., [Response to Request 20150312-1](#) at Pg. 2.) Here, ICANN organization endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN organization’s request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations. ICANN organization’s contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN organization to breach its contract with the CPE Provider. The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN organization’s contract with the CPE Provider: there is a Nondisclosure Condition for “[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.” ([DIDP](#).)

#### Items 1, 2, 4, 5, and 9

Items 1, 2, 4, 5, and 9 seek either the same or overlapping documentary information. Items 1, 2, 4, and 5 seek email correspondence among ICANN organization personnel (Item 1), between ICANN organization personnel and CPE Provider personnel (Item 2), and that ICANN organization provided to FTI (Items 4 and 5). Item 9 seeks documents provided to FTI by ICANN organization personnel Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, and Christine Willett. dotgay previously requested these materials in Requests 20141022-1 and 20151022-1, both of which sought disclosure of, among other things, policies, guidelines, directives, instructions or guidance from ICANN organization to the CPE Provider, and Request 20170518-1, which sought disclosure of, among other things, “materials provided to the evaluator [FTI] by” the CPE Provider and by ICANN organization. (See [Response to Request 20170518-1](#), at Pgs. 3-6; [Response to Request 20151022-1](#), at Pgs. 5-6; [Response to Request 20140122-1](#), at Pgs. 3-5.)

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<sup>4</sup> Of note, and as discussed within the Transparency Subgroup of the Work Stream 2 effort for the Cross Community Working Group on Enhancing ICANN Accountability, ICANN’s contracting practice has evolved such that nondisclosure agreements are not entered into as a matter of course, but instead require a showing of business need.

As set forth in the Scope 1 Report, FTI requested that ICANN provide “[i]nternal emails among relevant ICANN organization personnel relating to the CPE process and evaluations,” and “[e]xternal emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations.” ([Scope 1 Report](#), at Pg. 6). FTI’s request encompassed the documents that dotgay now requests in Items 1, 2, 4, 5, and 9. In response to FTI’s request, ICANN organization provided FTI with 100,701 emails, including attachments. The time period covered by the emails received dated from 2012 to March 2017. The 100,701 emails (including attachments) produced to FTI include the documents responsive to Items 1, 2, 5, and 9 that are in ICANN’s possession, custody or control, subject to the applicable Nondisclosure Conditions below.

As noted in the Scope 1 Report, a large number of the emails were not relevant to FTI’s investigation, because the search terms were designed to be over-inclusive. ([Scope 1 Report](#), at Pgs. 10-11.) The terms included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process, and other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website. After confirming that the initial search terms were overbroad and returned a large number of emails that were not relevant to FTI’s investigation, FTI performed a targeted key word search to identify emails relevant to the CPE process and reduce the time and cost of examining irrelevant or repetitive documents. ([Scope 1 Report](#), at Pgs. 10-12.)

The Scope 1 Report states that the relevant emails “generally fell into three categories. First, ICANN organization’s emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider’s draft reports.” “Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization’s efforts to understand how the CPE Provider came to its conclusions on a specific evaluation.” Third, ICANN organization’s emails included “emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines.” ([Scope 1 Report](#), at Pgs. 11-12).

The vast majority of the non-relevant emails related to the CPE process were administrative in nature, such as communications to schedule meetings and conference calls. The emails also concerned correspondence between ICANN organization and its counsel, Jones Day, internal discussions regarding the standards applied to new gTLD applications, correspondence concerning invoices, correspondence with new gTLD and CPE applicants, and correspondence concerning public comments.

ICANN organization’s internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) described in the foregoing paragraphs are subject to the following Nondisclosure Conditions:

- Confidential business information and/or internal policies and procedures.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

Indeed, dotgay acknowledges in the instant Request that the materials it seeks reflect "ICANN's deliberative and decision-making process."<sup>5</sup>

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

dotgay asserts that "the attorney-client privilege does not bar disclosure of any requested document" because all requested documents were provided to FTI, which dotgay describes as a third party. (Request at Pg. 2.) dotgay cites California's Evidence Code and *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229 (2004) for support of its argument. (*Id.*) However, under California's Evidence Code, "[a] disclosure that is itself privileged is not a waiver of any privilege." (Cal. Evid. Code § 912(c).) And *McKesson HBOC* explains that

where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege.

(115 Cal. App. 4th 1229, 1236-37 (2004).) Here, ICANN organization's outside counsel, Jones Day—not ICANN organization—retained FTI.<sup>6</sup> Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization.<sup>7</sup> Therefore, FTI's draft and working materials are protected by the attorney-client privilege under California law.

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<sup>5</sup> Request at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

<sup>6</sup> See FTI's CPE Process Review Reports, each of which indicate they were "Prepared for Jones Day", <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

<sup>7</sup> See also *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 774 (2013) (application of attorney-client privilege to communications to third parties "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted . . . clearly includes communications to a consulting expert" (internal quotation marks and citations omitted)).

Further, even if the attorney-client privilege did not apply to documents shared with FTI (which it does), disclosing the content and choice of documents that ICANN organization and the CPE Provider provided to FTI pursuant to ICANN organization's outside counsel's direction, and FTI's draft and working materials, "might prejudice an[] internal . . . investigation"—that is, the CPE Process Review. ([DIDP](#).) Accordingly, such documentary information is subject to a Nondisclosure Condition.

ICANN organization's communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) described above are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

Again, dotguy acknowledges that the materials it seeks reflect "ICANN's deliberative and decision-making process."<sup>8</sup>

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider's correspondence with ICANN organization contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or

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<sup>8</sup> Request at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.<sup>9</sup>

ICANN organization notes that the correspondence between the CPE Provider and ICANN organization reflects the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those communications, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. As noted, ICANN sought the CPE Provider's consent to waive the confidentiality, but this was not granted.

- Confidential business information and/or internal policies and procedures.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 5 seeks

[a]ll emails provided to FTI that (1) are "largely administrative in nature," (2) discuss[] the substan[ce] of the CPE process and specific evaluations," and (3) are "from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines

To the extent that this Item includes internal email correspondence among the CPE Provider personnel, as noted in the Scope 1 Report, FTI did not receive such documents. ([Scope 1 Report](#) at Pg. 6.) As such, ICANN organization is not in possession, custody, or control of those documents.

#### Items 3, 14, 15, and 16

Items 3, 14, 15, and 16 seek FTI's list of search terms (Item 3), notes, transcripts, recordings, and documents created in response to FTI's interviews of ICANN organization personnel (Item 14) and of CPE Provider personnel (Item 14), and FTI's investigative plan (Item 16). dotgay previously requested certain of these materials in Request 20170518-1 Item 13, which sought "materials provided to ICANN by [FTI] concerning the [CPE Process] Review." (See [Response to Request 20170518-1](#), at Pgs. 3-4.)

The CPE Process Review Reports includes the information responsive to these Items. Specifically, concerning Item 3, the Scope 1 Report states, "[i]n an effort to ensure the comprehensive collection of relevant emails, FTI provided ICANN organization with a

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<sup>9</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that ‘hit’ on a search term. The search terms were designated to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI’s investigation...the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website.” ([Scope 1 Report](#), at Pg. 10.)

With regard to Item 16, all three CPE Process Review Reports contain detailed descriptions of FTI’s investigative plan. ([Scope 1 Report](#), at Pgs. 3-7; [Scope 2 Report](#), at Pgs. 3-9; and [Scope 3 Report](#), at Pgs. 5-8.)

With respect to documents responsive to Items 3, 14, 15, and 16, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

As noted above, dotgay acknowledges in the instant Request that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”<sup>10</sup>

- Personnel, medical, contractual, remuneration, and similar records relating to an individual’s personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

FTI’s interviews of CPE Provider personnel referenced the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization’s contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

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<sup>10</sup> Request at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.<sup>11</sup>

ICANN organization notes that FTI's notes of interviews of CPE Provider personnel reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those materials, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. ICANN organization does not have possession, custody, or control over any transcripts, recordings, or other documents created in response to these interviews.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

#### Items 6, 7, and 8

Items 6, 7, and 8 seek draft CPE reports concerning .GAY (Items 6 and 7) and draft CPE reports reflecting communications between ICANN organization and the CPE Provider concerning ICANN's questions about "the meaning the CPE Provider intended to convey" (Item 8).

The CPE Provider provided to FTI, at FTI's request, "all draft CPE reports, including any drafts that reflected feedback from ICANN organization." ([Scope 1 Report](#), at Pg. 15.) Also, as noted above, ICANN organization provided FTI with emails between ICANN organization and the CPE Provider reflecting questions or suggestions made to clarify how the CPE Provider came to its conclusions on a specific evaluation. As discussed above, the CPE provider has objected to disclosure of its work product, including working papers and draft CPE reports, some of which were attached to emails between ICANN organization and the CPE Provider, and ICANN organization is contractually obligated to maintain the confidentiality of the draft CPE reports, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived.

Although the draft CPE reports may not be disclosed pursuant to the nondisclosure provision, FTI endeavored to describe the relevant aspects of the draft CPE reports in the Reports without violating the nondisclosure provision of ICANN organization's

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<sup>11</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

contract with the CPE Provider. As noted in the Scope 1 Report, ICANN organization's feedback on draft CPE reports was in redline form. All of the comments that FTI was able to attribute to ICANN organization "related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions." ([Scope 1 Report](#), at Pg. 16.) ICANN organization's feedback included "an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey." ([Scope 1 Report](#), at Pg. 16.) It was "clear" to FTI "that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another."

FTI concluded in the Scope 1 Report that "ICANN organization had no role in the [CPE] evaluation process and no role in the writing of the initial draft CPE report." ([Scope 1 Report](#), at Pg. 9.) Further, based on its interviews of ICANN organization and CPE Provider personnel, and its review of relevant email communications, FTI concluded that "ICANN organization was not involved in the CPE Provider's research process." ([Scope 1 Report](#), at Pg. 9.) Only after the CPE Provider "completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization," which "provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls." ([Scope 1 Report](#), at Pg. 9.) "FTI observed that when ICANN organization commented on a draft report, it was only to suggest amplifying rationale based on materials already reviewed and analyzed by the CPE Provider." ([Scope 3 Report](#), at Pg. 10.)

dotgay previously requested these materials in Requests 20151022-1 and 20141022-1, both of which sought disclosure of, among other things, policies, guidelines, directives, instructions or guidance from ICANN organization to the CPE Provider, and Request 20170518-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to Request 20170518-1](#), at Pgs. 3-4; [Response to Request 20151022-1](#), at Pgs.5-6; [Response to Request 20141022-1](#), at Pgs. 3-5.)

With respect to documents responsive to Items 6, 7, and 8 as described above, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

dotgay acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”<sup>12</sup>

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.<sup>13</sup>

ICANN organization notes that draft CPE reports reflect the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

#### Item 10

Item 10 seeks the 13 January 2017 engagement letter between FTI and ICANN. FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist.

ICANN organization described the scope of FTI’s review (i.e. the terms of its engagement) and provided links to ICANN organization’s CPE Process Review Update, 2 June 2017, in response to Item 7 of dotgay’s Request 20170518-1. ([Response to Request 20170518-1](#), at Pgs. 4-5; [CPE Process Review Update, 2 June 2017](#).)

As described in the CPE Process Review Update, dated 2 June 2017, the scope of the Review consisted of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such

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<sup>12</sup> Request at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

<sup>13</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

reference materials exist for the evaluations which are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 2 June 2017.](#))

The 2 June 2017 Update further explained that the Review was being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focused on gathering information and materials from ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE provider. (See [CPE Process Review Update, 2 June 2017.](#))

Further, even if documents responsive to Item 10 existed, this request is subject to the following Nondisclosure Condition:

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

#### Item 11

Item 11 seeks the original Request for Proposal (RFP) pertaining to FTI's review of the CPE [P]rocess. ICANN did not issue an RFP concerning the CPE Process Review. As such, the requested documentary information does not exist.

ICANN organization informed the community in the 2 June 2017 CPE Process Review Update that FTI was chosen following consultation with various candidates. FTI was selected because it had the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. (See [CPE Process Review Update, 2 June 2017.](#))

#### Items 12 and 13

Items 12 and 13 seek the CPE Provider's working papers associated with dotgay's CPE (Item 12) and the CPE Provider's internal documents relating to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets (Item 13). dotgay previously requested these materials in Request 20170518-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to Request 20170518-1](#), at Pgs. 3-6.)

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers, and ICANN organization is contractually obligated to maintain the confidentiality of the working papers, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE

Provider has not waived. Although FTI was unable to disclose the contents of the working papers in its Reports, FTI endeavored to describe the relevant aspects of the working papers in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider, although ICANN organization was required to redact some of the information that FTI originally included in the Scope 3 Report before publishing it, pursuant to ICANN organization's contractual obligations. (See, e.g., [Scope 3 Report](#), at Pgs. 18-19.)

As noted in the Scope 3 Report, FTI learned in its investigation "that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, 'Is the community clearly delineated?'; the same question appears in the CPE Guidelines. The 'Answer' field had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a 'yes' or 'no' response. In the 'Evidence' field, the evaluator provided his/her reasoning for his/her answer. In the 'Source' field, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including, but not limited to, the application (or sections thereof), reference material, or letters of support or opposition." ([Scope 3 Report](#), at Pg. 9.)

As explained in the Scope 2 Report, FTI also learned that after two CPE Provider evaluators assessed and scored a CPE application in accordance with the Applicant Guidebook and CPE Guidelines, a "Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team [evaluating the CPE application] then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet." ([Scope 2 Report](#), at Pg. 8.)

With respect to documents responsive to Items 12 and 13 described in the foregoing paragraphs, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

dotgay acknowledges in that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”<sup>14</sup>

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider’s working papers include references to the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization’s contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.<sup>15</sup>

ICANN organization notes that the CPE Provider’s working papers reflect the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

#### Item 17

Item 17 seeks FTI’s follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided. There is no written follow up communications from FTI to the CPE Provider. As such, ICANN organization is not in possession, custody, or control of any documents responsive to Item 17 because no such documents exist.

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<sup>14</sup> Request at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

<sup>15</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

### Items 18, 19, 20, and 21

Items 18, 19, 20, and 21 seek communications between ICANN organization and FTI (Item 18), ICANN organization and the CPE Provider (Item 19), the CPE Provider and FTI (Item 20) regarding FTI's review, and documents and communications regarding the scope of FTI's review (Item 21).

dotgay previously requested some of these materials in Requests 20141022-1 and 20151022-1, both of which sought disclosure of, among other things, policies, guidelines, directives, instructions or guidance from ICANN organization to the CPE Provider, and Request 20170518-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to Request 20170518-1](#), at Pgs. 3-6; [Response to Request 20151022-1](#), at Pgs. 5-6; [Response to Request 20140122-1](#), at Pgs. 3-5.)

With respect to documents responsive to Items 18, 19, 20, and 21, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

dotgay acknowledges that the materials it seeks reflect "ICANN's deliberative and decision-making process."<sup>16</sup>

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider's correspondence with ICANN organization and FTI contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the

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<sup>16</sup> Request at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.<sup>17</sup>

ICANN organization notes that the CPE Provider's correspondence reflects the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of that correspondence, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Confidential business information and/or internal policies and procedures.

Additionally, documents responsive to Item 18 and 21 are subject to the following Nondisclosure Condition:

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

#### Public Interest in Disclosure of Information Subject to Nondisclosure Conditions

Notwithstanding the applicable Nondisclosure Conditions identified in this Response, ICANN organization has considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure. ICANN organization has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

#### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN organization makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN organization continually strives to provide as much information to the community as is reasonable. We encourage you to

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<sup>17</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN organization's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# **Exhibit 7**

**ARIF HYDER ALI**

Contact Information  
Redacted

September 13, 2016

**VIA E-MAIL**

ICANN Board of Directors  
c/o Mr. Steve Crocker, Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Expert Opinion of Prof. William N. Eskridge, Jr., in Support of dotgay's  
Community Priority Application**

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC (“dotgay”), to submit an independent expert opinion of Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, to the ICANN Board (“Board”) with the goal to assist the Board in evaluating dotgay’s reconsideration request (16-3) on September 15, 2016.<sup>1</sup> Prof. Eskridge is a world renowned expert both in legal interpretation and in sexuality, gender, and the law, and was recently ranked as one of the ten most-cited legal scholars in American history. Prof. Eskridge’s independent expert report explains, step-by-step, fundamental errors in the EIU’s reasons for denying dotgay’s community status.

Pursuant to the Independent Review Panel’s recent findings in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (July 29, 2016) (“Dot Registry Declaration”), which was accepted by the Board by way of its Resolutions 2016.08.09.11 and 2016.08.09.13 on August 9, 2016, it is imperative that the Board carefully reviews and considers Prof. Eskridge’s expert report prior to deciding dotgay’s reconsideration request (16-3).

First, the Board Governance Committee’s (“BGC”) June 26, 2016, recommendation to the Board to deny dotgay’s reconsideration request (16-3) was

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<sup>1</sup> Expert Report of Professor William N. Eskridge Jr., dated September 12, 2016, Exhibit 1

premised on a standard that was subsequently rejected by the Dot Registry Declaration. Specifically, the BGC rejected dotgay's request for reconsideration because dotgay did not "identify any misapplication of policy or procedure by the EIU that materially or adversely affected [dotgay], and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information." The Dot Registry Declaration, however, rejected this standard for reconsideration and held that "in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB."<sup>2</sup> At no point in dotgay's recourse to ICANN's accountability processes from 2014 to date has the Board scrutinized the CPE Report for consistency with the principles of fairness, transparency and non-discrimination; as Prof. Eskridge's Report demonstrates, the CPE Report would fail even the most lenient examination.

Second, the BGC's June 26, 2016 Recommendation improperly declined to consider dotgay's May 15, 2016, presentation and written summary of arguments because "the Presentation focused on the merits of the Second CPE Report." According to the Dot Registry Declaration, "the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations."<sup>3</sup> The BGC's failure to recognize its responsibility to ensure the EIU's compliance with these principles infected its decision to exclude from consideration whether the EIU had in fact been correct in its application of the Articles, Bylaws and AGB. This is troubling because, as explained by Prof. Eskridge in his report, the EIU failed to comply with ICANN's Articles and Bylaws.

Specifically, Prof. Eskridge explains that the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement between the applied-for string (.GAY) and the LGBTQIA community: (1) interpretive errors by misreading the explicit criteria laid out in ICANN's Applicant Guidebook ("AGB") and ignoring ICANN's mission and core values; (2) errors of inconsistency and discrimination by failure of the EIU to follow its own guidelines and its discriminatory application to dotgay's application

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<sup>2</sup> *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration, p. 34 (29 July 2016).

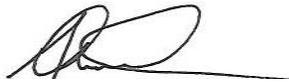
<sup>3</sup> *Id.* at p.34.

when compared with other applications; and (3) errors of fact, namely, a misstatement of important empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities. Prof. Eskridge's report, after discussing EIU's egregious reasoning behind rejecting dotgay's application, concludes that the EIU "engaged in a reasoning process that remains somehow mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory."

Finally, as dotgay has amply demonstrated in its submissions to the ICANN Board, it is entitled to the full two points in relation to community endorsement,<sup>4</sup> since it has the support of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) – a global human rights organization focused on the gay community with member organizations in 125 countries.

Accordingly, pursuant to the Board's obligation to exercise due diligence, due care, and independent judgment in reaching reconsideration decisions, we sincerely hope that the Board: (1) will review and agree with Prof. Eskridge's independent expert opinion that the EIU's evaluation of dotgay's community priority application was flawed, and (2) grant dotgay's community priority application without any further delay.

Sincerely,



Arif Hyder Ali  
Partner, Co-Chair of International Arbitration Group

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<sup>4</sup> See dotgay letter to ICANN Board of Directors (September 8, 2016) pp. 5-9. See also dotgay presentation to the Board Governance Committee (May 17, 2016) pp. 7-9 and Statement of Renato Sabbadini (May 17, 2016).

# **EXPERT REPORT**

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- 1. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES**
- 2. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S PREVIOUS REPORTS**

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## **I. EXECUTIVE SUMMARY**

Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report, authored by the Economist Intelligence Unit (EIU) recommended that the application be denied; the major reason was that dotgay did not meet the nexus requirement between the applied-for string (“.gay”) and the community of people who do not conform to traditional norms of sexuality and gender. The CPE Report is fundamentally erroneous. The Report’s fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States. In short, the CPE Report and its recommendations should be rejected, and dotgay should be awarded full credit (4 of 4 points) for establishing the nexus of its string with the community.

## **II. QUALIFICATIONS OF THE EXPERT**

1. I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent legal opinion on the validity of the ICANN Community Priority

Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), evaluating dotgay's community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string ".gay".

2. I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,<sup>1</sup> leading monographs,<sup>2</sup> and dozens of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.<sup>3</sup>
3. My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN's gTLD Applicant Guidebook (AGB), especially Module 4.2.3, "Criterion #2: Nexus Between Proposed String and Community"; (iii) the history of the terminology in dispute, especially the term "gay" and its applicability to the community of sexual and

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<sup>1</sup> William N. Eskridge Jr. & Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation 1997, now in its third edition, with the fourth edition out next year). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, "by far," ever published in the field of legislation and suggesting that it would "alter the law school curriculum").

<sup>2</sup> For interpretation, consult William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (Foundation 2016), and *Dynamic Statutory Interpretation* (Harvard 1994), as well as William N. Eskridge Jr., *A Republic of Statutes: The New American Constitution* (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard 1999), and *Dishonorable Passions: Sodomy Law in America, 1861-2003* (Viking 2008), and *Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence* (Oxford 2006) (co-authored with Darren Spedale).

<sup>3</sup> According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> (viewed September 8, 2016).

gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

### **III. BACKGROUND**

#### **A. DOTGAY'S APPLICATION**

4. Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures established by the Internet Corporation for Assigned Names and Numbers (ICANN).

#### **B. THE GOVERNING RULES: ICANN'S BYLAWS AND ITS APPLICANT GUIDEBOOK**

5. The governing legal materials include ICANN's Bylaws and its Applicant Guidebook. The Bylaws establish ICANN's mission “to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN's “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).
6. Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

7. ICANN's Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay's application. See AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant "community," nexus between the proposed string and the community, registration policies, and community endorsement. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The CPE Panel of EIU awarded dotgay a score of 10 of 16 points, including a score of 0 of 4 points for Criterion #2, the nexus requirement that will be the focus of this Expert Report.

**C. THE ICANN REQUIREMENTS FOR MEETING THE NEXUS BETWEEN THE APPLIED-FOR STRING AND THE COMMUNITY**

8. Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay's application. Dotgay's petition lost 4 of 4 possible points on Criterion #2, and I shall focus on that criterion, "Nexus Between Proposed String and Community (0-4 Points)." More particularly, I shall focus on the nexus requirement, which is responsible for 3 of the 4 points. (A uniqueness requirement accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)
9. An application merits **3 points** for the nexus requirement if "[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community." AGB, 4-12 (emphasis added). "Name" of the community means "the established name by which the community is commonly known by others." AGB, 4-13. "[F]or a score of 3, the essential

aspect is that the applied-for string is commonly known by others as the identification/name of the community.” AGB, 4-13.

10. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.

11. An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that “[s]tring had no other significant meaning beyond identifying the community described in the application.” AGB, 4-13.

**D. THE CPE REPORT’S REASONS FOR DENYING DOTGAY ANY POINTS FOR THE COMMUNITY-NEXUS REQUIREMENT**

12. In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus requirement. CPE Report, 4-6. Because dotgay secured 10 points from the remaining Criteria and needed 14 points for approval, Criterion #2 was the critical reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.

13. Recall that an application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12. The CPE Report dismissed this possibility: “The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community.” CPE Report, 5.

14. The CPE Report does not identify precisely what evidence the EIU Panel relied on to conclude that “gay” is not a “well known short-form or abbreviation of the community” defined in dotgay’s application, but it does read into the explicit requirement (“well known short-form or abbreviation of the community”) an implicit requirement that the string **also** “identify” the community and its members. This implicit requirement is taken from the Applicant Guidebook’s explanation for a partial nexus score. Recall that an application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the “identify” requirement (used in the 2-point evaluation) into the 3-point evaluation.

15. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report rephrased the ICANN definition to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, 5. Based upon this narrowing revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender,

intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

16. The Report did not identify the methodology the EIU followed to support these sweeping empirical statements. Instead, the Report asserted that “a comprehensive survey of the media’s language in this field is not feasible,” CPE Report, 5 note 10, and that “a survey of all LGBTQIA organizations globally would be impossible.” CPE Report, 5 note 12.
17. Dotgay’s application relied on the common use of “gay” as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in “gay pride” parades, support “gay rights,” and follow the “gay media.” The CPE Report conceded this point (CPE Report, 7) but nevertheless claimed that “gay” is “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.” CPE Report, 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are “many similar transgender stories in the media where ‘gay’ is not used to identify the subject.” CPE Report, 6-7 and note 14.
18. The CPE Report also conceded that “gay” is used in the media much “more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.” CPE Report, 7. Nonetheless, the EIU Panel asserted that there is no evidence that “when ‘gay’ is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities.” CPE Report, 7. The EIU Panel’s “own review of the news media” (footnote: the Panel said that “a comprehensive survey of the media’s language is not feasible”) found that “gay” is “more common than terms such as ‘LGBT’ or ‘LGBTQIA’, these terms are now more widely used than ever.” CPE Report, 7 and note 19.

19. The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that “gay” is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, 8.
20. Based upon this reasoning, the CPE Report awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the CPE Report awarded 0 of 1 point for uniqueness. CPE Report, 8.

#### **IV. FUNDAMENTAL ERRORS IN THE CPE REPORT’S REASONING**

21. The CPE Report compiled by the EIU Panel is fundamentally incorrect in its approach to the nexus criterion and in its evaluation of the evidence of community nexus. The fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world.

##### **A. THE CPE REPORT MISREAD ICANN’S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS**

22. Recall the requirements ICANN has set forth, explicitly, for the nexus requirement in its Applicant Guidebook: An application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12 (emphasis added). “Name” of the community means “the established name by which the community is commonly known by others.” AGB, 4-13. “[F]or a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”
23. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.
24. As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.<sup>4</sup> As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes.

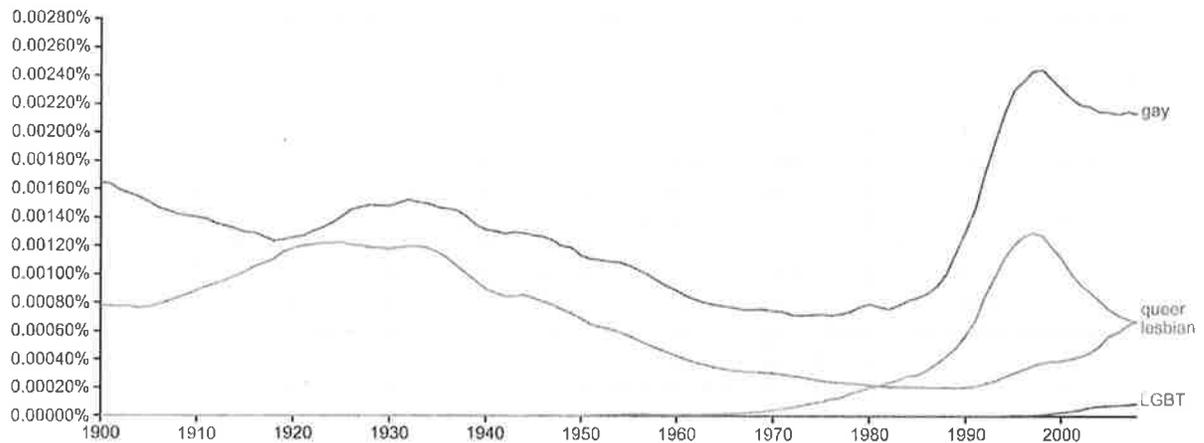
**1. The CPE Report Substantially Ignored The Primary Test: Is the Proposed String a “well known short-form or abbreviation of the community”?**

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<sup>4</sup> The proposition in text is explained and defended in Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37–38 (2012); Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015).

25. To begin with, a major problem is that the EIU Panel systematically ignored the Applicant Guidebook's focus on whether the proposed string (".gay") is "a well known short-form or abbreviation of **the community**" (3 points) or "closely describes **the community**" (2 points) (emphasis added in both quotations). Notice the precise language, especially the language I have set **in bold**. The proposed string does not have to be "**the only** well known short-form or abbreviation of the community" and does not have to be "**the only term that** closely describes the community" (bold type for language I am adding for contrast). More important, the primary focus is "the community," not just "community members" (who are an alternative focus for the 2-point score).

26. The overall community is sexual and gender nonconformists. This is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely embraced natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. "Gay" is a "well known short-form or abbreviation of the community" (the requirement for 3 points) and also "closely describes the community" (the requirement for 2 points). There is no requirement that "gay" must be the only umbrella term for the community or even that it be the most popular term—but in fact "gay" remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that "gay" has been a popular word for more than a century, but also demonstrates that once "gay rights" became ascendant in the 1990s, the term's dominance increased and consolidated.



*Figure 1. A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008*

## **2. The CPE Report Created an “Under-Reach” Criterion Not Found in or Supported by the Applicant Guidebook and Applied the Novel Criterion to create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws**

27. In another major departure from ICANN’s Applicant Guidebook and its Bylaws, the EIU Panel introduced a **Liberum Veto** (Latin for “free veto”) into ICANN’s nexus criteria. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth’s ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The CPE Report created a similar Liberum Veto, by importing a requirement that the applied-for string (“.gay”) can be vetoed if it “does not sufficiently identify **some**

**members** of the applicant’s defined community, in particular transgender, intersex, and ally individuals.” CPE Report, 5 (emphasis added).

28. Where did this Liberum Veto come from? It was not taken from the Applicant Guidebook’s explicit instructions for the nexus requirement, AGB, 4-12, nor was it taken from the Guidebook’s Definitions of “Name” or “Identify,” AGB 4-13. Yet the EIU Panel quoted the Applicant Guidebook for its statement of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake.

29. According to the Applicant Guidebook, “Identify,” a key term in the 2-point test, means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report recast this Guidebook criterion to require that the applied-for string “must [1] ‘closely describe the community or the community members’, i.e., the applied-for string is what [2] ‘the typical community member would naturally be called.’ ” CPE Report, 5 (quoting the AGB). Notice that the first part [1] of the CPE Report’s requirement is taken from the Guidebook’s nexus requirement and the second part [2] is quoted from an illustration of **one** example where the Guidebook’s criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook’s focus on “the community” and refocused only on “members of the community,” so the Panel ignored the Applicant Guidebook’s focus on an **objective** view of the community and refocused only on **subjective** usages by some members of the community. And it took subjective usages pretty far by creating a Liberum Veto.

30. Moreover, the EIU Panel’s Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that the Guidebook defines “Identify” to mean that “the applied-for string closely describes the community or the community members, **without over-reaching substantially beyond the community.**” AGB, 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application, like this:

*ICANN AGB Concern: Applied-For String > Community Defined in Application*

But that’s not the concern identified by the EIU Panel’s Liberum Veto analysis, which claims that the applied-for string (“gay”) “under-reaches” substantially short of the whole community. The Panel’s “under-reaching” concern flips the “over-reaching” concern of the Applicant Guidebook. The Panel’s worry that the applied-for string is much narrower than the community defined in the application, looks like this:

*EIU Panel Concern: Applied-For String < Community Defined in Application*

31. Although I shall document how the EIU Panel is mistaken in its application of its “under-reaching” analysis, note that this analysis and the Liberum Veto are errors by the EIU Panel and are contrary to the ordinary meaning of ICANN’s Applicant Guidebook. The “under-reaching” analysis and the Liberum Veto are also inconsistent with the CPE Guidelines, Version 2.0, prepared by the EIU itself. See EIU, CPE Guidelines, 7-8 (Version 2.0), analyzed below.

### 3. The CPE Report Ignored and Is Inconsistent with ICANN's Bylaws

32. Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN's mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support "broad, informed participation reflecting the \* \* \* cultural diversity of the Internet." ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.
33. There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—.gay—is ideally suited for these purposes.
34. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), "suicide.gay" (one of the community-operated websites proposed in the application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Expert Report) would think "suicide.gay" before they would think "suicide.lgbt" or "suicide.lgbtqia." See Figure 1, above. Indeed, many educated people (including the author of this Expert Report) cannot easily remember the correct order of the letters in the latter string ("lgbtqia"). Does a

Liberum Veto make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as “lgbtqia”). Figure 2, below, is a dramatic illustration of this point: “gay suicide” is a common locution; the search of books published between 1950 and 2008 does not register significant usage for “LGBT suicide” or “LGBTQIA suicide.”

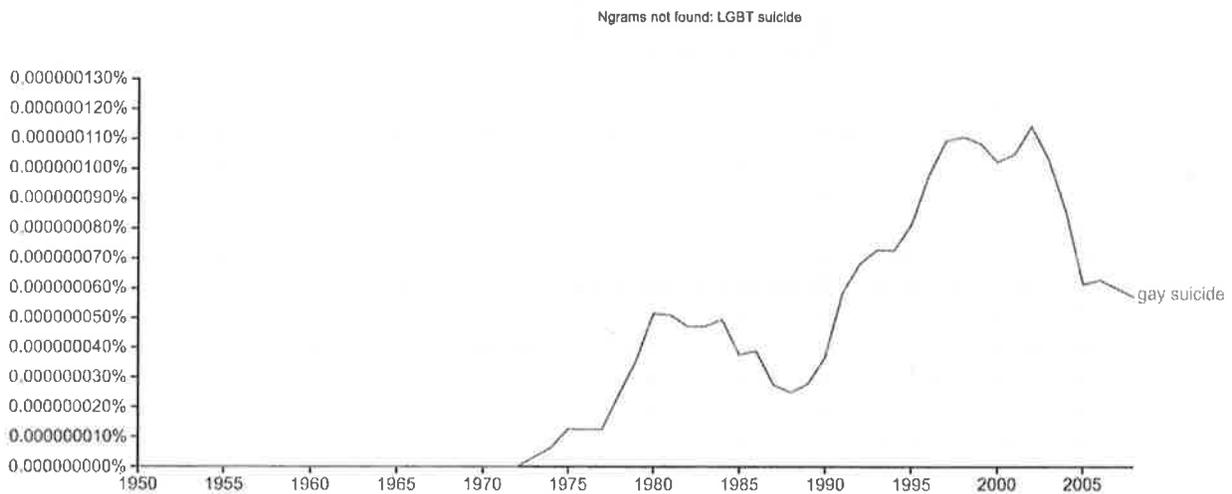


Figure 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the Corpus of Books published between 1950 and 2008

35. Not least important, recall that “non-discriminatory treatment” is a fundamental principle identified in ICANN’s Bylaws. As I shall now show, the EIU has arbitrarily created an “under-reaching” test or requirement, without any notice in its own guidelines. Needless to say, other EIU Panel evaluations have ignored that criterion in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an “under-reaching” test in its nexus requirement, the EIU Panel here has applied it in a most draconian

manner, namely, creating a Liberum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

**B. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES AND PREVIOUS REPORTS AND THEREFORE VIOLATES ICANN'S DUTY OF NON-DISCRIMINATION**

**1. The CPE Report Is Inconsistent with the EIU's Own Guidelines**

36. Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the applied-for string “identifies” the community but does not qualify for a score of 3. I believe dotgay properly qualified for a score of 3, but the CPE Report combined in a confusing way (and apparently contrary to the precise terms of the Applicant Guidebook) the requirements for full (3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the application “identified” the community.
37. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, 5.
38. Based upon this revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the

applicant’s defined community, in particular transgender, intersex, and ally individuals.”  
CPE Report, 5-6.

39. As I concluded above, the EIU Panel has imported a new “under-reaching” test into the nexus analysis—contrary to the Applicant Guidebook’s concern only with “over-reaching.” Indeed, this CPE Report’s unauthorized test is also directly inconsistent with the EIU’s own published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the EIU’s Guidelines quote the Applicant Guidebook’s definition of “Identify,” with the “over-reaching language. Then, the EIU announces its own “Evaluation Guidelines” for this term, including this:

“Over-reaching substantially” means that the string indicates a **wider** geographic or thematic remit than the community has.

EIU, CPE Guidelines, Version 2.0, at 7 (emphasis added). The EIU’s Guidelines do not suggest that the inquiry should be whether the string indicates a “**narrower** geographic or thematic remit than the community has” (emphasis for my substitution).

40. The EIU Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

*Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?*

*Does the string capture a wider geographic/thematic remit than the community has?*

EIU, CPE Guidelines, Version 2.0, at 8 (emphasis in original).

41. Given these Guidelines, one would not expect “under-reaching” decisions, even when an application clearly presents those concerns. An excellent example is the CPE Report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string “.Osaka”. “Members of the community are defined as those who are within the Osaka geographical area as well as those who self-identify as having a tie to Osaka, or the culture of Osaka.” Osaka CPE Report, 2. In a nonexclusive list, the applicant identified as members of the community “Entities, including natural persons who have a legitimate purpose in addressing the community.” Osaka CPE Report, 2.
42. The applied-for string (“.Osaka”) would seem to be one that very substantially “under-reaches” the community as defined by the applicant. Apply to this application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka probably self-identify as “Japanese” rather than “Osakans.” Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. *Liberum Veto?*
43. Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular AirBnB location), or even resident might say, “I am only interested in Chūō-ku! The rest of Osaka has no interest for me.” If a fair number of people feel this way, “more than a small part of the applicant’s defined community is not identified by the applied-for string,” Dotgay CPE Report, 5, if one were following the logic of the EIU Panel evaluating dotgay’s application.

44. I must say that this kind of Libero Vetoevidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for “.Osaka” and that posed by the EIU Panel for “.gay.” Simply substitute “transgender” for “Chūō-ku” in the foregoing analysis, and you have the EIU Panel’s evaluation in the Dotgay CPE Report.

45. By its broad definition of the community, including “[e]ntities, including natural persons who have a legitimate purpose in addressing the community,” the “.Osaka” applicant is screaming “under-reach.” Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the “.Osaka” application simply concluded that the string “matches the name of the community” and awarded the applicant 3 of 3 points for nexus. Osaka CPE Report, 4. “The string name matches the name of the geographical and political area around which the community is based.” Osaka CPE Report, 4. Yes, but the applicant defined the community much, much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an “under-reach” analysis or consider a Libero Vetoevidence in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU’s CPE Guidelines. And, it almost goes without saying, the EIU Panel’s analysis for the dotgay application is strongly inconsistent with the EIU Panel’s lenient analysis for the Osaka application.

## **2. The CPE Report Is Inconsistent with the EIU’s Own Previous Reports**

46. Dotgay’s application may not have been the first time the EIU has performed a nexus analysis suggesting an “under-reach” of an applied-for string, compared with the identified

community. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a *Liberum Veto*.

47. An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether “.hotel” should be approved as a top-level domain. The EIU Panel may have performed a kind of “under-reach” analysis—but it was nothing as critical as that which it performed for dotgay’s application, even though the “.hotel” name was a much more dramatic illustration of “under-reach.”

48. The applicant wanted a domain that would serve the “global Hotel Community.” It defined its community in this way: “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.” Hotel CPE Report, 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.

49. In the discussion of the nexus requirement, the EIU Panel observed that “the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD. However, these entities are considered to comprise only a small part of the community.” Hotel CPE Report, 4. This is a stunning understatement. The applicant’s broad definition of “hotel” would logically sweep into the “community” resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express’s

sleeping car a “hotel”? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be “hotel” rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

50. The EIU’s “under-reach” analysis of the Hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (“.hotel”) did not match the community defined in the application. Contrast the Panel’s tolerant analysis in the Hotel application with its hyper-critical analysis of dotgay’s application. The contrast becomes even more striking, indeed shocking, when you also consider the dotgay CPE Report’s vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in the current Expert Report (reported below).

51. Another example of an EIU Panel’s forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for “.spa”. The EIU Panel awarded the applicant 14 of 16 points, including 4 of 4 points for nexus and uniqueness. Like the “.hotel” applicant, the “.spa” applicant has more significant problems of “under-reach” than dotgay’s application has.

52. The “.spa” applicant defined the community to include “Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors.” Spa CPE Report, 2. The EIU Panel awarded the

applicant 4 of 4 points based upon a finding that these three kinds of persons and entities “align closely with spa services.” Spa CPE Report, 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with “spa” and would not think “.spa” if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this “alignment” concern, and awarded the spa applicant 3 of 3 points for nexus.

**C. THE CPE REPORT IGNORED IMPORTANT HISTORICAL AND EMPIRICAL EVIDENCE THAT STRONGLY SUPPORTS DOTGAY’S APPLICATION**

53. Assume, contrary to any sound analysis, that the CPE Report correctly stated the Applicant Guidebook’s requirements for Criterion #2 (community nexus and uniqueness). Even under the EIU Panel’s excessively restrictive understanding of ICANN’s requirements, dotgay’s application would merit 4 of 4 points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.

54. Recall that the EIU Panel “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community

described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

55. The CPE Report makes no effort to situate dotgay’s claims within the larger history of sexual and gender minorities in history or in the world today. Nor does it identify the methodology the EIU Panel followed to support these sweeping empirical statements. The remainder of this Expert Report will attempt to do that. The analyses contained in Appendix 2 will explain the methodology my research team and I followed for each of the Figures used below.

### **1. From Stonewall to Madrid: “Gay” as an Umbrella Term for Sexual and Gender Minorities, as Well as a Term for Homosexual Men**

56. In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as “degenerates,” “moral perverts,” “intersexuals,” and “inverts,” as well as “homosexuals.”<sup>5</sup> European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of “inverts” and “perverts” departed from “natural” (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a “degeneration” from natural forms.<sup>6</sup>

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<sup>5</sup> E.g., Havelock Ellis, *Sexual Inversion* (3d ed. 1915); William Lee Howard, *The Perverts* (1901), and *Effeminate Men and Masculine Women*, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 39-49 (2008); Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 213 et al. (1983).

<sup>6</sup> Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, 46-49.

57. Even the “inverts” themselves used these terms, as illustrated by Earl Lind’s *Autobiography of an Androgyne* (1918) and *The Female Impersonators* (1922). Lind’s was the first-person account of an underground New York City society of people he describes as “bisexuals,” “inverts,” “female impersonators,” “sodomites,” “androgynes,” “fairies,” “hermaphroditoi,” and so forth. What these social outcasts and legal outlaws had in common is that they did not follow “nature’s” binary gender roles (biological, masculine man marries biological, feminine woman) and procreative sexual practices that were socially expected in this country. See also Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908); Xavier Mayne (a/k/a Edward Stevenson), *The Intersexes: A History of Simulsexualism as a Problem in Social Life* (1908). Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.

58. Most of these terms were at least somewhat derogatory, as was “homosexual,” a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe “urnings,” and Magnus Hirschfeld described “transvestites” with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was “gay,” a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this “happy” word as a description of their own amorphous subculture.

59. An early literary example is Gertrude Stein’s *Miss Furr and Miss Skeene* (1922, but written more than a decade earlier). The author depicts a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a

woman would “naturally” marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed or posed as a man. (Such an explicit book would have been subject to immediate censorship.) Instead, Gertrude Stein described the women thus:

“They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay.”

If they were not completely baffled, most readers in the 1920s would have assumed the traditional reading of “gay,” used here in a distinctively repetitive manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the “man’s role,” or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an “androgynous” or “hermaphrodite.”

60. Gertrude Stein’s story illustrates how “gay” could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. (As the twentieth century progressed, meaning (1) has been almost completely eclipsed by meanings (2) and (3).) There was in this early, closeted era a “camp” feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences “in the know” could find delight in the ambiguity.

61. An early example from popular culture might be helpful. In the hit cinematic comedy *Bringing Up Baby* (1938), Cary Grant's character sends his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asks why the handsome leading man is thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line highly amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.<sup>7</sup>

62. In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular **and** as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. See Figure 1, above. Indeed, in many countries, "queer" to this day carries more negative connotations than "gay," which continues to make "queer" a less attractive generic term.

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<sup>7</sup> For a provocative analysis of the bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

63. A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City's Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the "Gay Revolution."<sup>8</sup> Sympathetic accounts of the Stonewall riots mobilized the popular term "gay" to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the "Gay Revolution." For example, Carter's account reports that this "Gay Revolution" began when a "butch dyke" punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights of protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that "special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. \* \* \* A common theme links those who resisted first and fought the hardest, and that is gender transgression."<sup>9</sup>

64. Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts almost universally described as a "gay bar." The patrons of the gay bar included homosexual and bisexual men who were insisting they be called "gay" and not the disapproved Greek terms ("homosexual" and "bisexual") that had been devised by the doctors. Many of the people in the "gay bar" were not homosexual men, but were lesbians,

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<sup>8</sup> David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2010).

<sup>9</sup> *Id.* at 261; see *id.* at 150-51 (describing the first punch thrown by the "butch dyke," who floored a police officer).

gender-bending “bull dykes” and “drag queens,” gender rebels, bisexual or sexually open youth, and the friends of these gender and sexual nonconformists.<sup>10</sup>

65. Early on, Stonewall was hailed as “the birth of the Gay liberation movement.”<sup>11</sup> In New York alone, it spawned organizations for “gay rights” that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other “gay” groups. These groups included “gay” men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and “queers” of all sorts. The community of sexual and gender minorities knowingly used the term “gay” in both senses—as a term displacing “homosexual” for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman’s *The Gay Manifesto* (1970) made clear that the “gay agenda” was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. “Closet queens” should “come out” and celebrate their differences.

66. Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls “Gay American History.” First published in 1976 and reissued many times since, Katz’s *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called “hermaphrodites” and “man-women”;<sup>12</sup> poet Walt Whitman, who celebrated “the love of

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<sup>10</sup> See *id.* at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

<sup>11</sup> Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 508 (1976).

<sup>12</sup> *Id.* at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

comrades,” which he depicted as male bonding and intimate friendships;<sup>13</sup> “male harlots,” or prostitutes, on the streets of New York;<sup>14</sup> Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans;<sup>15</sup> lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman.<sup>16</sup> More recent historical accounts of the diverse community of sexual and gender nonconformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York*.<sup>17</sup>

67. Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.
68. Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by “lesbian and gay” persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as “LGB” (lesbian, gay, and bisexual) persons, and soon after that the blanket term “LGBT” (lesbian, gay, bisexual, and

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<sup>13</sup> Id. at 509-12 (Whitman).

<sup>14</sup> Id. at 68-73 (male prostitutes, called “harlots” in a contemporary report).

<sup>15</sup> Id. at 317-90 (dozens of women who “passed” as men, many of whom marrying women).

<sup>16</sup> Id. at 118-27 (Smith), 787-97 (Goldman).

<sup>17</sup> Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) (excellent account of the increasingly diverse and differentiated population of “Gay Los Angeles”); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) (although an account focusing on the world of men, this book includes within the “gay male world” bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term “gay” still captured the larger community. I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: “Gaylaw is the ongoing history of state rules relating to gender and sexual nonconformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgendered people.”<sup>18</sup> Although many readers were taken aback that “gaylaw” might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that “gaylaw” and “gay rights” did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

69. In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with “queer” added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay’s application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.

70. Has the expanding acronym rendered “gay” obsolete as the commonly understood umbrella term for our community? Not at all. Recall that the requirement for the nexus requirement

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<sup>18</sup> William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn from *Gaylaw* as well. See *id.* at 567-68. Justice Scalia’s dissenting opinion cited *Gaylaw* so often that he short-formed it “Gaylaw.” See *id.* at 597-98 (dissenting opinion).

between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (“.gay”) “is a well-known short-form or abbreviation of the community.” AGB, 4-12.

There are many, many specific examples indicating that it is.

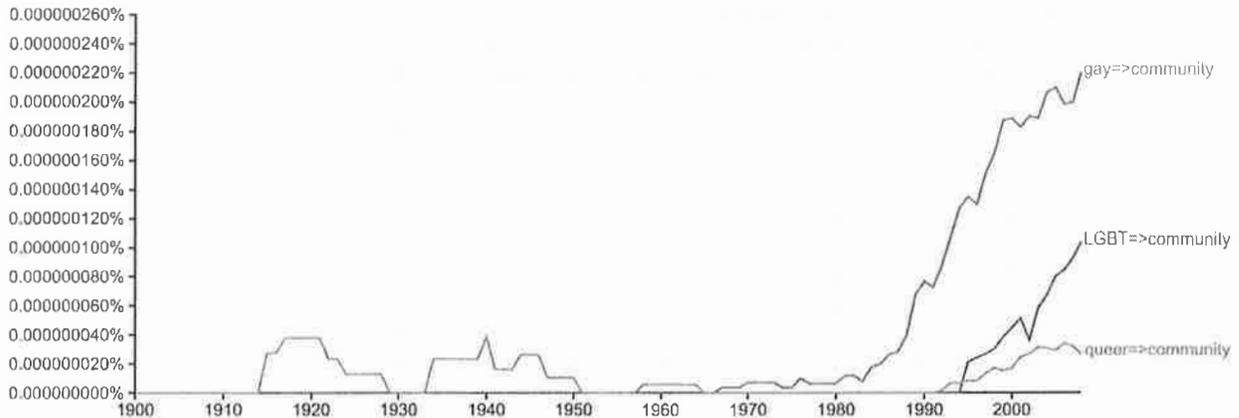


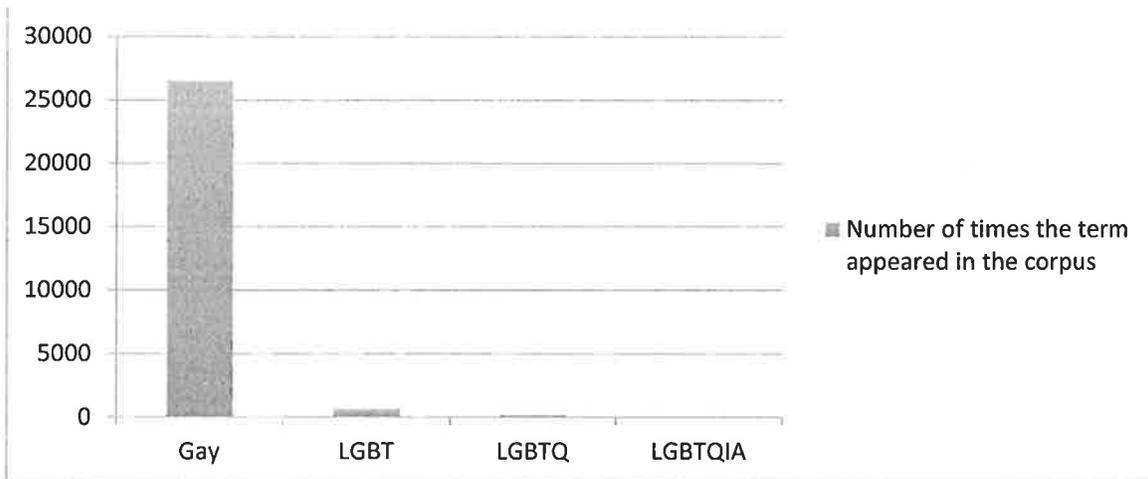
Figure 3. A Depiction of Dependency Relations among “Community” and Modifying Adjectives (“Gay”, “LGBT”, and “Queer”)

71. Figure 3, above, reflects the usage in the searchable Internet of “gay” as modifying “community,” and offers a comparison with other adjectives, such as “queer” and “LGBT” modifying “community.” (As with the other Figures, the methodology for the search is contained in Appendix 2.)

72. There are other corpuses that can be searched, and we have done so to check the reliability of the data in Figure 3. Brigham Young University maintains a Corpus of Contemporary American English (“BYU Corpus”); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at <http://corpus.byu.edu/coca/> (last viewed

Sept. 9, 2016). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that “gay” dominates “LGBT” and other acronyms used to describe sexual and gender minorities. Specifically, we had 26,530 hits on the BYU Corpus for “gay,” 673 hits for “LGBT,” 193 hits for “LGBTQ,” and 0 hits for “LGBTQIA.”

73. Does “gay community” generate a comparable number of hits? In our search of the BYU Corpus, we found “gay community” eight times more frequently than “LGBT community.” (“LGBTQIA community” returned no results.) While “LGBT community” is much more popular now than it was ten or even five years ago, the most popular term remains “gay community.” Figure 3A provides an illustration of these results.



*Figure 3A. A Depiction of Dependency Relations found in the BYU Corpus among “Community” and Modifying Adjectives (“Gay”, “LGBT”, “LGBTQ” and “LGBTQIA”)*

74. How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN’s Applicant Guidebook awards 3 of 3 points

for the community-nexus category if the applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that “gay” is a “well known short-form or abbreviation for the community.” Indeed, the data would support the proposition that “gay” is the “**best known** short-form or abbreviation for the community” (“best” substituted for “well”). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). To confirm this point, consider some current evidence.

75. Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the “gay bar” in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this unprecedented mass assault by a single person on American soil.<sup>19</sup> Almost all of them described Pulse as a “gay bar,” the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a “gay bar” and a “gay community” that included lesbians, bisexual men and women, transgender persons, queer persons, and “allies,” as well as many gay men.

76. Forty-nine “gay people” died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.<sup>20</sup> Most of the victims were

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<sup>19</sup> We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

<sup>20</sup> For biographies of victims in the Pulse shootings, see <http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims> (last viewed 9/2/16).

homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer “allies” such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

77. Consider, finally, a positive legacy of the Stonewall riots, namely, “gay pride.” For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called “the Gay Pride Parade.”<sup>21</sup>

78. Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Auckland to Gay Pride Rome to Gay Pride Orgullo Buenos Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 “gay pride events”

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<sup>21</sup> E.g., *Highlights from New York’s Gay Pride Parade*, N.Y. Times, June 26, 2016, available at <http://www.nytimes.com/live/gay-pride-parade-nyc-2016/> (viewed Sept. 10, 2016).

all over the world, <https://www.nighttours.com/gaypride/> (viewed Sept. 9, 2016). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

79. There are also international gay pride events. In 2017, it will be World Pride Madrid, celebrating Spain's leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid's annual pride celebration was voted "best gay event in the world" by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as "Gay World Pride."<sup>22</sup> Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use "gay" **both** as a generic, umbrella term for sexual and gender minorities **and** as a term referring to homosexual men—often in the same article.

## 2. "Gay" Is an Umbrella Term for the Community That Includes Transgender, Intersex, and "Allied" Persons

80. As illustrated by the accounts of the Orlando "gay bar" and the world-wide "gay pride" events, the term "gay" remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that "gay people," the generic term, remains the most popular use of the term "gay," with "gay men" and "gay women" also popular, but much less so.

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<sup>22</sup> E.g., *Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at <http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/>.

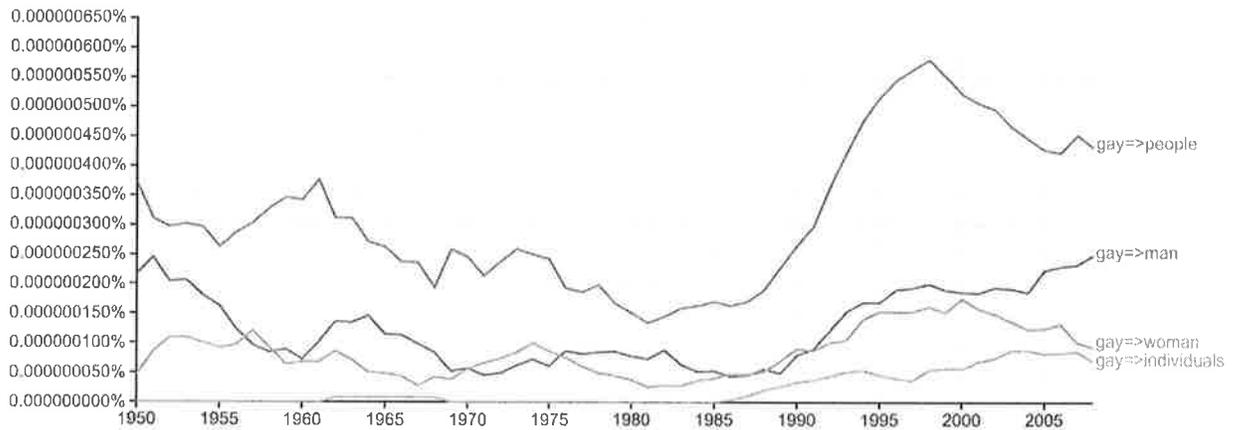


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”

81. The CPE Report, however, insisted that “gay community” does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition, aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing. As I shall show, the EIU Panel did not browse very extensively.
82. To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that “gay” does not describe the overall community. Indeed, the CPE Report and this Expert Report are in agreement that the term “gay” has been the only stable term that has described the community of sexual and gender nonconformists over a period of generations. That “gay” has been a longstanding, stable, and widely referenced term

makes it perfect for an Internet domain (".gay") for the community that consists of sexual and gender minorities.

83. Thus, almost all of the CPE Report's examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay's claim that "gay" is a "well known short-form or abbreviation for the community." The EIU Panel objected that dotgay's analysis "fails to show that when 'gay' is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities." CPE Report, 7. Although I do not believe the EIU Panel fairly characterized dotgay's application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).

84. Consider the famous "Gay Games," an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. The stated purpose of the Gay Games is to foster "self-respect of lesbian, gay, bisexual, transgender, and all sexually-fluid or gender-varient individuals (LGBT+) throughout the world."<sup>23</sup> The mission of the Federation is "to promote equality through the organization of the premiere international LGBT and LGBT-friendly sports and cultural event known as the Gay Games."<sup>24</sup> Notice how the Federation uses the term "gay" as both a generic, umbrella term ("Gay Games") and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly,

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<sup>23</sup> Federation of Gay Games, *Purpose and Mission Statement*, ¶ 1, <https://gaygames.org/wp/about-the-fgg/about-the-federation/purpose-and-mission-statement-2/> (viewed Sept. 9, 2016).

<sup>24</sup> *Id.*, ¶ 2.

LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., “Gay” Games.

85. Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know “gay” to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer “Gay Games” (or its predecessor, “Gay Olympics”) than “Trans Games” or “Intersex Olympics.”

86. The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate “gay pride” events or engage in “gay rights” advocacy.<sup>25</sup> “Gay rights” include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted

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<sup>25</sup> CPE Report, 7; *Gay Pride Calendar*, <http://www.gaypridecalendar.com/> (viewed Sept. 9, 2016) (the website that lists dozens of “pride” parades, operating under a variety of names but all clustered under the generic “gay pride calendar”).

transgender and intersex persons, the mainstream media constantly referenced this as an “anti-gay” measure or as a law that implicated “gay rights.”<sup>26</sup>

87. In addition to being a unifying term to describe the community’s political and legal activity, the short-form “gay” is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called “gay bars.” These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies.<sup>27</sup> *Gay Star News* is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues.<sup>28</sup>

88. Recent histories by LGBT+ insiders continue to use “gay” as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons’ account of *Gay L.A.* They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has “exhausted [her] identity as a ‘lesbian of color’ \* \* \*. But, as she affirms, there is a

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<sup>26</sup> E.g., Richard Socarides, *North Carolina and the Gay-Rights Backlash*, *New Yorker*, Mar. 28, 2016; Jonathan M. Katz & Erik Eckhom, *Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina*, *New York Times*, Apr. 5, 2016.

<sup>27</sup> Sunnive Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, *Advocate*, June 20, 2016, <http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video> (viewed Sept. 9, 2016).

<sup>28</sup> Greg Hernandez, *Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015*, *Gay Star News*, Sept. 8, 2016, <http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA> (viewed Sept. 9, 2016).

panoply of identities from which to choose in an expansive **gay L.A.**”<sup>29</sup> These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger “gay community.” And recall that the test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term “gay community” to be a “short-form or abbreviation” for sexual and gender nonconformists.

89. Consider another recent example, James Franco. He is a famous actor who is as coy about his sexual orientation and gender identity as he is friendly and “allied” with the gay community. He is often asked whether he is “gay,” and his characteristic (and current) answer is that, yes, he is “gay,” even though he does not have sex with men and is neither transgender nor intersex.<sup>30</sup> In a March 2015 interview with himself, “Gay James Franco” said this: “Well, I like to think that I’m gay in my art and straight in my life. Although, I’m also gay in my life up to the point of intercourse, and then you could say I’m straight.”<sup>31</sup> James Franco is a friend, an ally, a co-explorer with sexual and gender nonconformists of all sorts. Like Raquel Gutierrez, he is part of a larger “gay community.” Both people illustrate how “gay” can be **both** a popular term referring to sexual orientation and activity **and** a generic, umbrella term referring to a sensibility or a community whose members do not conform to traditional gender and sexual norms.

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<sup>29</sup> Faderman & Timmons, *Gay L.A.*, 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

<sup>30</sup> *Understanding James Franco*, Rolling Stone, April 7, 2016 (account and quotations in text).

<sup>31</sup> J. Bryan Lowder, *James Franco Is Gay—Well, At Least Half of Him Is*, Slate, March 16, 2015.

Another example is Miley Cyrus, an announced “pansexual” who has recently been sporting clothes with the slogan “Make America Gay Again.”<sup>32</sup>

90. As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. My research associates and I have run a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where “gay” is not only in the same sentence as “transgender,” but is, more specifically, being used to include “transgender.” Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing “gay,” as the CPE Report suggested, “transgender” becomes associated with “gay.” Specifically, we found thousands of examples where “gay” was used in a way that included “transgender” or “trans” people.



Figure 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

<sup>32</sup> Joe Williams, *Miley Cyrus Wants to ‘Make America Gay Again,’* Pink News, July, 25, 2016, available at <http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/> (viewed Sept. 9, 2016).

91. The relationship between the gay community and intersex persons is trickier to establish, because “intersex” is a newer and still-mysterious term, and it is not clear how many acknowledged intersex persons there are in the world. Most discussion of intersexuality in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter (“I”) to the expanding acronym—hence the LGBTQIA term used in dotgay’s application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon.

92. Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya of South Africa won the gold medal in the women’s 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a “Gender in Sport” policy that creates opportunities for fair competition without stigmatizing gender minorities.<sup>33</sup>

93. Common usages of “gay” as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website,

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<sup>33</sup> Federation of Gay Games, “Gender in Sport,” <https://gaygames.org/wp/sport/sports-policiesd/gender/> (viewed Sept. 9, 2016).

*Everyone Is Gay*.<sup>34</sup> The *Gay Star News* is a news source for the broad gay community, and it includes informative articles in intersex persons.<sup>35</sup> While there are many intersex-focused websites, *Everyone Is Gay* does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

## V. CONCLUSION AND SIGNATURE

94. Return to ICANN’s mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

95. Dotgay’s application for the string “.gay” would seem to fit perfectly within the mission and core values of ICANN. “Gay” is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Expert Report. Such a “.gay” string would create a readily-identifiable space within the Internet for this community. Not surprisingly,

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<sup>34</sup> *Intersex Advice*, *Everyone Is Gay*, <http://everyoneisgay.com/tag/intersex/> (viewed Sept. 9, 2016).

<sup>35</sup> E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, *Gay Star News*, Mar. 16, 2016, <http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg> (viewed Sept. 9, 2016).

ICANN's requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay's application. Indeed, dotgay's application more than meets the requirements actually laid out in the Applicant Guidebook.

96. Moreover, ICANN "shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." ICANN Bylaws, Art. II, § 3 ("Non-Discriminatory Treatment"). And ICANN "and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." ICANN Bylaws, Art. III, § 1.

97. Evaluating dotgay's application, the EIU has not acted in a completely "open and transparent manner," nor has it followed "procedures designed to ensure fairness." To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

98. Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and to grant dotgay's application, for it legitimately deserves at least 14 of 16 points (i.e., including 4 of 4 points for Criterion #2, the community nexus requirement).

**Respectfully submitted,**

**Date,** September 13, 2016



William N. Eskridge Jr.

John A. Garver Professor of Jurisprudence  
Yale Law School

## **APPENDICES**

### **APPENDIX 1**

#### **CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL**

##### **EDUCATION**

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha  
(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

##### **POSITIONS HELD**

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present

Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995

Stanford, 1995

Toronto, 1999, 2001

Vanderbilt, 2003

Columbia, 2003

Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011

Fordham, 2008

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998

Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 - 1979

(SELECTED) PUBLICATIONS

*Books*

**Interpreting Law: A Primer on How to Read Statutes and the Constitution** (Foundation 2016)

**Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes** (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

**A Republic of Statutes: The New American Constitutionalism** (Yale 2010) (co-authored with John Ferejohn)

**"Dishonorable Passions": Sodomy Law in America, 1861-2003** (Viking 2008)

**Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence** (Oxford 2006) (co-authored with Darren Spedale)

**Equality Practice: Civil Unions and the Future of Gay Rights** (Routledge 2002)

**Legislation and Statutory Interpretation** (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

**Gaylaw: Challenging the Apartheid of the Closet** (Harvard 1999)

**Constitutional Tragedies and Stupidities** (NYU 1998) (co-authored and edited with Sanford Levinson)

**Sexuality, Gender, and the Law** (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

**The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment?** (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

**Dynamic Statutory Interpretation** (Harvard 1994)

**Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century** (West Publishing Co. 1993; 2d ed. 1998; 3d ed. 2004, 4th ed. 2009; 5th ed. 2013) (co-authored with Daniel Farber & Philip Frickey and, with fifth edition, Jane Schacter)

**Legislation: Statutes and the Creation of Public Policy** (West 1987; 2d ed. 1994; 3d ed. 2001; 4th ed. 2007; 5th ed. 2014) (co-authored with Philip Frickey and, after second edition, Elizabeth Garrett; starting with fifth edition, add James Brudney)

**A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem** (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

*(Selected) Articles*

“The First Marriage Cases, 1970-74,” in *Love Unites Us: Winning the Freedom to Marry in America* 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett, eds., 2016)

“Law and the Production of Deceit,” in Austin Sarat ed., *Law and Lies: Deception and Truth-Telling in the American Legal System* 254-312 (2015)

“Original Meaning and Marriage Equality,” 52 *Hous. L. Rev.* 1067 (2015)

“Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011,” 92 *Tex. L. Rev.* 1317 (2014) (with Matthew R. Christiansen)

“Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,” 93 *B.U.L. Rev.* 275 (2013)

“Expanding *Chevron*’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,” 2013 *Wis. L. Rev.* 411

“The New Textualism and Normative Canons,” 113 *Colum. L. Rev.* 531 (2013) (book review)

“Marriage Equality: An Idea Whose Time Is Coming,” 37 *NYU Rev. L. & Soc. Change* 245 (2013)

“Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms,” 57 *St. Louis U.L. Rev.* 865 (2012)

“Vetogates and American Public Law,” *J.L. Econ. & Org.* (April 2012), available online at <http://jleo.oxfordjournals.org/content/early/2012/04/19/jleo.ews009.abstract>

“Family Law Pluralism: A Guided-Choice Regime of Menus, Default Rules, and Override Rules,” 100 *Geo. L.J.* 1881 (2012)

“Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms,” 45 *Ga. L. Rev.* 657 (2011)

“Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?,” 50 *Washburn L.J.* 1 (2010)

“*Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases,” 110 *Colum. L. Rev.* 1727 (2010) (with Connor N. Raso)

“The California Proposition 8 Case: What Is a Constitution For,” 98 Calif. L. Rev. 1235 (2010)

“Sexual and Gender Variation in American Public Law: From Malignant to Tolerable to Benign,” 57 UCAL L. Rev. 1333 (2010)

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“A Pluralist Theory of Equal Protection,” U. Pa. J. Const’l L. (2009)

“Constitutional Horticulture: Deliberation-Respecting Judicial Review,” 87 Tex. L. Rev. 1273 (2009) (with John Ferejohn)

“Vetogates, Preemption, *Chevron*,” 83 Notre Dame L. Rev. 1441 (2008)

“The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*,” 96 Geo. L.J. 1083 (2008) (co-authored with Lauren Baer) (the Ryan Lecture)

“America’s Statutory ‘Constitution,’” 41 U.C. Davis L. Rev. 1 (2007) (the Barrett Lecture)

“No Frills Textualism,” 119 Harv. L. Rev. 2041 (2006) (book review)

“*Chevron* and Agency Norm Entrepreneurship,” 115 Yale L.J. 2623 (2006) (essay co-authored with Kevin Schwartz)

“Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” 57 Fla. L. Rev. 1011 (2005) (the Dunwoody Lecture)

“Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics,” 114 Yale L.J. 1279 (2005)

“*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism,” 2 Int’l J. Const’l L. 555 (2004)

“*Lawrence*’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics,” 88 Minn. L. Rev. 1021 (2004)

“Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” 100 Mich. L. Rev. 2062 (2002)

“Structuring Lawmaking to Reduce Cognitive Bias: A Critical View,” 87 Cornell L. Rev. 616 (2002)

“Channeling: Identity-Based Social Movements and Public Law,” 150 U. Pa. L. Rev. 419 (2001)

“All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776-1806,” 101 Colum. L. Rev. 999 (2001)

“The Relationship Between Obligations and Rights of Citizens,” 69 Fordham L. Rev. 1721 (2001)

“Super-Statutes,” 50 Duke L.J. 1215 (2001) (co-authored with John Ferejohn)

"Equality Practice: Reflections on the Jurisprudence of Civil Unions," 64 Alb. L.J. 853 (2001) (Sobota Lecture)

"January 27, 1961: The Birth of Gaylegal Equality Arguments," 58 NYU Ann. Survey Am. Law 39 (2001)

"No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review," 75 NYU L. Rev. 1327 (2000)

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"The Circumstances of Politics and the Application of Statutes," 100 Colum. L. Rev. 558 (2000)

"Multivocal Prejudices and Homo Equality," 100 Ind. L.J. 558 (1999) (Harris Lecture)

"Norms, Empiricism, and Canons in Statutory Interpretation," 66 U. Chi. L. Rev. 671 (1999)

"*Hardwick* and Historiography," 1999 U. Ill. L. Rev. 631 (Baum Lecture)

"Relationships Between Formalism and Functionalism in Separation of Powers Cases," 22 Harv. J.L. & Pub. Pol'y 21 (1998)

"Should the Supreme Court Read the *Federalist* But Not Statutory Legislative History?," 66 Geo. Wash. L. Rev. 1301 (1998)

"Textualism, the Unknown Ideal," 96 Mich. L. Rev. 1509 (1998) (book review)

"A Jurisprudence of 'Coming Out': Religion, Sexuality, and Liberty/Equality Collisions in Public Law," 106 Yale L.J. 2411 (1997)

"Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961," 24 Fla. St. U.L. Rev. 703 (1997) (Mason Ladd Lecture)

"Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981," 25 Hofstra L. Rev. 817 (1997) (Visiting Scholar in Residence Lecture)

"Willard Hurst, Master of the Legal Process," 1997 Wis. L. Rev. 1181

"From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945," 82 Iowa L. Rev. (1997) (Murray Lecture)

"Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism," 68 U. So. Cal. L. Rev. 1447 (1995) (co-authored with Jenna Bednar)

"Virtual Logrolling: How the Court, Congress, and the States Multiply Rights," 68 U. So. Cal. L. Rev. 1545 (1995)

"Regulatory Variables and Statutory Interpretation," 73 Wash. U.L.Q. 1103 (1995) (co-authored with Judith Levi)

"Fetch Some Soupmeat," 16 *Cardozo L. Rev.* 2209 (1995)

"The Supreme Court, 1993 Term – Foreword: Law as Equilibrium," 108 *Harv. L. Rev.* 26 (1994) (co-authored with Philip Frickey)

"The Elastic Commerce Clause: A Political Theory of American Federalism," 49 *Vand. L. Rev.* 1355 (1994) (co-authored with John Ferejohn)

"The Making of 'The Legal Process,'" 107 *Harv. L. Rev.* 2031 (1994) (essay, co-authored with Philip Frickey)

"From Handholding to Sodomy: The First Amendment and the Regulation of Homosexual Conduct," 29 *Harv. C.R.-C.L. L. Rev.* 319 (1994) (co-authored with David Cole)

"The Economics Epidemic in an AIDS Perspective," 61 *U. Chi. L. Rev.* 733 (1994) (review essay co-authored with Brian Weimer)

"Gaylegal Narratives," 46 *Stan. L. Rev.* 607 (1994)

"Post-Enactment Legislative Signals," 57 *Law & Contemp. Probs.* 75 (Winter 1994)

"The Judicial Review Game," 88 *Nw. U.L. Rev.* 382 (1993)

"Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet," 2 *Reconstruction* 52 (1993)

"The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in a Nutshell," 61 *Geo. Wash. L. Rev.* 1731 (1993)

"A History of Same-Sex Marriage," 79 *Va. L. Rev.* 1419 (1993)

"The Relationship Between Theories of Legislatures and Theories of Statutory Interpretation," in *The Rule of Law (Nomos, 1993)* (co-authored with John Ferejohn)

"A Gay Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda," 102 *Yale L.J.* 333 (1992) (review essay)

"Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking," 45 *Vand. L. Rev.* 593 (1992) (co-authored with Philip Frickey)

"The Article I, Section 7 Game," 80 *Geo. L.J.* 523 (1992) (co-authored with John Ferejohn)

"Overriding Supreme Court Statutory Interpretation Decisions," 101 *Yale L.J.* 331 (1991)

"Making the Deal Stick: Enforcing the Original Constitutional Understanding," *J.L. Econ & Org.* (1991) (co-authored with John Ferejohn)

"Reneging on History? Playing the Court/Congress/President Civil Rights Game," 79 *Calif. L. Rev.* 613 (1991)

"The New Public Law Movement: Moderation as a Postmodern Cultural Form," 89 *Mich. L. Rev.* 707 (1991) (co-authored with Gary Peller)

"The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases)," 88 Mich. L. Rev. 2450 (1990)

"Legislative History Values," 66 Chi.-Kent L. Rev. (1990)

"Dynamic Interpretation of Economic Regulatory Statutes," 21 L. & Pol'y Int'l Bus. 663 (1990)

"Gadamer/Statutory Interpretation," 90 Colum. L. Rev. 609 (1990)

"The New Textualism," 37 UCLA L. Rev. 621 (1990)

"Statutory Interpretation as Practical Reasoning," 42 Stan. L. Rev. 321 (1990) (co-authored with Philip Frickey)

"Spinning Legislative Supremacy," 78 Geo. L.J. 319 (1989)

"Public Values in Statutory Interpretation," 137 U. Pa. L. Rev. 1007 (1989)

"Metaprocedure," 98 Yale L.J. 945 (1989) (review essay)

"Interpreting Legislative Inaction," 87 Mich. L. Rev. 67 (1988)

"Overruling Statutory Precedents," 76 Geo. L.J. 1361 (1988)

"Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation," 74 Va. L. Rev. 275 (1988)

"Dynamic Statutory Interpretation," 135 U. Pa. L. Rev. 1479 (1987)

"Legislation Scholarship & Pedagogy in the Post-Legal Process Era," 48 U. Pitt. L. Rev. 691 (1987) (co-authored with Philip Frickey)

"*Les Jeux Sont Faits*: Structural Origins of the International Debt Problem," 25 Va. J. Int'l L. 281 (1985)

"One Hundred Years of Ineptitude," 70 Va. L. Rev. 1083 (1984)

"The Iranian Nationalization Cases," 22 Harv. Int'l L.J. 525 (1981)

"*Dunlop v. Bachowski* & the Limits of Judicial Review under Title IV of the LMRDA," 86 Yale L.J. 885 (1977) (student note)

#### ENDOWED LECTURES

Henry J. Miller Lecture, Georgia State University College of Law, "Marriage Equality, 1967-2017," September 15, 2016

Frankel Lecture, University of Houston Law Center, "Marriage Equality as a Testing Ground for Original Meaning," November 2014, published as "Marriage Equality and Original Meaning," 52 Hous. L. Rev. 1057 (2015)

Mathew O. Tobriner Memorial Lecture on Constitutional Law, University of California at Hastings, College of Law, "Marriage Equality's Cinderella Moment," September 6, 2013

2012 Distinguished Lecture, Boston University School of Law, "Beyond Backlash: How Constitutional Litigation Has Advanced Marriage Equality in the United States, 1970-2012," November 15, 2012, published as "Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States," 93 B.U.L. Rev. 275 (2013)

Foulston Siefkin Lecture, Washburn University School of Law, March 26, 2010, published as "Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?"

Sibley Lecture at the University of Georgia, School of Law, March 18, 2010, published as "Noah's Curse and Paul's Admonition: What the Civil Rights Cases Can Teach Us about the Clash Between Gay Rights and Religious Liberty"

Centennial Visitor, Public Lecture, Chicago-Kent College of Law, "Administrative Constitutionalism," March 5, 2009

Edward Barrett Lecture at the University of California, Davis, School of Law January 17, 2007, published as "America's Statutory constitution," U.C. Davis L. Rev. (2008).

Ryan Lecture at Georgetown University Law Center, November 4, 2006, published as "The Supreme Court's Deference Continuum, An Empirical Study (from *Chevron* to *Hamdan*)," 86 Geo. L.J. (2008)

Center for Religious Studies at Princeton University, November 2005, "Nordic Bliss: What the American Same-Sex Marriage Debate Can Learn from Scandinavia"

Lockhart Lecture at University of Minnesota School of Law, "Same-Sex Marriage and Equality Practice," October 2005,

Dunwoody Lecture at University of Florida School of Law, March 2005, published as "Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion," Fla. L. Rev. (2005)

President's Lecture at Davidson College, March 2004, "The Case for Same-Sex Marriage"

Brennan Lecture at Oklahoma City University School of Law, March 2004, "*Lawrence v. Texas* and Constitutional Regime Shifts"

Dean's Diversity Lecture at Vanderbilt University School of Law, February 2000, "Prejudice and Theories of Equal Protection"

Steintrager Lecture at Wake Forest University, February 1999, "Jeremy Bentham and No Promo Homo Arguments"

Adrian C. Harris Lecture at the University of Indiana School of Law, October 1998, published as "Multivocal Prejudices and Homo Equality," *Ind. L.J.* (1999)

Robbins Distinguished Lecture on Political Culture and the Legal Tradition at the University of California at Berkeley School of Law, February 1998, "Implications of Gaylegal History for Current Issues of Sexuality, Gender, and the Law"

Baum Lecture at the University of Illinois School of Law, November 1997, published as "*Hardwick* and Historiography," 1998 *U. Ill. L. Rev.*

Visiting Scholar in Residence Lecture at Hofstra University School of Law, October 1996, published as "Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981," 25 *Hofstra L. Rev.* 817 (1997)

Mason Ladd Lecture at Florida State University College of Law, April 1996, published as "Privacy Jurisprudence and the Apartheid of the Closet," 24 *Fla. St. U.L. Rev.* 703 (1997)

Murray Lecture at the University of Iowa, January 1996, published as "From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945," *Iowa Law Review* (1998)

Cutler Lecture at William and Mary School of Law, February 1995, published as "The Many Faces of Sexual Consent," 37 *Wm. & Mary L. Rev.* 47 (1995)

Donley Lectures at West Virginia University School of Law, published as "Public Law from the Bottom Up," 97 *W. Va. L. Rev.* 141 (1994)

## Congressional Testimony and Consultation

Senate Comm. on Labor, Pensions, 111<sup>th</sup> Congress, 1<sup>st</sup> Sess., *Proposed Employment Non-Discrimination Act of 2009* (Nov. 2009) (written testimony only)

House Comm. on Education & Labor, 111<sup>th</sup> Congress, 1<sup>st</sup> Sess., *Proposed Employment Non-Discrimination Act of 2009* (Sept. 2009)

Senate Comm. on the Judiciary, Senator Arlen Specter (Chair), Confirmation of Judge John Roberts as Chief Justice, United States Supreme Court (2005) (consultation only)

*H.R. 1283, The Fairness in Asbestos Compensation Act*, House Comm. on the Judiciary, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1999) (written testimony only) (jumbo consolidations in asbestos litigation)

Senate Comm. on the Judiciary, Senator Joseph Biden (Chair), Confirmation of Judge Stephen Breyer as Associate Justice, United States Supreme Court (1994) (consultation only)

*S. 420, the Ethics in Government Reform Act of 1993, and S. 79, the Responsible Government Act of 1993*, Subcomm. on Oversight of Government Management of the Senate Comm. On Governmental Affairs, 103d Cong., 1<sup>st</sup> Sess. (1993)

*Interpreting the Pressler Amendment: Commercial Military Sales to Pakistan*, Senate Comm. on Foreign Relations, 102d Cong., 2d Sess. (1992)

*S. 2279, the Lobbying Disclosure Act of 1992*, Subcomm. On Oversight of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. (1992)

*Statutory Interpretation and the Uses of Legislative History*, Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101<sup>st</sup> Cong., 2d Sess. (1990)

*Adjustable Rate Mortgages (ARMs)*, Subcomm. On Housing and Community Development of the House Comm. on Banking and Urban Affairs, 98<sup>th</sup> Cong., 2d Sess. (1984)

## APPENDIX 2

### EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

#### **FIGURE 1. *A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English Corpus of Books published in the United States from 1900 to 2008***

This Figure is a comparison of the frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are “Gay” “Queer” “Lesbian” and “LGBT”?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the English Corpus of Books published in the United States from 1950 to 2008**

This Figure is a comparison of the frequency of “gay suicide” and “LGBT suicide” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/uniforms in the sample of books, what percentage of them are “gay suicide” and what percentage of them are “LGBT suicide.”

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 3. A Depiction of Dependency Relations: Frequency of Various Adjectives (“Gay”, “LGBT”, and “Queer”) Modifying “Community”**

This Figure is a comparison of how often “community” is modified by “gay” “LGBT” and “queer” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 4. *A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”***

This figure is a comparison of how often “gay” modifies “people” “man” “woman” and “individuals” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”**

This figure is a comparison of how often “gay” modifies the word “transgender” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

# **Exhibit 8**

[GET STARTED \(/GET-STARTED\)](/GET-STARTED)[NEWS & MEDIA \(/NEWS\)](/NEWS)[POLICY \(/POLICY\)](/POLICY)[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](/PUBLIC-COMMENTS)[RESOURCES \(/RESOURCES\)](/RESOURCES)[COMMUNITY \(/COMMUNITY\)](/COMMUNITY)[IANA STEWARDSHIP  
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](/STEWARDSHIP-ACCOUNTABILITY)

## Details

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## ICANN (Internet Corporation for Assigned Names and Numbers) Organization Publishes Reports on the Review of the Community Priority Evaluation Process

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[中文 \(http://www.icann.org/news/announcement-d6-2017-12-19-zh\)](http://www.icann.org/news/announcement-d6-2017-12-19-zh) | [Русский \(http://www.icann.org/news/announcement-4c-2017-12-19-ru\)](http://www.icann.org/news/announcement-4c-2017-12-19-ru) | [Português \(http://www.icann.org/news/announcement-68-2017-12-19-pt\)](http://www.icann.org/news/announcement-68-2017-12-19-pt) | [Français \(http://www.icann.org/news/announcement-16-2017-12-19-fr\)](http://www.icann.org/news/announcement-16-2017-12-19-fr) | [Español \(http://www.icann.org/news/announcement-de-2017-12-19-es\)](http://www.icann.org/news/announcement-de-2017-12-19-es) | [العربية \(http://www.icann.org/news/announcement-77-2017-12-19-ar\)](http://www.icann.org/news/announcement-77-2017-12-19-ar) | English



LOS ANGELES – 13 December 2017 – The Internet Corporation for Assigned Names and Numbers ([ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)) today published three reports on the review of the Community Priority Evaluation (CPE) process (the CPE Process Review). The CPE Process Review was initiated at the request of the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#) as part of the Board's due diligence in the administration of the CPE process. The CPE Process Review was conducted by [FTI Consulting Inc.'s \(FTI\) \(http://www.fticonsulting.com/\)](#) Global Risk and Investigations Practice (GRIP) and Technology Practice, and consisted of three parts: (i) reviewing the process by which the [ICANN \(Internet Corporation for Assigned Names and](#)

Numbers) organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1); (ii) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (iii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests that were pending at the time that ICANN (Internet Corporation for Assigned Names and Numbers) initiated the CPE Process Review (Scope 3).

FTI concluded that "there is no evidence that the ICANN (Internet Corporation for Assigned Names and Numbers) organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process" (Scope 1) and that "the CPE Provider consistently applied the criteria set forth in the New gTLD (generic Top Level Domain) Applicant Guidebook [ ] and the CPE Guidelines throughout each CPE" (Scope 2). (See [Scope 1 report \(/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf\)](#) [PDF, 159 KB], Pg. 3; [Scope 2 report \(/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf\)](#) [PDF, 312 KB], Pg. 3.)

For Scope 3, FTI observed that two of the eight relevant CPE reports included a citation in the report for each reference to research. In the remaining six reports, FTI observed instances where the CPE Provider referenced research but did not include the corresponding citations in the reports. Except for one evaluation, FTI observed that the working papers underlying the reports contained material that corresponded with the research referenced in the CPE reports. In one instance, FTI did not find that the working papers underlying the relevant report contained citation that corresponded with the research referenced in the CPE report. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers underlying the first evaluation of that application. (See [Scope 3 report \(/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf\)](#) [PDF, 309 KB], Pg. 4.) The findings will be considered by the Board Accountability Mechanisms Committee (BAMC) when the BAMC reviews the remaining pending Reconsideration Requests as part of the Reconsideration process.

"The Board appreciates the community's patience during this detailed investigation, which has provided greater transparency into the CPE evaluation process," said Cherine Chalaby, Chairman of the ICANN (Internet Corporation for Assigned Names and Numbers) Board. "Further, this CPE

Process Review and due diligence has provided additional facts and information that outline and document the ICANN (Internet Corporation for Assigned Names and Numbers) organization's interaction with the CPE Provider."

For more information about the CPE process and the CPE Process Review, please visit <https://newgtlds.icann.org/en/applicants/cpe> (<https://newgtlds.icann.org/en/applicants/cpe>).

## More Announcements

[ICANN \(Internet Corporation for Assigned Names and Numbers\) Publishes First Complaints Office Semi-Annual Report](#)  
([/news/announcement-2018-03-07-en](#))

[ICANN \(Internet Corporation for Assigned Names and Numbers\) Reserve Fund: Proposed Replenishment Strategy](#)  
([/news/announcement-2018-03-06-en](#))

[Draft Project Plan for the Proposed Name Collision Analysis Project \(NCAP\)](#)  
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# **Exhibit 9**

## Reconsideration Request

**1. Requester Information**

**Name:** dotgay LLC

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Counsel:** Bart Lieben – Contact Information Redacted

**2. Request for Reconsideration of (check one only):**

**Board action/inaction**

**Staff action/inaction**

**3. Description of specific action you are seeking to have reconsidered.**

On February 1<sup>st</sup>, 2016, ICANN published the Determination of the Board Governance Committee (BGC) in relation to Requester's Reconsideration Request 15-21 (hereinafter: the "Second BGC Determination").

On the basis of the arguments set out in the Second BGC Determination, *"the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21."*

**4. Date of action/inaction:**

February 1<sup>st</sup>, 2016.

**5. On what date did you become aware of the action or that action would not be taken?**

February 2<sup>nd</sup>, 2016.

**6. Describe how you believe you are materially affected by the action or inaction:**

Requester is the applicant for the community-based gTLD .GAY, (Application ID: 1-1713-23699, Prioritization Number: 179; see

<https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>) (hereinafter referred to as the “Application”).

Requester has elected to participate in the Community Priority Evaluation (“CPE”) in accordance with the provisions set out in the Applicant Guidebook.

On October 7, ICANN published the CPE Report that has been drawn up by the EIU, which states that the Requester’s application for the .GAY gTLD “*did not prevail in Community Priority Evaluation*”.

Despite having invoked ICANN’s Accountability Mechanisms on various occasions, “*the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21.*”

Therefore, the Requester is now facing contention resolution with three other applicants for the same string “*through the other methods as described in Module 4 of the Applicant Guidebook*”, requiring Requester to – ultimately – resolve such contention directly with the other applicants for the .GAY gTLD. Such contention resolution may include the participation in a “last resort” auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the EIU Determinations had been developed in accordance with ICANN’s standards, in particular those set out in the Applicant Guidebook.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

Considering the fact that the .GAY gTLD, as contemplated by Requester, intends to be operated to the benefit of and as a safe haven on the internet for a wide variety of members of the gay community, our current and future members and endorsers will be adversely affected if the .GAY gTLD would be awarded to a registry operator that turns it into an unrestricted extension and does not necessarily have the public interests in mind for the community as a whole and the community members it wishes to serve.

Given the fact that gays are still considered a vulnerable group in many countries, the intention of reserving a specific zone on the Internet dedicated to the gay community will promote the safety and security of this community and its members.

The fact that not only Requester but the gay community in its entirety is affected by the CPE Report and the Determinations is substantiated by the various letters of support for the Reconsideration Requests that have been submitted to ICANN by the Federation of Gay Games, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, and the National Gay & Lesbian Chamber of Commerce. Requester also refers in this respect to the numerous letters of support received when developing its Application for the .GAY gTLD.

## **8. Detail of Board or Staff Action – Required Information**

### **8.1. Introduction**

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.

In the First Determination, the BGC specified that *“new CPE evaluators (and potentially new core team members) [were] to conduct a new evaluation and issue a new report that will supersede the existing CPE Panel’s Report.”*

Now, the evidence provided by Requester shows that the EIU has appointed at least one evaluator who developed the First EIU Determination in order to develop the Second EIU Determination, which is contrary to the instructions by the BGC.

### **8.2. The Second BGC Determination**

Section C of the Second BGC Determination reads as follows:

*“The Requester contends that reconsideration is warranted because “it appears that both during the first and second CPE, the EIU appointed the same evaluator for performing the new CPE,” in contravention of the BGC’s Determination on Request 14-44. However, this argument is inaccurate. The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU. Moreover, the identities of CPE evaluators are confidential. ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and replaced one core team member for the administration of the Second CPE.” (emphasis added)*

### **8.3. The “CPE Panel Process Document”**

On August 6, 2014, ICANN published the Economist Intelligence Unit’s Process documentation for Community Priority Evaluation in view of providing

*“transparency of the panel’s evaluation process”.*<sup>1 2</sup>

According to this CPE Panel Process Document:

*“The Community Priority Evaluation panel comprises a core team, in addition to several independent evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit’s Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.”<sup>3</sup> (emphasis added)*

The CPE Panel Process Document describes the CPE Evaluation Process as follows:

*“The EIU evaluates applications for gTLDs once they become eligible for review under CPE. The evaluation process as described in section 4.2.3 of the Applicant Guidebook and discussed in the CPE Guidelines document is described below:*

*[...]*

*As part of this process, one of the two evaluators assigned to assess the same string is asked to verify the letters of support and opposition. (Please see “Verification of letter(s) of support and opposition” section for further details.)”<sup>4</sup> (emphasis added)*

Furthermore, on page 5 of the CPE Panel Process Document, the EIU has described the process for “Verification of letter(s) of support and opposition”, which reads as follows:

*“As part of this CPE evaluation process, one of the two evaluators assigned to assess the same string verifies the letters of support and opposition. This process is outlined below:”*

*[...]*

*“For every letter of support/opposition received, the designated evaluator assesses both the relevance of the organization and the validity of the documentation. Only one of the two evaluators is responsible for the letter*

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<sup>1</sup> See <https://newgtlds.icann.org/en/applicants/cpe>, § CPE Resources.

<sup>2</sup> See <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf> for the actual CPE Panel Process Document.

<sup>3</sup> CPE Panel Process Document, Page 2.

<sup>4</sup> CPE Panel Process Document, Page 2, §CPE Evaluation Process, third bullet.

*verification process.”*

And:

*“To provide every opportunity for a response, the evaluator regularly contacts the organization for a response by email and phone for a period of at least a month.”*

**8.4. The EIU made a process error in allowing a third person, not even a core team member, and certainly not an “independent evaluator” to perform the verification of the letters of support and opposition**

Bearing in mind the confirmation by the BGC that the “*CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements*”, and that “*the CPE Materials are entirely consistent with the Guidebook*”, the BGC confirmed – apparently on the basis of information ICANN does not want to see independently verified – that:

*“The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU.”*

Now, considering the fact that the CPE Process Document – which is considered by the BGC to be “*consistent with*” and “*strictly adheres to the Guidebook’s criteria and requirements*”, it is clear that the verification of the letters should have been performed by an independent evaluator (as emphasized in §8.2 above), and not by someone “*responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU*”.

It is therefore clear that, according to the CPE Panel Process Document, the point of contact for organizations had to be an evaluator. Also, the verification of the letters had to be performed by an evaluator.

Based on the statement contained in the last BGC Determination, it is clear that the BGC confirmed that the contact person for organizations was not an evaluator, and the letters of have not been verified by an evaluator.

In any case, it is obvious that – when reviewing the Second BGC Determination in light of the Applicant Guidebook and the CPE Panel Process Document –

previously defined processes and policies have not been followed, regardless of whether one sees the Applicant Guidebook and the CPE Panel Process Document as defining the same process, or that the one complements the other.

### **8.5. The BGC rejected Requester’s arguments that the CPE Materials imposed additional requirements than the ones contained in the New gTLD Applicant Guidebook**

In the context of its First and Second Reconsideration Requests, Requester claimed that the EIU was not entitled to develop the CPE Materials in so far and to the extent they imposed more stringent requirements than the ones set forth by the Applicant Guidebook. Furthermore, Requester contended that the EIU’s use of these CPE Materials violated the policy recommendations, principles and guidelines issued by the GNSO relating to the introduction of new gTLDs.<sup>5</sup>

Nonetheless, the BGC confirmed in the Second BGC Determination that:

- *“none of the CPE Materials comprise an addition or change to the terms of the Guidebook;”<sup>6 7</sup>*
- *“The CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements”;*<sup>8</sup>
- *“the CPE Materials are entirely consistent with the Guidebook”.*<sup>9</sup>

One of the key arguments put forward by the BGC was that Requester should have challenged the development and implementation of the CPE Materials earlier, in particular *“within 15 days of the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action”*.

The BGC concluded that:

- *“[...] nothing about the development of the CPE Materials violates the GNSO policy recommendations or guidelines relating to the introduction of new gTLDs as the Requester has suggested.”; and*
- *“no reconsideration is warranted based on the development or use of the CPE Materials, because any such arguments are both time-barred and without merit.”<sup>10</sup>*

Requester notes that the Applicant Guidebook does not include the concept of a

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<sup>5</sup> Second BGC Determination, page 11.

<sup>6</sup> The Second BGC Determination defines the term “CPE Materials” as “(1) the EIU’s CPE Panel Process Document; (2) the CPE Guidelines; (3) ICANN’s CPE Frequently Asked Questions page, dated 10 September 2014 (FAQ Page); and (4) an ICANN document summarizing a typical CPE timeline (CPE Timeline).

<sup>7</sup> Second BGC Determination, page 12.

<sup>8</sup> *Ibid.*

<sup>9</sup> Second BGC Determination, footnote 34.

<sup>10</sup> Second BGC Determination, page 14.

“core team” that is appointed in the context of CPE. In fact, the Applicant Guidebook only refers to a “Community Priority Panel” that is appointed by ICANN in order to perform CPE.<sup>11</sup>

Therefore, the CPE Panel Process Document introduces a concept that has not been included in the Applicant Guidebook, which only refers to “evaluators”.

Indeed, according to the CPE Panel Process Document, each application is evaluated by seven individuals, being two independent evaluators and five core team members.

The fact that the BGC confirmed that, in addition to the seven individuals, an eight person has contributed to developing the CPE Determinations, being a “*person [...] responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU*”, can only lead to the following conclusions:

- the CPE Panel Process Document provides for a process and composition of a team that is different from what the Applicant Guidebook states (being only a “Community Priority Panel” that performs CPE);

OR

- the team that has been composed by the EIU in order to perform CPE for Requester’s Application does not have the composition that has been defined in the Applicant Guidebook nor in the CPE Panel Process Document.

## **8.6. Conclusion**

For the reasons set out above, Requester is of the opinion that ICANN and the EIU have not respected the processes and policies:

- contained in the Applicant Guidebook;
- contained in the CPE Materials;
- relating to openness, fairness, transparency and accountability as set out above, and even have carried out the CPE for Requester’s Application in a discriminatory manner.

Indeed, when developing the Second BGC Determination, the BGC should, on the basis of the arguments and facts set out above, have confirmed:

- that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator, as

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<sup>11</sup> See Applicant Guidebook, 4-8.

prescribed by this CPE Panel Process Document, but by someone else (a “core team member” or someone “responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU”; or

- that the CPE Panel Process Document *does* define and describe a process that is more stringent than the one set out in the Applicant Guidebook, which does not require the independent evaluator perform such verification of letters of support and objection.

In the first case, the process followed by the EIU would be in direct contradiction with the processes it has designed itself and, moreover, would be contrary to the First BGC Determination, which required the EIU to appoint a new evaluation panel for performing CPE.

In the second case, the BGC has erred in confirming that “*none of the CPE Materials comprise an addition or change to the terms of the Guidebook*”.

Setting aside any possible arguments regarding possibly unfounded time-barred allegations, it is obvious that the outcome of a process is often, if not always, determined by the fact whether the correct process has been followed. In any event, the above facts clearly show that the EIU and – by extension ICANN – have not.

### **8.7. Request for a Hearing**

Bearing in mind the elements set out above, Requester respectfully submits the request to organize a hearing with the BGC in order to further explain its arguments and exchange additional information in this respect.

### **8.8. Reservation of Rights**

Notwithstanding the fact that Requester only relates to the fact that the EIU and ICANN have not followed due process in developing the Second CPE Determination, Requester is submitting this Reconsideration Request with full reserve of its rights, claims and defenses in this matter, whether or not stated herein.

## **9. What are you asking ICANN to do now?**

Considering the information and arguments included in this Reconsideration Request, Requesters request ICANN to:

- (i) acknowledge receipt of this Reconsideration Request;

- (ii) determine that the Second BGC Determination is to be set aside;
- (iii) invite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;
- (iv) determine that, given the circumstances, any and all of its requests set out in §9 of Requester's Second Reconsideration Request be awarded, which are incorporated herein by reference.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

Requester has standing in accordance with:

- (1) ICANN's By-Laws, considering the fact that Requester has been adversely affected by the Second BGC Determination; and
- (2) ICANN's Top-Level Domain Application Terms and Conditions.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

- Yes
- No

**11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.**

N/A

**Do you have any documents you want to provide to ICANN?**

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to be 'Bart Lieben', with a large, loopy flourish extending from the end.

February 17, 2016

Bart Lieben

Date

Attorney-at-Law

# **Exhibit 10**

ARIF HYDER ALI

Contact Information  
Redacted

January 31, 2018

**VIA E-MAIL**

ICANN Board of Directors  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Second Expert Opinion of Professor William N. Eskridge, Jr., in Response to FTI Consulting, Inc.'s Independent Review of the Community Priority Evaluation Process**

Dear Members of the ICANN Board:

On behalf of our client, dotgay LLC (“dotgay”), please find attached the Second Expert Opinion of Professor William N. Eskridge, Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, addressing FTI’s purported “independent” review of the CPE process.

Professor Eskridge’s Second Expert Opinion unequivocally concludes that FTI Consulting, Inc.’s (“FTI”) findings are based on a superficial investigative methodology wholly unsuited for the purpose of an independent review. His Opinion confirms that the Economist Intelligence Unit’s (“EIU”) evaluation of dotgay’s application was incorrect, superficial, and discriminatory. In fact, a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind.

We urge – indeed beseech – the Board (i) to not rely on the FTI Reports in determining how to proceed with dotgay’s application; (ii) to not hide behind technicalities and process; (iii) to carefully review Professor Eskridge’s two detailed expert opinions; (iv) to act in accordance with the spirit and letter of ICANN’s Articles of Incorporation, Bylaws, gTLD Applicant Guidebook (“AGB”), and the most basic principles of fairness, decency, and morality; and, on these bases, (v) to approve dotgay’s community priority application.

If the Board needs expert support for its consideration of dotgay’s application, we respectfully submit that it has Professor Eskridge. Professor Eskridge is a renowned expert in both legal interpretation and in sexuality, gender, and the law. He is, according to recent empirical ranking of law review citations, among the ten most-cited legal scholars in American history. He has delved in to the AGB and the Community Priority Evaluation (“CPE”) Process, and has provided empirical evidence as to why dotgay’s application

should be granted community priority status. He has demonstrated that to do otherwise would be discriminatory and unfair, and he has laid bare a number of fundamental flaws in FTI's investigation and analysis. He is available at any time to present his findings to ICANN's General Counsel, ICANN's outside counsel, and to the Board.

Professor Eskridge analyzes two of the three reports drafted by FTI: the "Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports" ("Scope 2 Report"), and the "Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests" ("Scope 3 Report"). As part of this analysis, Professor Eskridge identifies the reports' fundamental errors, performs a substantive review of dotgay's application, and explains why dotgay should receive community priority status based upon a proper application of the CPE criteria to its application.

Professor Eskridge disagrees with the Scope 2 Report's conclusion that the EIU consistently applied the CPE criteria throughout the CPE process. After determining that the "Scope 2 Report is long on description and conclusory statements and short on actual evaluation,"<sup>1</sup> Professor Eskridge demonstrates several flaws in FTI's Scope 2 Report:

1. FTI "failed to recognize or engage the many criticisms of the EIU Panel's application of ICANN's and CPE's guidelines to the dotgay and other applications."<sup>2</sup>
2. FTI's conclusion, that "the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements,"<sup>3</sup> "was supported by no independent analysis."<sup>4</sup> In fact, "the approach followed by FTI was a 'description' of the CPE Reports, but not an 'evaluation' to determine whether the CPE Reports were actually following the applicable guidelines."<sup>5</sup>
3. "Because its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of

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<sup>1</sup> Second Eskridge Opinion, ¶ 3.

<sup>2</sup> Second Eskridge Opinion, ¶ 37.

<sup>3</sup> Second Eskridge Opinion, ¶ 38.

<sup>4</sup> Second Eskridge Opinion, ¶ 38.

<sup>5</sup> Second Eskridge Opinion, ¶ 38.

ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as in the CPE Reports.<sup>6</sup>

4. FTI “completely failed to examine the EIU Panel’s analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these applications.”<sup>7</sup>

Professor Eskridge likewise examines the Scope 3 Report and concludes that the report “provides evidence that undermines the factual bases for the CPE Report’s conclusions as to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement).”<sup>8</sup> His study of the sources referenced in the Scope 3 Report, the very sources to which the EIU cited in support of its adverse findings against dotgay, reveals that “some of those sources directly support dotgay’s position.”<sup>9</sup> For instance, one of the EIU’s major sources confirms that the term “gay” is in fact a well-recognized umbrella term for the entire LGBT community – completely contrary to the EIU’s determination in dotgay’s CPE. How could FTI have missed this? Is such a blatant omission, coupled with FTI’s superficial analysis, evidence of intentional discrimination against the gay community by ICANN, the EIU and FTI?

We respectfully submit that the best interests of ICANN as an organization would not be served by letting this matter go to an Independent Review Process. Accordingly, pursuant to the Board’ obligation to exercise due diligence, due care, and independent judgment, we sincerely hope that the Board will (1) review and agree with Professor Eskridge’s expert opinions; (2) reject the findings made by FTI in the FTI Reports; and (3) grant dotgay’s community priority application without any further delay.

Sincerely,



Arif Hyder Ali

AAA

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<sup>6</sup> Second Eskridge Opinion, ¶ 42.  
<sup>7</sup> Second Eskridge Opinion, ¶ 76.  
<sup>8</sup> Second Eskridge Opinion, ¶ 37.  
<sup>9</sup> Second Eskridge Opinion, ¶ 88.

# **SECOND EXPERT REPORT**

**PROFESSOR WILLIAM N. ESKRIDGE, JR.**

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## **APPENDICES**

### **APPENDIX 1**

**CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF  
JURISPRUDENCE, YALE LAW SCHOOL**

### **APPENDIX 2**

**EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES**

## **I. EXECUTIVE SUMMARY**

- 1 Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report, authored by the Economist Intelligence Unit (EIU), identified by FTI Consulting, Inc. as the CPE Provider, recommended that the application be denied. The predominant reason given was that dotgay did not meet the nexus requirement between the applied-for string (“.gay”) and the community of people who do not conform to traditional norms of sexuality and gender, namely, the community to be served by the string. Also, the EIU Panel authoring the Report incorrectly awarded dotgay only partial scores for the community endorsement requirement. Dotgay promptly requested reconsideration of and objected to the conclusions of its CPE Report, on the grounds that it did not properly follow the directives of the ICANN Guidebook and the principles of the ICANN Bylaws, was inconsistent with the CPE Reports for other applications, and rested upon an incomplete understanding of the facts.
- 2 Responding to the objections that dotgay and other community applicants that were raised against the CPE process, as well as certain findings of the IRP Panels in the Dot Registry and Despegar proceedings, the ICANN Board of Directors ordered a CPE Process Review. FTI Consulting, Inc. (FTI) was retained to conduct the Review. Scope 2 of the Review was supposed to be an “evaluation of whether the CPE criteria were applied consistently throughout each CPE Report.” Scope 3 was supposed to be a “compilation of the reference material relied upon by the CPE Provider \* \* \* for the evaluations which are the subject of pending

Reconsideration Requests,” such as that of dotgay. On December 13, 2017, ICANN published FTI’s Scope 2 and Scope 3 Reports, as well as its Scope 1 Report. This Second Expert Report focuses on the Scope 2 and Scope 3 FTI Reports.

- 3 The **FTI Scope 2 Report** “found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner” (p. 3). Unfortunately, the FTI Scope 2 Report is long on description and conclusory statements and short on actual evaluation. At best, it is superficial; at worst, it echoes the errors and confusion of the CPE Report for dotgay’s application. As I show in this Second Expert Report, the FTI Scope 2 Report (a) not only fails to correct the EIU Panel’s many erroneous interpretations of ICANN’s fundamental directives, but sometimes adds new mistakes of its own (such as FTI’s own erroneous statements about the requirements reflected in Criterion #2, Nexus); (b) fails to engage with the evident inconsistencies in the EIU Panel’s application of the standards to the .RADIO, .HOTEL, .OSAKA, and .SPA applications and to the .GAY application; and (c) tries to paper over the demonstrable fact that the EIU Panel showed no interest in or knowledge of gay history, made no serious attempt to gain such knowledge, misunderstood the deep interrelationship among sexual and gender minorities historically and currently, and had no systematic method for determining how the general population refers to LGBTQUIA people and their community.
- 4 The **FTI Scope 3** Report describes FTI’s compilation of the reference materials relied upon by the EIU for each of the eight pending Reconsideration Requests, including that of dotgay’s

second evaluation (p. 3 & note 11). A review of the FTI Scope 3 Report confirms the substantive criticisms of the EIU Panel’s CPE Report on the dotgay application, as outlined in the previous paragraph. Specifically, the FTI Scope 3 Report reveals that most of the evidence relied upon by the EIU Panel was not actually identified in the CPE Report (pp. 35-37), and confirms that the Panel employed no systematic methodology to determine whether, in fact, “gay” is a term that describes the broad community that includes transgender and intersex persons. Moreover, much of the evidence FTI found in the Panel’s working papers actually supports dotgay’s objections to the CPE Report’s scores for Nexus and Community Endorsement. This raises serious red flags because it calls into question whether anyone actually read the sources that the EIU Panel says it consulted.

5 The only proper methodological response to the many failures of the EIU Panel’s determinations would have been a substantive review of the affected applications, namely, a review that considered dotgay’s and other applicants’ objections to the EIU Panel’s interpretations of ICANN directives, its implementation of those directives for different applications, and the research methodology and findings of the EIU staff.<sup>1</sup> FTI chose to conduct a different kind of review—one that can only be described as superficial and far from fit for its assigned purpose. Accordingly, in my expert opinion, I do not see how the Board can rely on FTI’s review and still comply with the requirement of ICANN’s Bylaws that

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<sup>1</sup> As part of this methodological response, for example, FTI should have taken into consideration my Expert Report of September 2016, Professor Lee Badgett’s Expert Report, the Council of Europe Report, the Recommendation from ICANN’s Ombudsman, and the ICC Independent Expert Determination. It does not appear to have done any of this.

decisions must be made by applying documented policies neutrally and objectively, with integrity and fairness, as well without discrimination.

## II. QUALIFICATIONS OF THE EXPERT

6 I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent expert opinion on the validity of the ICANN Community Priority Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), which evaluated dotgay’s community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string “.gay”, as well as FTI’s review of the CPE process.

7 I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,<sup>2</sup> leading monographs,<sup>3</sup> and dozens

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<sup>2</sup> William N. Eskridge Jr. & Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation 1997, now in its fourth edition). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, “by far,” ever published in the field of legislation and suggesting that it would “alter the law school curriculum”).

<sup>3</sup> For interpretation, consult William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (Foundation 2016), and *Dynamic Statutory Interpretation* (Harvard 1994), as well as William N. Eskridge Jr., *A Republic of Statutes: The New American Constitution* (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard 1999), and *Dishonorable Passions: Sodomy Law in America, 1861-2003* (Viking 2008), and *Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence* (Oxford 2006) (co-authored with Darren Spedale).

of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.<sup>4</sup>

- 8 My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN’s gTLD Applicant Guidebook (AGB), especially Module 4.2.3, “Criterion #2: Nexus Between Proposed String and Community” and “Criterion #4 Community Endorsement”; (iii) the history of the terminology in dispute, especially the term “gay” and its applicability to the community of sexual and gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

### **III. BACKGROUND AND RELEVANT ICANN DIRECTIVES**

#### **A. DOTGAY’S APPLICATION AND THE CPE REPORT**

- 9 Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures established by ICANN (the Internet Corporation for Assigned Names and Numbers).

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<sup>4</sup> According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> (most recently viewed January 23, 2018).

10 The EIU Panel completed its first evaluation and report on the dotgay application in October 2014, but a procedural error was identified and the BGC determined that the application should be reevaluated. A second evaluation and report were completed on October 15, 2015. References in this Second Expert Report will be to the second CPE evaluation and report, which I shall refer to as the CPE Report.

**B. THE GOVERNING DIRECTIVES: ICANN’S BYLAWS AND ITS APPLICANT GUIDEBOOK**

11 The governing legal materials include ICANN’s Bylaws and its Applicant Guidebook. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

12 Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

13 ICANN’s Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay’s application. *See* AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant “community,” nexus between the proposed string and the community, registration policies, and community endorsement. AGB, Module 4.2.3. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The EIU Panel awarded dotgay a score of 10 out of 16 points, including a score of 0 out of 4 points for Criterion #2, the community nexus requirement, and a score of 2 out of 4 points for Criterion #4, the community endorsement requirement.

#### **C. THE ICANN NEXUS CRITERION AND ITS APPLICATION IN THE CPE REPORT**

14 Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay’s application. Dotgay’s petition lost 4 of 4 possible points on Criterion #2, “Nexus Between Proposed String and Community (0-4 Points).” In this part of this Second Expert Report I focus on the nexus element, which is responsible for 3 of the 4 points. (A uniqueness element accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)

15 An application merits **3 points** for the nexus element if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, p.4-12 (emphasis added). “Name” of the community means “the established name by which the community is commonly known by others.” AGB, p. 4-13. “[F]or a score of 3, the essential

aspect is that the applied-for string is commonly known by others as the identification/name of the community.” AGB, p. 4-13.

- 16 An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, p. 4-13.
- 17 An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that the “[s]tring had no other significant meaning beyond identifying the community described in the application.” AGB, p. 4-13.
- 18 In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus element. CPE Report, pp. 4-6. Because dotgay secured 10 points from the remaining criteria and needed 14 points for approval, Criterion #2 was the main reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.
- 19 Recall that an application merits 3 points if “[t]he string matches the name of the community or is a well-known short-form or abbreviation of the community.” AGB, p. 4-12. The CPE Report dismissed this possibility: “The string does not identify or match the name of the

community as defined in the application, nor is it a well known short-form or abbreviation of the community.” CPE Report, p. 5. As I demonstrate below, this is demonstrably not correct.

20 The CPE Report did not identify precisely what evidence the EIU Panel relied on to conclude that “gay” is not “a well known short-form or abbreviation of the community” defined in dotgay’s application, but it did read into the explicit requirement (“a well known short-form or abbreviation of the community”) an implicit requirement that the string **also** “identify” the community and its members. This implicit requirement was taken from the Applicant Guidebook’s explanation for a partial nexus score. Recall that an application merits 2 points if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the “identify” requirement (used in the 2-point evaluation) into the 3-point evaluation. Neither the EIU Panel nor FTI provided any explanation in this regard.

21 “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. The CPE Report rephrased the ICANN definition to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, p. 5. Based upon this narrowing revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel

“determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the EIU Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, pp. 5-6. I will return to the EIU Panel’s representation regarding the “review” it claims to have conducted “of the language used in the media as well as by organizations that work within the community” below.

22 The CPE Report did not identify the methodology the EIU Panel followed to support these sweeping empirical statements. Instead, the CPE Report asserted that “a comprehensive survey of the media’s language in this field is not feasible,” CPE Report, p. 5 note 10, and that “a survey of all LGBTQIA organizations globally would be impossible.” CPE Report, p. 5 note 12. While this may be true to a certain extent, there is a significant and material gap between what the EIU Panel did and what is in fact feasible and indeed easily doable.

23 Dotgay’s application relied on the common use of “gay” as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in “gay pride” parades, support “gay rights,” and follow the “gay media.” The EIU Panel conceded this point (CPE Report, p. 7) but nevertheless took the position that “gay” is “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.” CPE Report, p. 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are

“many similar transgender stories in the media where ‘gay’ is not used to identify the subject.”  
CPE Report, pp. 6-7 and note 14.

24 The CPE Report also conceded that “gay” is used in the media much “more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.” CPE Report, p. 7. Nonetheless, the EIU Panel asserted that there is no evidence that “when ‘gay’ is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities.” CPE Report, p. 7. But, the Panel’s “own review of the news media” (footnote: the Panel said that “a comprehensive survey of the media’s language is not feasible”) found that although “gay” is “more common than terms such as ‘LGBT’ or ‘LGBTQIA’, these terms are now more widely used than ever.” CPE Report, p. 7 and note 19. This inconsistency is not addressed anywhere in the CPE Report or by FTI.

25 The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that “gay” is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, p. 8.

26 Based upon this reasoning, the EIU Panel awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the Panel awarded 0 of 1 points for uniqueness. CPE Report, p. 8.

**D. THE ICANN COMMUNITY ENDORSEMENT CRITERION AND ITS APPLICATION IN THE CPE REPORT**

- 27 Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications; Criterion #4 is “Community Endorsement.” As many as 2 points are awarded based upon support within the relevant community; as many as 2 points are awarded based upon lack of opposition within the relevant community. Dotgay’s petition lost 1 of 2 possible points on each element of Criterion #4.
- 28 Under the support element of the community endorsement criterion, **2 points** are awarded if the “[a]pplicant is, or has documented support from, the recognized community institution(s)/member organization(s) **or** has otherwise documented authority to represent the community.” AGB, p. 4-17 (emphasis added). **1 point** is awarded if there is “[d]ocumented support from at least one group with relevance, but insufficient support for a score of 2.” AGB, p. 4-17. An applicant will be awarded 1 rather than 2 points if “it does not have support from a majority of the recognized community institutions/member organizations.” AGB, p. 4-18.
- 29 Under the opposition prong of the community endorsement criterion, **2 points** are awarded if there is “[n]o opposition of relevance.” AGB, p. 4-17. **1 point** is awarded if there is “[r]elevant opposition from one group of non-negligible size.” AGB, p. 4-17.
- 30 In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 2 out of 4 possible points for Criterion #4, including 1 out of 2 possible points for support and one out of 2 possible points for opposition. CPE Report, pp. 10-11.

31 The EIU Panel awarded dotgay a partial score (1 point) for support, even though dotgay submitted strong statements of support from dozens of relevant organizations, including the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), which the EIU Panel identified as perhaps the only “entity mainly dedicated to the entire global community as defined.” CPE Report, p. 3. The Panel, however, “determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have the documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s).” CPE Report, p. 11.

32 The EIU Panel awarded dotgay a partial score (1 point) for opposition. The reason was that “there is opposition to the application from one group of non-negligible size.” CPE Report, p. 11. Although the CPE Report did not identify the group, it was the Q Center in Portland, Oregon. The Q Center is a small, local community center. It is a member of CenterLink, a national association of around 200 community centers. CenterLink endorsed dotgay’s application; the Q Center was the only one of its 200 members to oppose the dotgay application.

**E. RECONSIDERATION OF THE CPE REPORT AND THE CPE PROCESS REVIEW BY FTI**

33 Dotgay objected to the conclusions reached by the CPE Report and requested a Reconsideration. Specifically, dotgay objected that its application deserved an award of all 4 possible points under Criterion #2, Nexus with the Community. Awarding 0 points, the EIU Panel made three different errors of legal or factual analysis: (i) interpretive errors, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring

ICANN's mission and core values; (ii) errors of inconsistency and discrimination, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay's application when compared with other applications; and (iii) errors of fact, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world. On September 15, 2016, I submitted an Expert Report documenting these three errors. In addition, dotgay objected that its application deserved an award of all 4 possible points under Criterion #4, Community Endorsement.

34 On October 18, 2016, the ICANN Board Governance Committee responded to the pending Reconsideration Requests with a CPE Process Review. Scope 2 of that Review was supposed to be an evaluation of whether the CPE criteria were applied consistently throughout each CPE Report. Scope 3 was supposed to be a compilation of reference materials relied upon by the EIU Panel for its evaluations of the applications of the pending Requests, including that of dotgay. Through counsel, ICANN retained FTI Consulting, Inc.'s Global Risk and Investigations and Technology Practice (FTI) to conduct the CPE Process Review. On December 13, 2017, FTI released its three Reports on Scopes 1-3. (This Second Expert Report will not discuss or analyze the FTI Report on Scope 1, which evaluates the EIU Panel's communications.)

35 FTI's Report on Scope 2, "Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports," determined "whether the CPE Provider consistently applied the CPE criteria throughout each CPE." FTI Scope 2 Report, p. 2. "FTI

found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.” FTI Scope 2 Report, p. 3.

36 FTI’s Report on Scope 3, “Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations Which Are the Subject of Pending Reconsideration Requests,” examined the EIU Panel’s “working papers” associated with each evaluation. FTI Scope 3 Report, p. 3. On the nexus criterion, FTI observed as many as “23 references to research or reference materials” in the working papers that were not cited in the CPE Report. FTI Scope 3 Report, pp. 38-39 & note 117. The FTI Report made no effort to evaluate these materials and so made no determination whether they supported the conclusions and generalizations of the CPE Report. On the community endorsement criterion, FTI reported three sources of information about the Q Center, which was the only opposition to the dotgay application. FTI Scope 3 Report, p. 40 & note 120.

37 This Second Expert Report addresses the FTI Scope 2 and Scope 3 Reports as they relate to the CPE Report for dotgay’s application. This Report will focus on the FTI Reports as they relate to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement). In my expert opinion, the FTI Scope 2 Report is not a serious analysis of the many interpretive and factual problems with the CPE Report. FTI failed to recognize or engage the many criticisms of the EIU Panel’s application of ICANN’s and CPE’s guidelines to the dotgay and other applications. Indeed, nothing in the FTI Scope 2 Report rescues the CPE Report from a variety of logical and analytical flaws or from its documented inconsistency with other CPE reports.

I shall set forth those criticisms in detail below. In my expert opinion, the FTI Scope 3 Report provides evidence that undermines the factual basis for the CPE Report's conclusions as to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement).

#### **IV. The FTI Scope 2 Report Completely Missed the Important Ways the CPE Report Misinterpreted or Ignored the Established Directives for Evaluating Applications**

38 The FTI Scope 2 Report “found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines.” FTI Scope 2 Report, p. 3. The Report quoted the applicable guidelines and claimed to have considered the “concerns raised in the Reconsideration Requests,” yet still concluded that the “CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 21. The conclusion was supported by no independent analysis, however. The Report uncritically repeated the conclusions found in the EIU Panel’s reports and did not ask whether the criteria the EIU Panel claimed to apply were the criteria laid out in the Applicant Guidebook and other authorities, some of which the EIU Panel and FTI ignored altogether. E.g., FTI Scope 2 Report, pp. 37-41 (Nexus). The approach followed by FTI was a “description” of the CPE Reports, but not an “evaluation” to determine whether the CPE Reports were actually following the applicable guidelines. As regards the dotgay application, they were decidedly **not**.

**A. IN ITS ANALYSIS OF THE NEXUS CRITERION, THE CPE REPORT MISREAD ICANN'S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS**

- 39 The FTI Scope 2 Report says that EIU personnel “stated that they were strict constructionists and used the Applicant Guidebook as their ‘bible.’” FTI Scope 2 Report, p. 10. If it were true that the EIU considered the Guidebook to be its “Bible,” its personnel were far from strict constructionists—they were heretics who rewrote rather than interpreted the Guidebook’s rules for Criterion #2, especially its nexus element.
- 40 Recall the requirements ICANN has set forth, explicitly, for the nexus element in its Applicant Guidebook: An application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, p. 4-12 (emphasis added). “Name” of the community means ‘the established name by which the community is commonly known by others.’” AGB, p. 4-13. “[F]or a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”
- 41 An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, p. 4-13.

42 As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.<sup>5</sup> As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes. Because its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes. FTI Scope 2 Report, pp. 37-41.

**1. The EIU Panel and FTI Substantially Ignored the Primary Test for Nexus: Is the Proposed String “a Well Known Short-Form or Abbreviation of the Community”?**

43 To begin with, the EIU Panel and FTI systematically ignored the Applicant Guidebook’s focus on whether the proposed string (“.gay”) is “**a well known short-form or abbreviation of the community**” (3 points) or “closely describes **the community**” (2 points) (emphasis added in both quotations). Notice the precise language, especially the language set **in bold**. The proposed string does not have to be “**the only** well known short-form or abbreviation of the community” and does not have to be “**the only term that** closely describes the community”

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<sup>5</sup> The proposition in text is explained and defended in virtually all the leading books on statutory, treaty, and contract interpretation, including such works as Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37–38 (2012); Antonin Scalia, *A Matter of Interpretation* (1997); Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015).

(bold type for language added for contrast). More important, the primary focus is “the community,” not just “community members” (an alternative focus for the 2-point score).

44 For dotgay’s application, the overall community is sexual and gender nonconformists. As set forth in more detail in Part V below, this is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely asserted natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. “Gay” is “a well known short-form or abbreviation of the community” (the requirement for 3 points) and also “closely describes the community” (the requirement for 2 points). There is no requirement that “gay” must be the only umbrella term for the community or even that it be the most popular term—but in fact “gay” remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that “gay” has been a popular word for more than a century, but also

demonstrates that once “gay rights” became ascendant in the 1990s, the term’s dominance increased and consolidated. (Appendix 2 describes the methodology underlying Figure 1.)

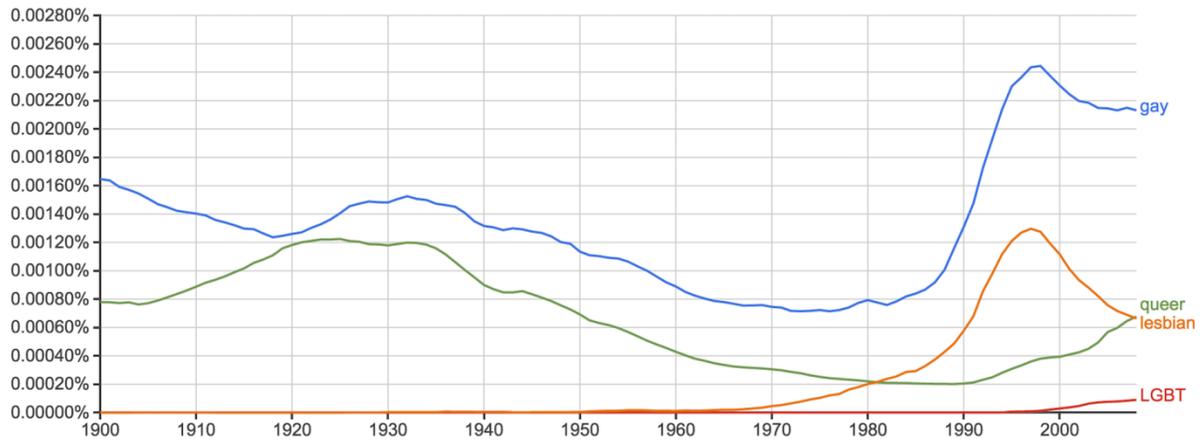


Figure 1. A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008

## 2. The EIU Panel and FTI Created an “Under-Reach” Test for Nexus That Is Inconsistent with the Applicant Guidebook and Applied the New Test to Create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws

45 In another major departure from ICANN’s Applicant Guidebook and its Bylaws, the EIU Panel has introduced a **Liberum Veto** (Latin for “free veto”) into ICANN’s nexus element. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth’s ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The EIU Panel created a similar Liberum Veto, by importing a requirement that the applied-for string (“.gay”) can be vetoed if it “does not sufficiently identify **some members** of the applicant’s defined community, in particular transgender, intersex, and ally individuals.”

CPE Report, p. 5 (emphasis added). In its uncritical presentation, FTI simply repeated the error. FTI Scope 2 Report, pp. 37-39.

- 46 Where did this Liberum Veto come from? It was not taken from the Applicant Guidebook’s explicit instructions for the nexus requirement, AGB, p. 4-12, nor was it taken from the Guidebook’s definitions of “Name” or “Identify,” AGB, p. 4-13. Yet the EIU Panel and FTI cited the Applicant Guidebook for their misunderstanding of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake, a mistake completely missed by FTI.
- 47 According to the Applicant Guidebook, “Identify,” a key term in the 2-point test, means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. For the dotgay application, the EIU Panel recast this Guidebook criterion to require that the applied-for string “must [1] ‘closely describe the community or the community members’, i.e., the applied-for string is what [2] ‘the typical community member would naturally be called.’ ” CPE Report, p. 5 (quoting the AGB). Notice that the first part [1] of the Report’s requirement is taken from the Guidebook’s 2-point nexus requirement and the second part [2] is quoted from an illustration of **one** example where the Guidebook’s criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook’s focus on “the community” and refocused only on “members of the community,” so it ignored the Applicant Guidebook’s focus on an **objective** view of the community and refocused only on **subjective** usages by some members of the community. And it took subjective usages pretty far by creating a Liberum Veto.

48 Moreover, the EIU Panel’s Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that, for its 2-point score, the Guidebook defines “Identify” to mean that “the applied-for string closely describes the community or the community members, **without over-reaching substantially beyond the community.**” AGB, p. 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application:

***ICANN AGB Concern: Applied-For String > Community Defined in Application***

But that’s not the concern identified by the EIU Panel’s Liberum Veto analysis, which claims that the applied-for string (“gay”) “under-reaches” substantially short of the whole community. The EIU Panel’s “under-reaching” concern flips the “over-reaching” concern of the Applicant Guidebook. In evaluating the dotgay application, the EIU Panel worried that the applied-for string is narrower than the community defined in the application:

***EIU Panel Concern: Applied-For String < Community Defined in Application***

49 The EIU Panel imported its “under-reaching” concern into the Applicant Guidebook, but in the teeth of the ordinary meaning of its text. The Liberum Veto for “under-reaching” is a regulatory addition to the Guidebook and not a proper interpretation of the Guidebook, which only requires that the proposed string be “a well known short-form or abbreviation of the community” (3 points) or “closely describes the community” (the requirement for 2 points). There is no requirement that “gay” must be only term, or even the most popular term, that would be used by every member of the community. On the other hand, the Applicant

Guidebook does say, for a 2-point score, that the proposed string must “closely describe[e] the community, without over-reaching substantially beyond the community.” AGB, p. 4-13 (2 points). The explicit concern of the Applicant Guidebook is that the proposed string not “over-reach”; by omitting parallel language for “under-reach,” the Applicant Guidebook should be interpreted to allow more latitude for under-reaching.<sup>6</sup> It is a widely accepted canon of contract, statutory, and even constitutional interpretation that the expression of one exception suggests the exclusion of others.<sup>7</sup>

50 Stating the matter more simply, and even more at odds with ICANN’s Applicant Guidebook, the FTI’s Scope 2 Report identified eight applications (including dotgay’s) where the proposed “string identified the name of the core community members,” but “failed to match or identify the **peripheral industries and entities** included in the definition of the community set forth in the application.” FTI Scope 2 Report, p. 38 & note 133 (emphasis added). To impose upon applicants the duty to carefully match each and every conceivable “peripheral” entity or subgroup to the proposed string would be absurd, and the FTI’s overstatement helps us see why the Applicant Guidebook avoids this requirement. In our dynamic culture, groups tend to expand and subdivide. If an applicant had to come up with a term that embraced every

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<sup>6</sup> The EIU Panel and FTI read the Applicant Guidebook as if it said that the proposed string must “closely describe[e] the community, without over-reaching substantially beyond the community **and without under-reaching substantially within the community.**” AGB, p. 4-13 (new language, implicitly added by the EIU Panel, **in bold**).

<sup>7</sup> Antonin Scalia & Bryan Garner, *Reading Law* 107-11 (2012); 2A *Sutherland Statutes and Statutory Construction* § 47.23 (7th ed. 2015).

“peripheral” entity that might be included in its community, ICANN would be pushing those applicants toward increasing complexity—such as LGBTQIA, “Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Allied.” That is too complicated a domain name—and it, too, would be subject to an “under-reaching” objection because it might not adequately describe “Asexuals,” a significant portion of the population, or even “Pansexuals,” perhaps a “peripheral” subgroup, but one that the FTI analysis would consider.

51 I shall document, in Part V, how the EIU Panel was mistaken in its application of its “under-reaching” analysis, another clear error missed by the uncritical analysis by FTI. Here, my point is that the new Librum Veto based upon the proposed string’s “under-reach” is a strong example where the “CPE Provider’s evaluation process or reports deviated \* \* \* from the applicable guidelines,” contrary to the uncritical assumption of the FTI Scope 2 Report, p. 3. The “under-reach” analysis and the Librum Veto are also inconsistent with the CPE Guidelines, Version 2.0. *See* EIU, CPE Guidelines, pp. 7-8 (Version 2.0), analyzed below.

### **3. In Evaluating the Nexus Criterion, the CPE Report Ignored and Violated ICANN’s Bylaws**

52 Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN’s mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support “broad, informed participation reflecting the \* \* \* cultural diversity of the Internet.” ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those

in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.<sup>8</sup>

53 There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—“.gay”—is ideally suited for these purposes. Conversely, no other string would bring together all the websites of interest to sexual and gender minorities as comprehensively as “.gay.” Certainly, a longer string—like “.LGBTQIA”—would be less accessible for the general population or, as I shall demonstrate below, even for the various subgroups within the larger gay community.

54 Consider an example. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), “suicide.gay” (one of the community-operated websites proposed in the dotgay application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Second Expert Report) would think “suicide.gay” before they would think “suicide.lgbt” or “suicide.lgbtqia.” See Figure 1, above. Indeed, many educated people (including the author of this Second Expert Report) cannot easily remember the correct order of the letters in the

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<sup>8</sup> See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 85 (2006); William Eskridge Jr., *Interpreting Law* 3-11, 105-08 (2016); Robert Katzmann, *Judging Statutes* (2015); Antonin Scalia & Bryan Garner, *Reading Law* 63-66 (2012).

latter string (“lgbtqia”). Does a Librum Veto based on “under-reach” make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as “lgbtqia”). As I documented in my earlier Expert Report, “gay suicide” is a common locution; the search of books published between 1950 and 2008 did not register any significant usage for “LGBT suicide” or “LGBTQIA suicide.”

55 Not least important, “non-discriminatory treatment” is a fundamental principle identified in ICANN’s Bylaws. As I shall now show, the EIU Panel’s Librum Veto based upon a made-up “under-reaching” test has been fabricated without any notice in its own guidelines. Needless to say, other CPE evaluations have ignored that fabricated test in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an “under-reaching” test in its nexus requirement, the EIU Panel here has applied it in a most draconian manner, namely, creating a Librum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

**B. IN ITS APPLICATION OF THE NEXUS CRITERION, THE CPE REPORT WAS INCONSISTENT WITH THE CPE GUIDELINES AND PREVIOUS CPE REPORTS AND VIOLATED ICANN’S NON-DISCRIMINATION DIRECTIVE**

56 The FTI Scope 2 Report concluded that “the CPE Provider’s scoring decisions were based upon a consistent application of the Applicant Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 3. As before, the FTI said that it considered the “concerns raised in the Reconsideration Requests,” yet still concluded that the “CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant

Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 21. As before, this conclusion is supported by no independent analysis. The FTI Scope 2 Report uncritically repeated the conclusions found in the CPE Reports and did not discuss or consider the various fairness and nondiscrimination objections raised by dotgay and other applicants. E.g., FTI Scope 2 Report, pp. 37-41 (nexus). This approach is a “description” of the CPE Reports, but is not an “evaluation” to determine whether the CPE Reports were actually applying the guidelines in a neutral and nondiscriminatory manner. At least as regards the dotgay application, they were decidedly **not**.

### **1. The CPE Report Was Inconsistent with CPE Guidelines**

57 According to FTI’s interviews with EIU Panel personnel, “the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process.” FTC Scope 2 Report, p. 11. Yet the EIU Panel has imported into the nexus element a *Liberum Veto* based on “under-reaching” which is strikingly inconsistent with the EIU’s CPE Guidelines. Rather than transparency, the CPE Guidelines, if read carefully in light of their ordinary meaning, are a trap for the applicant. Indeed, as applied by the EIU Panel, they open the door to discriminatory, unfair, and unpredictable application.

58 Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the applied-for string “identifies” the community but does not qualify for a score of 3. I believe dotgay properly qualified for a score of 3, but the CPE Report combined in a confusing way (and apparently contrary to the precise terms of the Applicant Guidebook) the requirements for full

(3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the application “identified” the community.

59 “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, pp. 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’” CPE Report, p. 5.

60 Based upon this revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals.” CPE Report, pp. 5-6.

61 As I concluded above, the EIU Panel has imported a new “under-reaching” test into the nexus analysis—contrary to the Applicant Guidebook’s concern only with “over-reaching.” Moreover, this report’s unauthorized test is also directly inconsistent with the published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the CPE Guidelines developed by the Economist Intelligence Unit quote the Applicant Guidebook’s definition of “Identify,” with the “over-reaching” language. Then, the EIU announces its own “Evaluation Guidelines” for this term, including this:

“Over-reaching substantially” means that the string indicates a **wider** geographic or thematic remit than the community has.

EIU, CPE Guidelines, Version 2.0, p. 7 (emphasis added). The EIU’s CPE Guidelines do not suggest that the inquiry should be whether the string indicates a “**narrower** geographic or thematic remit than the community has” (emphasis for my substitution).

62 The EIU’s CPE Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

*Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?*

*Does the string capture a wider geographic/thematic remit than the community has?*

EIU, CPE Guidelines, Version 2.0, p. 8 (emphasis in original). Notice that the EIU’s CPE Guidelines do **not** include the following inquiries (new language in **bold**):

*Does the string identify a **narrower** community **than that which is revealed in the applicant’s description of its community?***

*Does the string capture a **narrower** geographic/thematic remit than the community has?*

63 Given these CPE Guidelines, one would not expect “under-reaching” decisions, even when an application clearly presents those concerns. An excellent example is the CPE report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string “.Osaka.” “Members of the community are defined as those who are within the

Osaka geographical area as well as those who self-identify as having a tie to Osaka, or the culture of Osaka.” Osaka CPE Report, p. 2. In a nonexclusive list, the applicant identified as members of the community “Entities, including natural persons who have a legitimate purpose in addressing the community.” Osaka CPE Report, p. 2.

64 The applied-for string (“.Osaka”) would seem to be one that very substantially “under-reaches” the community as defined by the applicant. Apply to the Osaka application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka self-identify as “Japanese” rather than “Osakans.” Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. Shouldn’t the Libero Veto, grounded upon “under-reaching,” apply here?

65 Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular Air BnB location), or even resident might say, “I am only interested in Chūō-ku! The rest of Osaka has no interest for me.” If a fair number of people feel this way, “more than a small part of the applicant’s defined community is not identified by the applied-for string,” CPE Report, p. 5, if one were following the logic of the EIU Panel evaluating dotgay’s application.

66 I must say that this kind of Libero Veto evidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for “.Osaka” and that posed by the EIU Panel for

“.gay.” Simply substitute “transgender” for “Chūō-ku” in the foregoing analysis, and you have the EIU Panel’s evaluation in the CPE Report.

67 By its broad definition of the community, including “[e]ntities, including natural persons who have a legitimate purpose in addressing the community,” the “.Osaka” applicant is screaming “under-reach.” Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the “.Osaka” application simply concluded that the string “matches the name of the community” and awarded the applicant 3 of a possible 3 points for nexus. Osaka CPE Report, p. 4. “The string name matches the name of the geographical and political area around which the community is based.” Osaka CPE Report, p. 4. Yes, but the applicant defined the community much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an “under-reach” analysis or consider a *Liberum Veto* in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU’s CPE Guidelines. And, it almost goes without saying, the EIU Panel’s analysis for the dotgay application is strongly inconsistent with the EIU Panel’s lenient analysis for the Osaka application.

68 Notwithstanding the foregoing analysis, which was spelled out in my earlier Expert Report, FTI made no effort to reconcile the EIU Panel’s lenient treatment of the Osaka application and its draconian treatment of the dotgay application, even though the Osaka application seems like a more obvious candidate for a *Liberum Veto* based upon the made-up “under-reaching” requirement. Instead, FTI simply observed that the Osaka application was awarded full credit (3 points) for the nexus element of Criterion #2. FTI Scope 2 Report, p. 40.

## 2. The CPE Report Was Inconsistent with the EIU Panel's Own Previous Reports

69 Dotgay's application was not the first time the EIU Panel has performed a nexus analysis suggesting an "under-reach" of an applied-for string, compared with the identified community. *See* FTI Scope 2 Report, pp. 38-39. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a *Liberum Veto*.

70 An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether ".hotel" should be approved as a top-level domain. The EIU Panel may have performed a kind of "under-reach" analysis—but it was nowhere as critical as that which it performed for dotgay's application, even though the ".hotel" name was a much more dramatic illustration of "under-reach."

71 The applicant wanted a domain that would serve the "global Hotel Community." It defined its community in this way: "A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available." Hotel CPE Report, p. 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.

72 In the discussion of the nexus requirement, the EIU Panel observed that "the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the

gTLD. However, these entities are considered to comprise only a small part of the community.” Hotel CPE Report, p. 4. This is a stunning understatement. The applicant’s broad definition of “hotel” would logically sweep into the “community” resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express’s sleeping car a “hotel”? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be “hotel” rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

73 The EIU’s “under-reach” analysis of the hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (“.hotel”) did not match the community defined in the application. Contrast the EIU Panel’s tolerant analysis in the hotel application with its hyper-critical analysis of dotgay’s application. The contrast becomes even more striking, indeed shocking, when you also consider the CPE Report’s vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in this Second Expert Report (reported below).

74 Another example of an EIU Panel’s forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for “.spa”. The EIU Panel awarded the applicant 14 of 16 possible points, including 4 of 4 possible points for nexus and uniqueness. Like the

“.hotel” applicant, the “.spa” applicant presented more significant problems of “under-reach” than dotgay’s application did.

75 The “.spa” applicant defined the community to include “Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors.” Spa CPE Report, p. 2. The EIU Panel awarded the applicant 4 of 4 possible points based upon a finding that these three kinds of persons and entities “align closely with spa services.” Spa CPE Report, p. 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with “spa.” As a consumer, I should not think “.spa” if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this “alignment” concern, and awarded the spa applicant 3 of 3 points for nexus.

**C. IN ITS ANALYSIS OF THE COMMUNITY ENDORSEMENT CRITERION, THE CPE DOTGAY REPORT MISAPPLIED ICANN’S APPLICANT GUIDEBOOK, IGNORED ITS BYLAWS, AND EVALUATED THE REQUIREMENT LESS GENEROUSLY THAN IN OTHER REPORTS**

76 The EIU Panel awarded dotgay only 2 out of 4 points for Criterion #4, Community Endorsement. Dotgay lost 1 point for the community support element and 1 point for the community opposition element of that criterion. Both deductions by the EIU Panel were profoundly unfair and were justified by reasoning that is inconsistent with ICANN’s governing directives. As before, the FTI Scope 2 Report completely failed to examine the EIU Panel’s

analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these applications.

77 In connection with the support element of the community endorsement criterion, dotgay’s application established wide and deep community support, with letters from around 150 organizations, including the ILGA. Founded in 1978, ILGA is a worldwide federation of more than 1100 lesbian, gay, bisexual, transgender, and intersex national and local organizations in over 100 nations on five continents. It is the leading world-wide organization dedicated to establishing the anti-discrimination norm for the benefit of sexual and gender minorities. ILGA enjoys consultative status with the Economic and Social Council of the United Nations.

78 Notwithstanding this impressive—overwhelming—support from the world gay community, the EIU Panel refused to award the full 2 points for community support. While the ILGA was clearly an entity dedicated to the community, the Panel found that it did not meet the standard of a “recognized” organization. According to the Panel, the AGB defines “recognized” to mean that the organization must “be clearly recognized by the community members as representatives of the community.” Without citing any evidence, the Panel concluded that there was no “reciprocal recognition on the part of community members of the [ILGA’s] authority to represent them.” Indeed, the Panel opined that “there is no single such organization recognized by all of the defined community members as the representative of the defined community in its entirety.” CPE Report, p. 11.

79 In the foregoing analysis, the EIU Panel, once again, rewrote the directive set forth in the Applicant Guidebook. The AGB contemplates one or more “recognized community

institution(s)/community organization(s)” and does not contemplate a situation where there is no “recognized community institution(s)/community organization(s)” at all. AGB, p. 4-17. Moreover, the Applicant Guidebook defines “recognized” to mean “the institution(s)/organization(s) that, **through membership or otherwise**, are clearly recognized by the community members as representative of the community.” ABG, pp. 4-17 to 4-18 (emphasized language omitted from the CPE Report). More than 1100 organizations representing the rights of sexual and gender minorities have become **members** of ILGA, and the United Nations has recognized it as the world-wide representative of LGBTI persons. This is surely enough to satisfy the actual requirements of the Applicant Guidebook. If there were any doubt about that, the EIU Panel should resolve the ambiguity by reference to the ICANN Bylaws, which require application of the directives in a nondiscriminatory manner.

80 Indeed, the EIU Panel applied the actual, more liberal, requirements found in the Applicant Guidebook to the application for “.hotel.” The hotel applicant could not identify a single institution that was as recognized a representative of the entire hotel industry, with the widespread membership that ILGA represents for the dotgay applicant. Instead, like dotgay, the hotel applicant offered support from a number of “recognized” organizations. The EIU Panel awarded 2 points for a submission that was less impressive than that made by dotgay. *See* Hotel CPE Report, p. 6. Even the statement of the AGB’s directive was more liberal (and more accurate) in the CPE Report for “.hotel” than in the CPE Report for “.gay.” Specifically, the EIU Panel evaluating the hotel application accurately quoted the AGB’s definition of “recognized” that included the “through membership or otherwise” language and applied the

definition with the understanding that there will normally be several “recognized” institutions and organizations. *See* Hotel CPE Report, p. 6.

- 81 In connection with the opposition element of the community endorsement criterion, only one organization registered opposition: the Q Center in Portland, Oregon, the home of an applicant for a competing string to that of dotgay. Yet the EIU Panel failed to award dotgay the full 2 points for opposition. Recall that the Applicant Guidebook requires an award of 2 points if there is “[n]o opposition of relevance,” and 1 point if there is “[r]elevant opposition from one group of non-negligible size.” AGB, p. 4-17.
- 82 To justify an award of only 1 point, the CPE Report invoked opposition from “one group of non-negligible size” (p. 11). The FTI Scope 3 Report identified that group as the Q Center in Portland, Oregon, and provided three references to the Q Center in the EIU Panel’s working papers (p. 40 note 120). The references establish that the Q Center is a local community center, geographically limited to Portland, Oregon. It is one of several gay groups and institutions in Oregon, which is a state with a small population. The Q Center is also one of more than 200 community centers in 45 states and overseas that are members of CenterLink: The Community of LGBT Centers, <https://www.lgbtcenters.org/> (viewed January 25, 2018). CenterLink is one of dozens of gay organizations that endorsed dotgay’s application. One two-hundredths of CenterLink’s membership—the Q Center in Portland—was deemed sufficient to count as opposition from “one group of non-negligible size.” In my expert opinion, the application by the EIU Panel to dotgay’s case was an absurd interpretation of the Application Guidebook’s stated approach for evaluating the support element of the community endorsement criterion.

It is standard legal interpretation to read terms of a statute, treaty, or contract to avoid absurd results.<sup>9</sup> The absurdity of the interpretation morphed into the realm of the bizarre, however, once I examined the materials discussed in the FTI Scope 3 Report.

83 Two of the three references identified in the FTI Scope 3 Report raise red flags. One reference reveals that in 2014 the Q Center had an organizational meltdown. *See* Dan Borgan, “A New Era Begins at Q Center,” *P.Q. Monthly*, Dec. 19, 2014, <http://www.pqmonthly.com/new-era-begins-q-center-basic-rights-oregon-provides-financial-stability/21355> (viewed January 25, 2018). The article reported that the Q Center had been mismanaged for some years and that in 2014 its officers had resigned amid charges of fraud and mismanagement. “Q Center is in a tumultuous time: many staff and board members have left.” Community trust had been shattered, according to the source in the CPE working papers. A subsequent article (not identified in the working papers) says that the Q Center’s troubles worsened in 2015. According to this source, the Q Center was operated for the benefit of whites; persons of color and transgender persons felt unwelcome. A Q Center panel addressing a gay bar’s blackface performance raised tensions because it excluded voices of color. The Q Center’s turmoil seemed to deepen, and new managers took over. David Stabler, “Can the Q Center Survive Anger, Plunging Donations, and Staff Departures?,” *The Oregonian*, March 2, 2015, [http://www.oregonlive.com/portland/index.ssf/2015/03/problems\\_at\\_portlands\\_q\\_center.htm](http://www.oregonlive.com/portland/index.ssf/2015/03/problems_at_portlands_q_center.htm) 1 (viewed January 25, 2018). Soon after this article appeared, on April 1, 2015, the new Chair

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<sup>9</sup> *See* William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 69-73 (2016); Antonin Scalia & Bryan Garner, *Reading Law* 234-39 (2012).

of the Q Center Board wrote dotgay a letter seeking to void the earlier opposition; dotgay passed on this letter to ICANN. On July 25, 2015, however, yet another new Chair of the Q Center Board wrote ICANN a letter reasserting the Q Center's opposition.

84 In 2014-2015, was the Q Center a “group of non-negligible size,” and was its “opposition of relevance,” the stated criteria in the Applicant Guidebook? The EIU Panel answered yes to both questions, yet such an answer is not even supported by the sources the EIU Panel consulted. Indeed, those sources should have alerted the EIU Panel to proceed cautiously, given the charges of racism and transphobia that were being made against the Q Center. Should ICANN not be concerned that the gay community's application for a needed string has been penalized because of opposition by a small local group riven with strife and charged with race and trans exclusions? Why did the EIU Panel not explore this problem? Why did FTI not flag it?

**V. The FTI Scope 3 Report Confirms Dotgay's Claim that the EIU Panel Ignored Important Evidence that Supports Full Credit under the Nexus Criterion**

85 Assume, contrary to any sound analysis, that the EIU Panel correctly interpreted and applied the Applicant Guidebook's requirements for Criterion #2 (Community Nexus and Uniqueness). Even under the EIU Panel's excessively restrictive understanding of ICANN's requirements, dotgay's application would merit 4 of 4 possible points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.

86 Recall that the EIU Panel “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, pp. 5-6.

87 The CPE Report made no effort to situate dotgay’s claims within the larger history of sexual and gender minorities in history or in the world today. Nor did it identify the methodology or evidence the EIU Panel followed to support these sweeping empirical statements. The FTI’s Report on Scope 3 examined the EIU Panel’s working papers. Most of the sources it identified are searches allegedly conducted by the EIU Panel, using terms that are blacked out (and therefore inaccessible) in the FTI Scope 3 Report, pp. 37-39 & note 117. Has the FTI’s Scope 3 Report been censored? Or was the EIU Panel’s methodology so scattershot that even its own working papers do not reveal how it conducted its research?

88 Other sources were specifically identified—and some of those sources directly support dotgay’s position. For a dramatic example, the FTI identified, as a major source contained in the EIU Panel’s working papers, the Wikipedia entry for “LGBT Community,”

[https://en.wikipedia.org/wiki/LGBT\\_community](https://en.wikipedia.org/wiki/LGBT_community) (viewed January 25, 2018). See FTI Scope 3 Report, p. 38 note 117. Here is the first paragraph of that entry (emphasis in the original):

The **LGBT community** or **GLBT community**, also referred to as the **gay community**, is a loosely defined grouping of lesbian, gay, bisexual, and transgender (LGBT) and LGBT-supportive people, organizations, and subcultures, united by a common culture and social movements. These communities generally celebrate pride, diversity, individuality, and sexuality. LGBT activists and sociologists see LGBT community-building as a counterbalance to heterosexism, homophobia, biphobia, transphobia, sexualism, and conformist pressures that exist in the larger society. The term “pride” or sometimes *gay pride* is used to express the LGBT community’s identity and collective strength; pride parades provide both a prime example of the use and a demonstration of the general meaning of the term. The LGBT community is diverse in political affiliation. Not all LGBT individuals consider themselves part of the LGBT community.

The remaining discussion in Wikipedia’s entry for “LGBT Community” uses “gay” and “LGBT” interchangeably. For example, the Wikipedia entry has an extensive discussion of “LGBT Symbols,” which starts this way: “The gay community is frequently associated with certain symbols; especially the rainbow or rainbow flags. The Greek lambda symbol (‘L’ for liberation), triangles, ribbons, and gender symbols are also used as ‘gay acceptance’ symbol. There are many types of flags to represent subdivisions in the gay community, but the most commonly recognized one is the rainbow flag.”

89 If the EIU Panel actually consulted the Wikipedia entry contained in its working papers, why did it not mention that entry in its CPE Report? If FTI actually read the Wikipedia entry that it cited in its Scope 3 Report, why did it not raise a question about whether the evidence assembled by the EIU Panel really supported its conclusion that “gay” was not a name that

matched or identified the community? These are troubling concerns. For a similar example, taken from the EIU Panel’s working papers referenced in the FTI Scope 3 Report, pp. 37-38 & note 117, *see* Wikipedia, “Coming Out, [https://en.wikipedia.org/wiki/Coming\\_out](https://en.wikipedia.org/wiki/Coming_out) (viewed January 25, 2018).

90 Many of the sources contained in the EIU Panel’s working papers (cited in FTI’s Scope 3 Report, pp. 37-39 & note 117) relate to the widely-known distinction between sexual orientation and gender identity. *See* GLAAD, “Glossary of Terms—Transgender,” <https://www.glaad.org/reference/transgender> (viewed January 25, 2018); Transgender Law Center, “Values—Mission,” <https://transgenderlawcenter.org/about/mission> (viewed January 25, 2018), both referenced in the FTI Scope 3 Report, p. 38 note 117. These and other sources can support the proposition that transgender persons distinguish between sexual orientation and gender identity and commonly use terms such as “trans” or “transgender” to describe themselves. One could make the same point about black women who sexually partner with other women: they distinguish among race, sex, and sexual orientation and commonly use terms such as “black” and “feminist”—rather than “lesbian” or “gay”—to describe themselves. Does that mean that “gay” cannot be a general descriptor for the larger community of sexual and gender minorities, a community that includes transgender persons, black lesbians, and intersex feminists? Of course, “gay” can be a general descriptor of such an internally diverse group.

91 The FTI Scope 3 Report reveals how unsophisticated the EIU Panel’s personnel were as they went about the process of evaluating the connection between the proposed string (“.gay”) and

the community of sexual and gender minorities. Consider a striking analogy. If the proposed string were “.car,” and the Applicant Guidebook awarded no nexus points if a proposed string “under-reached” the community (a requirement rejected by the actual ICANN Applicant Guidebook), would the nexus requirement be defeated upon a claim that “car” did not match or describe some members of the described community, such as people who are very proud of their Cadillacs and never refer to their automobiles as mere “cars”? Of course not. That would be supremely silly—but that is pretty much what the EIU Panel did when its personnel thought that because transgender persons consider themselves part of a “trans community,” they are not **also** part of a larger “gay community.” The same personnel who would conclude, “Of course, a Cadillac owner is **also** part of the larger car community,” apparently were not able to conclude, “And a transgender person is **also** part of the larger LGBT or gay community” (see Wikipedia, “LGBT Community,” quoted above). Why would they make this mistake? One explanation could be homophobia, but a much more likely explanation would be ignorance about sexual and gender minorities—and about the term “gay.”

92 My earlier Expert Report, presumably available to FTI, provided a terminological history of the term “gay” as a reference to the larger community of sexual and gender minorities. Without repeating all of that earlier evidence, let me reassemble most of it, in order to demonstrate not only how “gay” is, historically, the best term for the larger community of sexual and gender minorities, but also how “gay” brings together the ways that sexuality and gender are deeply interrelated. That is, one reason why lesbians and gay men are part of the same larger social movement as transgender and intersex persons is that all of these people have traditionally

been demonized and persecuted for the same general reason: they “deviate” from rigid gender roles that are derived from a naturalized (mis)understanding of biological sex.

**A. FROM STONEWALL TO MADRID: “GAY” AS AN UMBRELLA TERM FOR SEXUAL AND GENDER MINORITIES, AND NOT JUST A TERM FOR HOMOSEXUAL MEN**

93 In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as “degenerates,” “moral perverts,” “intersexuals,” and “inverts,” as well as “homosexuals.”<sup>10</sup> European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of “inverts” and “perverts” departed from “natural” (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a “degeneration” from natural forms.<sup>11</sup>

94 Even the “inverts” themselves used these terms, as illustrated by Earl Lind’s *Autobiography of an Androgyne* (1918) and *The Female Impersonators* (1922). Lind’s was the first-person account of an underground New York City society of people he described as “bisexuals,” “inverts,” “female impersonators,” “sodomites,” “androgynes,” “fairies,” “hermaphroditoi,” and so forth. What these social outcasts and legal outlaws had in common was that they did not follow “nature’s” binary gender roles (biological, masculine man marries biological,

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<sup>10</sup> E.g., Havelock Ellis, *Sexual Inversion* (3d ed. 1915); William Lee Howard, *The Perverts* (1901), and *Effeminate Men and Masculine Women*, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 39-49 (2008); Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 213 et al. (1983).

<sup>11</sup> Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, pp. 46-49.

feminine woman) and procreative sexual practices that were socially expected in this country.<sup>12</sup>

Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.

95 Most of these terms were derogatory, as was “homosexual,” a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe “urnings,” and Magnus Hirschfeld described “transvestites” with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was “gay,” a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this “happy” word as a description of their own amorphous subculture.

96 An early literary example was Gertrude Stein’s *Miss Furr and Miss Skeene* (1922, but written more than a decade earlier). The author depicted a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a woman would “naturally” marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed

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<sup>12</sup> See also Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908); Xavier Mayne (a/k/a Edward Stevenson), *The Intersexes: A History of Simulsexualism as a Problem in Social Life* (1908).

or posed as a man. (Such an explicit book would have been subject to immediate censorship.)

Instead, Gertrude Stein described the women thus:

“They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay.”

If they were not completely baffled, the censors and most readers in the 1920s would have assumed the traditional reading of “gay,” used here in a distinctively repetitive, literary manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the “man’s role,” or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an “androgynite” or “hermaphrodite.”

97 Gertrude Stein’s story illustrates how “gay” could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. As the twentieth century progressed, meaning (1) has been eclipsed by meanings (2) and (3), which are deeply related. There was in this early, closeted, era a “camp” feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences “in the know” could find delight in the ambiguity or being in on the secret.

98 An early example from popular culture might be helpful. In the hit cinematic comedy *Bringing Up Baby* (1938), Cary Grant's character sent his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asked why the handsome leading man was thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality or transvestism), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.<sup>13</sup>

99 In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular **and** as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. *See* Figure 1, above. Indeed,

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<sup>13</sup> For a provocative analysis of the Cary Grant-Randolph Scott bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

in many countries, “queer” to this day carries more negative connotations than “gay,” which continues to make “queer” a less attractive generic term.

100 A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City’s Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the “Gay Revolution.”<sup>14</sup> Sympathetic accounts of the Stonewall riots mobilized the popular term “gay” to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the “Gay Revolution.” For example, Carter reports that this “Gay Revolution” began when a “butch dyke” punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights of protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that “special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. \* \* \*

A common theme links those who resisted first and fought the hardest, and that is gender transgression.”<sup>15</sup>

101 Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts described as a “gay bar.” The patrons of the gay bar included

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<sup>14</sup> David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2010).

<sup>15</sup> *Id.* at 261; *see id.* at 150-51 (describing the first punch thrown by the “butch dyke,” who floored a police officer).

homosexual and bisexual men who were insisting they be called “gay” and not the disapproved Greek terms (“homosexual” and “bisexual”) that had been devised by the doctors. Many of the people in the gay bar were not homosexual men, but were lesbians, gender-bending “bull dykes” and “drag queens,” gender rebels, bisexual or sexually open youth, and the friends and allies of these gender and sexual nonconformists.<sup>16</sup>

102 Early on, Stonewall was hailed as “the birth of the Gay liberation movement.”<sup>17</sup> In New York alone, it spawned organizations for “gay rights” that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other gay groups. These groups included gay men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and “queers” of all sorts. The community of sexual and gender minorities knowingly used the term “gay” in both senses—as a term displacing “homosexual” for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman’s *The Gay Manifesto* (1970) made clear that the “gay agenda” was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. “Closet queens” should “come out” and celebrate their differences.

103 Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls “Gay American History.” First published in 1976 and reissued many

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<sup>16</sup> See *id.* at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

<sup>17</sup> Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 508 (1976).

times since, Katz's *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called "hermaphrodites" and "man-women";<sup>18</sup> poet Walt Whitman, who celebrated "the love of comrades," which he depicted as male bonding and intimate friendships;<sup>19</sup> "male harlots," or prostitutes, on the streets of New York;<sup>20</sup> Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans;<sup>21</sup> lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman.<sup>22</sup> More recent historical accounts of the diverse community of sexual and gender nonconformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York*.<sup>23</sup>

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<sup>18</sup> *Id.* at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

<sup>19</sup> *Id.* at 509-12 (Whitman).

<sup>20</sup> *Id.* at 68-73 (male prostitutes, called "harlots" in a contemporary report).

<sup>21</sup> *Id.* at 317-90 (dozens of women who "passed" as men, many of whom marrying women).

<sup>22</sup> *Id.* at 118-27 (Smith), 787-97 (Goldman).

<sup>23</sup> Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) (excellent account of the increasingly diverse and differentiated population of "Gay Los Angeles"); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) (although an account focusing on the world of men, this book includes within the "gay male world" bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

104 Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.

105 Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by “lesbian and gay” persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as lesbian, gay, and bisexual persons, and soon after that the blanket term “LGBT” (lesbian, gay, bisexual, and transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term “gay” still captured the larger community.

106 I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: “Gaylaw is the ongoing history of state rules relating to gender and sexual nonconformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgender people.”<sup>24</sup> Although many readers were taken aback that

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<sup>24</sup> William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn

“gaylaw” might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that “gaylaw” and “gay rights” did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

107 In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with “queer” added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay’s application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.

108 Has the expanding acronym rendered “gay” obsolete as the commonly understood umbrella term for our community? In my expert opinion, it has not. Recall that ICANN’s requirement for the nexus requirement between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (“.gay”) “is a well-known short-form or abbreviation of the community.” AGB, p. 4-12. There is a great deal of evidence indicating that it is. As the FTI Scope 3 Report makes painfully obvious, none of this evidence was considered by the EIU

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from *Gaylaw* as well. See *id.* at 567-68. Justice Scalia’s dissenting opinion cited *Gaylaw* so often that he short-formed it “Gaylaw.” See *id.* at 597-98 (dissenting opinion).

Panel, and none was considered by FTI when it concluded that the EIU Panel faithfully adhered to the ICANN and CPE guidelines and consistently applied those guidelines.



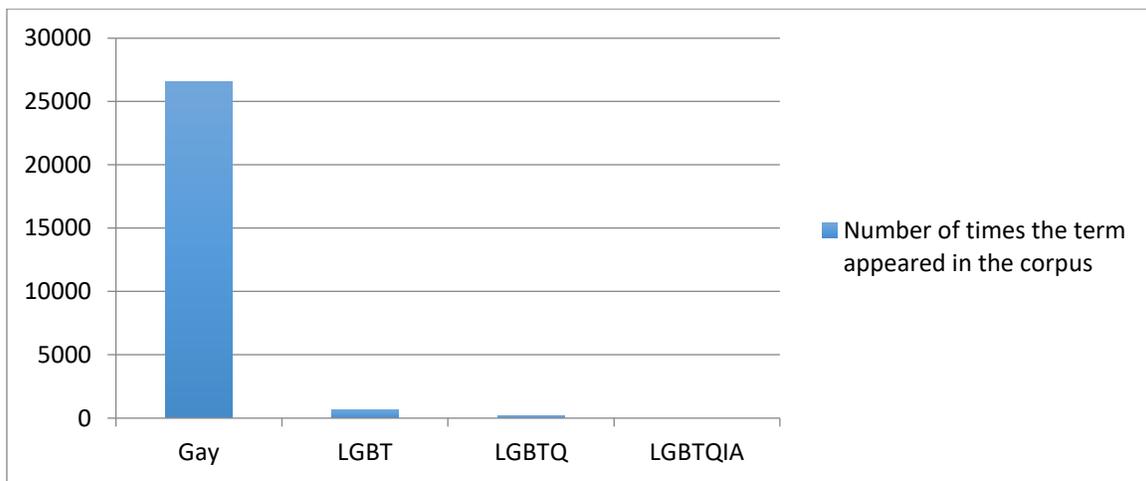
Figure 2. A Depiction of Dependency Relations among “Community” and Modifying Adjectives (“Gay”, “LGBT”, and “Queer”)

109 Figure 2, above, reflects the usage in the searchable Internet of “gay” as modifying “community,” and offers a comparison with other adjectives, such as “queer” and “LGBT” modifying “community.” (The methodology for the search is contained in Appendix 2.)

110 There are other corpuses that can be searched, and I have done so to check the reliability of the data in Figure 2. Brigham Young University maintains a Corpus of Contemporary American English (“BYU Corpus”); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at <http://corpus.byu.edu/coca/> (last viewed Jan. 28, 2018). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that “gay” dominates “LGBT” and other acronyms used to describe sexual and gender minorities. In my 2016

search, I found 26,530 hits on the BYU Corpus for “gay,” 673 hits for “LGBT,” 193 hits for “LGBTQ,” and 0 hits for “LGBTQIA.”

111 Does “gay community” generate a comparable number of hits? In my 2016 search of the BYU Corpus, I found “gay community” eight times more frequently than “LGBT community.” (“LGBTQIA community” returned no results.) While “LGBT community” is much more popular now than it was ten or even five years ago, the most popular term remains “gay community.” Figure 3 provides an illustration of these results.



*Figure 3. A Depiction of Dependency Relations found in the BYU Corpus among “Community” and Modifying Adjectives (“Gay”, “LGBT”, “LGBTQ” and “LGBTQIA”)*

112 How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN’s Applicant Guidebook awards 3 of 3 points for the community-nexus category if the applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that “gay” is a “well known short-form or abbreviation for the community.” Indeed, the data would support the proposition that “gay” is the “**best known** short-form or abbreviation for the community” (“best” substituted for “well”). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). To confirm this point, consider some current evidence.

113 Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the “gay bar” in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this then-unprecedented mass assault by a single person on American soil.<sup>25</sup> Almost all of them described Pulse as a “gay bar,” the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a “gay bar” and a “gay community” that included lesbians, bisexual men and women, transgender persons, queer persons, and allies, as well as many gay men.

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<sup>25</sup> We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

114Forty-nine “gay people” died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.<sup>26</sup> Most of the victims were homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer “allies” such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

115Consider, finally, a positive legacy of the Stonewall riots, namely, “gay pride.” For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was one of the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called “the Gay Pride Parade.”<sup>27</sup>

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<sup>26</sup> For biographies of victims in the Pulse shootings, see <http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims> (last viewed Sept. 9, 2016).

<sup>27</sup> *E.g.*, *Highlights from New York’s Gay Pride Parade*, N.Y. Times, June 26, 2016, available at <http://www.nytimes.com/live/gay-pride-parade-nyc-2016/> (viewed Sept. 10, 2016).

116 Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Auckland to Gay Pride Rome to Gay Pride Orgullo Buenos Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 “gay pride events” all over the world, <https://www.nighttours.com/gaypride/> (last viewed January 25, 2018). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

117 There are also international gay pride events. In 2017, it was World Pride Madrid, celebrating Spain’s leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid’s annual pride celebration was voted “best gay event in the world” by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as “Gay World Pride.”<sup>28</sup> The official website described World Pride Madrid as “the biggest Gay Pride Event in the World” during 2017, <http://worldgaypridemadrid2017.com/en/worldpride/> (viewed January 25, 2018). Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use “gay” **both** as a generic, umbrella term for

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<sup>28</sup> *E.g., Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at <http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/>.

sexual and gender minorities **and** as a term referring to homosexual men—often in the same article.

**B. “GAY” IS AN UMBRELLA TERM FOR THE COMMUNITY THAT INCLUDES TRANSGENDER, INTERSEX, AND ALLIED PERSONS**

118 As illustrated by the accounts of the Orlando “gay bar” and the world-wide “gay pride” events, the term “gay” remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that “gay people,” the generic term, remains the most popular use of the term “gay,” with “gay men” and “gay women” also popular, but much less so.

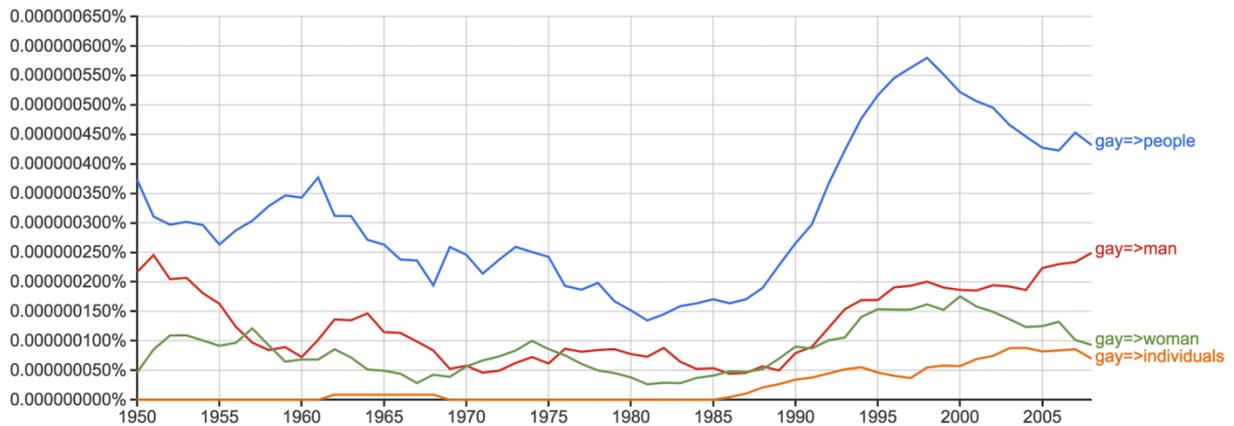


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”

119 The CPE Report, however, insisted that “gay community” does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition,

aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing, an impression that is confirmed by the FTI Scope 3 Report, pp. 37-39. As I shall show, the EIU Panel did not browse very extensively.

120 To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that “gay” does not describe the overall community. Indeed, the CPE Report and this Second Expert Report are in agreement that the term “gay” has been the only stable term that has described the community of sexual and gender nonconformists over a period of generations. That “gay” has been a longstanding, stable, and widely referenced term makes it perfect for an Internet domain (“.gay”) for the community that consists of sexual and gender minorities.

121 Thus, almost all of the CPE Report’s examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay’s claim that “gay” is a “well known short-form or abbreviation for the community.” The EIU Panel objected that dotgay’s analysis “fails to show that when ‘gay’ is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities.” CPE Report, p. 7. Although I do not believe that statement fairly characterized dotgay’s application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).

122 Consider the famous “Gay Games,” an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. “The mission of the Federation of Gay Games is to promote equality

through the organization of the premiere international LGBT and gay-friendly sports and cultural event known as the Gay Games.”<sup>29</sup> Or: “The Gay Games and its international Federation exist to serve the needs of athletes, artists, and activists. The mission is to promote equality for all, and in particular for lesbian, gay, bi and trans people throughout the world.”<sup>30</sup> Notice how the Federation uses the term “gay” as both a generic, umbrella term (“Gay Games”) and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly, LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., “Gay” Games.

123 Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know “gay” to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer “Gay Games” (or its predecessor, “Gay Olympics”) than “Trans Games” or “Intersex Olympics.”

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<sup>29</sup> Federation of Gay Games, *Purpose and Mission Statement*, <https://gaygames.org/Mission-&-Vision> (viewed January 25, 2018).

<sup>30</sup> Federation of Gay Games, “How We Do It,” <https://gaygames.org/> (viewed January 25, 2018).

124 The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate “gay pride” events or engage in “gay rights” advocacy. CPE Report, p. 7.<sup>31</sup> “Gay rights” include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted transgender and intersex persons, the mainstream media constantly referenced this as an “anti-gay” measure or as a law that implicated “gay rights.”<sup>32</sup>

125 In addition to being a unifying term to describe the community’s political and legal activity, the short-form “gay” is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called “gay bars.” These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies.<sup>33</sup>

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<sup>31</sup> See *Gay Pride Calendar*, <http://www.gaypridecalendar.com/> (last viewed January 25, 2018) (the website that lists dozens of “pride” parades, operating under a variety of names but all clustered under the generic “gay pride calendar”).

<sup>32</sup> E.g., Richard Socarides, *North Carolina and the Gay-Rights Backlash*, *New Yorker*, Mar. 28, 2016; Jonathan M. Katz & Erik Eckhom, *Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina*, *New York Times*, Apr. 5, 2016.

<sup>33</sup> Sunnive Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, *Advocate*, June 20, 2016, <http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video> (viewed Sept. 9, 2016).

*Gay Star News* is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues.<sup>34</sup>

126 Recent histories by LGBT+ insiders continue to use “gay” as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons’ account of *Gay L.A.* They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has “exhausted [her] identity as a ‘lesbian of color’.” \* \* \* But, as she affirms, there is a panoply of identities from which to choose in an expansive **gay L.A.**<sup>35</sup> These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger “gay community.” And recall that the Applicant Guidebook’s test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term “gay community” to be a “short-form or abbreviation” for sexual and gender nonconformists.

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<sup>34</sup> Greg Hernandez, *Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015*, *Gay Star News*, Sept. 8, 2016, <http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA> (viewed Sept. 9, 2016).

<sup>35</sup> Faderman & Timmons, *Gay L.A.*, pp. 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

127 Miley Cyrus is a famous singer and celebrity. She views herself as “gender fluid” and “pansexual.” From the perspective of the EIU Panel, she ought not be a person who would consider herself part of a larger “gay community,” but in the last few years she has been sporting t-shirts and caps adorned with the slogan “Make America Gay Again.”<sup>36</sup> Her selfie wearing her stylish “Make America Gay Again” t-shirt went viral on Instagram, reaching more than a million viewers.

128 As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. In 2016, my research associates and I ran a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where “gay” is not only in the same sentence as “transgender,” but is, more specifically, being used to include “transgender.” Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing “gay,” as the CPE Report suggested, “transgender” has become associated with “gay.” Specifically, we found thousands of examples where “gay” was used in a way that included “transgender” or “trans” people.

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<sup>36</sup> Joe Williams, *Miley Cyrus Wants to ‘Make America Gay Again,’* Pink News, July, 25, 2016, available at <http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/> (last viewed January 25, 2018).

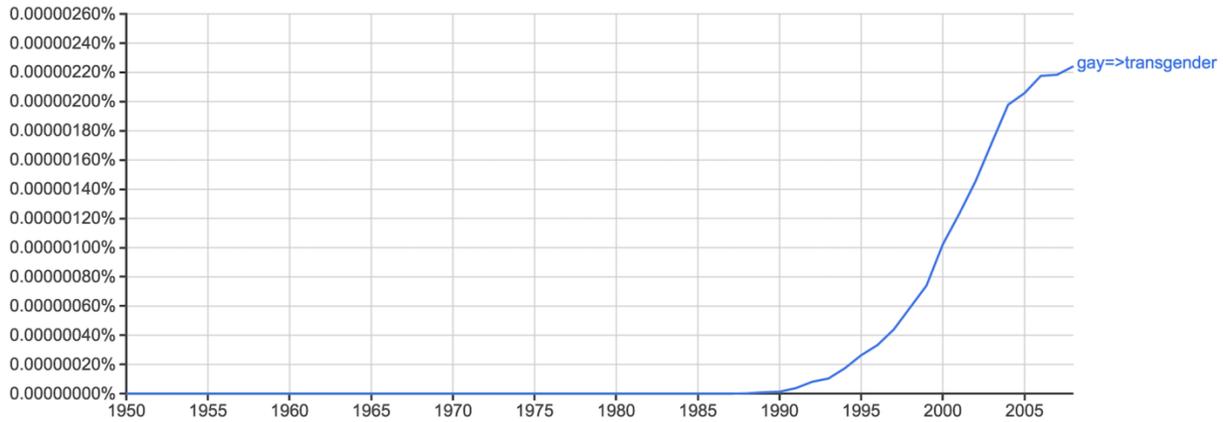


Figure 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

129 The relationship between the gay community and intersex persons is trickier to establish, because “intersex” is a newer term, and it is not clear how many intersex persons there are in the world. Most discussion of intersex persons in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter (“I”) to the expanding acronym—hence the LGBTQIA term used in dotgay’s application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon—starting with the ILGA, which strongly supports dotgay’s application and which includes intersex persons and organizations within its membership.

130 Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya

of South Africa won the gold medal in the women’s 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a “Gender in Sport” policy that creates opportunities for fair competition without stigmatizing gender minorities.<sup>37</sup>

131 Common usages of “gay” as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website, *Everyone Is Gay*.<sup>38</sup> The *Gay Star News* is a news source for the broad gay community, and it includes informative articles in intersex persons.<sup>39</sup> While there are many intersex-focused websites, *Everyone Is Gay* does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

## VI. CONCLUSION AND SIGNATURE

132 Return to ICANN’s mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique

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<sup>37</sup> See Caroline Symons, *Gay Games: A History* (2010) (describing the “Gender in Sport” policy, opening up the Gay Games to intersex and transgender persons on an equal basis).

<sup>38</sup> *Intersex Advice*, *Everyone Is Gay*, <http://everyoneisgay.com/tag/intersex/> (last viewed Sept. 9, 2016).

<sup>39</sup> E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, *Gay Star News*, Mar. 16, 2016, <http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg> (last viewed Sept. 9, 2016).

identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

133 Dotgay’s application for the string “.gay” would seem to fit perfectly within the mission and core values of ICANN. “Gay” is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Second Expert Report. Such a “.gay” string would create a readily-identifiable space within the Internet for this community. Not surprisingly, ICANN’s requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay’s application. Led by ILGA, the world-wide gay community supports this application as well, which ought to have generated a higher score for community endorsement, Criterion #4 in the Applicant Guidebook.

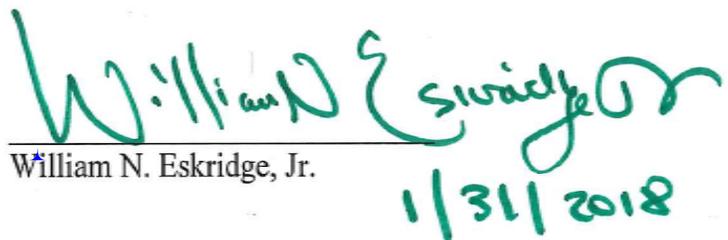
134 Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

135 Evaluating dotgay’s application, the EIU Panel has not acted in a completely “open and transparent manner,” nor has it followed “procedures designed to ensure fairness.” To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU’s own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

136 Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and the conclusions reached by FTI in its Scope 2 Report.

**Respectfully submitted,**

**Date:** January 31, 2018



William N. Eskridge, Jr.

John A. Garver Professor of Jurisprudence  
Yale Law School

# **APPENDICES**

## **APPENDIX 1**

### **CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL**

#### **EDUCATION**

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha  
(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

#### **POSITIONS HELD**

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present

Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995  
Stanford, 1995  
Toronto, 1999, 2001  
Vanderbilt, 2003  
Columbia, 2003  
Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011  
Fordham, 2008  
Pennsylvania, 2018 (expected)

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998  
Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 – 1979

**(SELECTED) PUBLICATIONS**

*Books*

**Interpreting Law: A Primer on How to Read Statutes and the Constitution** (Foundation 2016)

**Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes** (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

**A Republic of Statutes: The New American Constitutionalism** (Yale 2010) (co-authored with John Ferejohn)

**“Dishonorable Passions”: Sodomy Law in America, 1861-2003** (Viking 2008)

**Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence** (Oxford 2006) (co-authored with Darren Spedale)

**Equality Practice: Civil Unions and the Future of Gay Rights** (Routledge 2002)

**Legislation and Statutory Interpretation** (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

**Gaylaw: Challenging the Apartheid of the Closet** (Harvard 1999)

**Constitutional Tragedies and Stupidities** (NYU 1998) (co-authored and edited with Sanford Levinson)

**Sexuality, Gender, and the Law** (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

**The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment?** (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

**Dynamic Statutory Interpretation** (Harvard 1994)

**Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century** (West Publishing Co. 1993; 2d ed. 1998; 3d ed. 2004, 4th ed. 2009; 5th ed. 2013) (co-authored with Daniel Farber & Philip Frickey and, with fifth edition, Jane Schacter)

**Legislation: Statutes and the Creation of Public Policy** (West 1987; 2d ed. 1994; 3d ed. 2001; 4th ed. 2007; 5th ed. 2014) (co-authored with Philip Frickey and, after second edition, Elizabeth Garrett; starting with fifth edition, add James Brudney)

**A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem** (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

*(Selected) Articles*

“Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections,” 127 *Yale L.J.* 322 (2017)

“The First Marriage Cases, 1970-74,” in *Love Unites Us: Winning the Freedom to Marry in America* 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett, eds., 2016)

“Law and the Production of Deceit,” in Austin Sarat ed., *Law and Lies: Deception and Truth-Telling in the American Legal System* 254-312 (2015)

“Original Meaning and Marriage Equality,” 52 Hous. L. Rev. 1067 (2015)

“Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011,” 92 Tex. L. Rev. 1317 (2014) (with Matthew R. Christiansen)

“Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,” 93 B.U.L. Rev. 275 (2013)

“Expanding *Chevron*’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,” 2013 Wis. L. Rev. 411

“The New Textualism and Normative Canons,” 113 Colum. L. Rev. 531 (2013) (book review)

“Marriage Equality: An Idea Whose Time Is Coming,” 37 NYU Rev. L. & Soc. Change 245 (2013)

“Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms,” 57 St. Louis U.L. Rev. 865 (2012)

“Vetogates and American Public Law,” J.L. Econ. & Org. (April 2012)

“Family Law Pluralism: A Guided-Choice Regime of Menus, Default Rules, and Override Rules,” 100 Geo. L.J. 1881 (2012)

“Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms,” 45 Ga. L. Rev. 657 (2011)

“Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?,” 50 Washburn L.J. 1 (2010)

“Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases,” 110 Colum. L. Rev. 1727 (2010) (with Connor N. Raso)

“The California Proposition 8 Case: What Is a Constitution For,” 98 Calif. L. Rev. 1235 (2010)

“Sexual and Gender Variation in American Public Law: From Malignant to Tolerable to Benign,” 57 UCAL L. Rev. 1333 (2010)

“The California Supreme Court, 2007-2008—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy,” Calif. L. Rev. (2009)

“A Pluralist Theory of Equal Protection,” U. Pa. J. Const’l L. (2009)

“Constitutional Horticulture: Deliberation-Respecting Judicial Review,” 87 Tex. L. Rev. 1273 (2009) (with John Ferejohn)

“Vetogates, Preemption, *Chevron*,” 83 Notre Dame L. Rev. 1441 (2008)

“The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*,” 96 Geo. L.J. 1083 (2008) (co-authored with Lauren Baer) (the Ryan Lecture)

“America’s Statutory ‘Constitution,’” 41 U.C. Davis L. Rev. 1 (2007) (the Barrett Lecture)

“No Frills Textualism,” 119 Harv. L. Rev. 2041 (2006) (book review)

“*Chevron* and Agency Norm Entrepreneurship,” 115 Yale L.J. 2623 (2006) (essay co-authored with Kevin Schwartz)

“Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” 57 Fla. L. Rev. 1011 (2005) (the Dunwoody Lecture)

“Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics,” 114 Yale L.J. 1279 (2005)

“*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism,” 2 Int’l J. Const’l L. 555 (2004)

“*Lawrence*’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics,” 88 Minn. L. Rev. 1021 (2004)

“Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” 100 Mich. L. Rev. 2062 (2002)

“Structuring Lawmaking to Reduce Cognitive Bias: A Critical View,” 87 Cornell L. Rev. 616 (2002)

“Channeling: Identity-Based Social Movements and Public Law,” 150 U. Pa. L. Rev. 419 (2001)

“All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776-1806,” 101 Colum. L. Rev. 999 (2001)

“The Relationship Between Obligations and Rights of Citizens,” 69 Fordham L. Rev. 1721 (2001)

“Super-Statutes,” 50 Duke L.J. 1215 (2001) (co-authored with John Ferejohn)

“Equality Practice: Reflections on the Jurisprudence of Civil Unions,” 64 Alb. L.J. 853 (2001) (Sobota Lecture)

“January 27, 1961: The Birth of Gaylegal Equality Arguments,” 58 NYU Ann. Survey Am. Law 39 (2001)

“No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review,” 75 NYU L. Rev. 1327 (2000)

“Destabilizing Due Process and Evolutive Equal Protection,” 47 UCLA L. Rev. 1183 (2000)

“Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward Recognizing Gay Unions,” 31 McGeo. L.J. 641 (2000)

“The Circumstances of Politics and the Application of Statutes,” 100 Colum. L. Rev. 558 (2000)

“Multivocal Prejudices and Homo Equality,” 100 Ind. L.J. 558 (1999) (Harris Lecture)

“Norms, Empiricism, and Canons in Statutory Interpretation,” 66 U. Chi. L. Rev. 671 (1999)

“*Hardwick* and Historiography,” 1999 U. Ill. L. Rev. 631 (Baum Lecture)

“Relationships Between Formalism and Functionalism in Separation of Powers Cases,” 22 Harv. J.L. & Pub. Pol’y 21 (1998)

“Should the Supreme Court Read the *Federalist* But Not Statutory Legislative History?,” 66 *Geo. Wash. L. Rev.* 1301 (1998)

“Textualism, the Unknown Ideal,” 96 *Mich. L. Rev.* 1509 (1998) (book review)

“A Jurisprudence of ‘Coming Out’: Religion, Sexuality, and Liberty/Equality Collisions in Public Law,” 106 *Yale L.J.* 2411 (1997)

“Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961,” 24 *Fla. St. U.L. Rev.* 703 (1997) (Mason Ladd Lecture)

“Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981,” 25 *Hofstra L. Rev.* 817 (1997) (Visiting Scholar in Residence Lecture)

“Willard Hurst, Master of the Legal Process,” 1997 *Wis. L. Rev.* 1181

“From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945,” 82 *Iowa L. Rev.* (1997) (Murray Lecture)

“Steadying the Court’s ‘Unsteady Path’: A Theory of Judicial Enforcement of Federalism,” 68 *U. So. Cal. L. Rev.* 1447 (1995) (co-authored with Jenna Bednar)

“Virtual Logrolling: How the Court, Congress, and the States Multiply Rights,” 68 *U. So. Cal. L. Rev.* 1545 (1995)

“Regulatory Variables and Statutory Interpretation,” 73 *Wash. U.L.Q.* 1103 (1995) (co-authored with Judith Levi)

“Fetch Some Soupmeat,” 16 *Cardozo L. Rev.* 2209 (1995)

“The Supreme Court, 1993 Term – Foreword: Law as Equilibrium,” 108 *Harv. L. Rev.* 26 (1994) (co-authored with Philip Frickey)

“The Elastic Commerce Clause: A Political Theory of American Federalism,” 49 *Vand. L. Rev.* 1355 (1994) (co-authored with John Ferejohn)

“The Making of ‘The Legal Process,’” 107 *Harv. L. Rev.* 2031 (1994) (essay, co-authored with Philip Frickey)

“From Handholding to Sodomy: The First Amendment and the Regulation of Homosexual Conduct,” 29 *Harv. C.R.-C.L. L. Rev.* 319 (1994) (co-authored with David Cole)

“The Economics Epidemic in an AIDS Perspective,” 61 *U. Chi. L. Rev.* 733 (1994) (review essay co-authored with Brian Weimer)

“Gaylegal Narratives,” 46 *Stan. L. Rev.* 607 (1994)

“Post-Enactment Legislative Signals,” 57 *Law & Contemp. Probs.* 75 (Winter 1994)

“The Judicial Review Game,” 88 *Nw. U.L. Rev.* 382 (1993)

“Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet,” 2 *Reconstruction* 52 (1993)

“The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in a Nutshell,” 61 *Geo. Wash. L. Rev.* 1731 (1993)

“A History of Same-Sex Marriage,” 79 *Va. L. Rev.* 1419 (1993)

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“Legislation Scholarship & Pedagogy in the Post-Legal Process Era,” 48 U. Pitt. L. Rev. 691 (1987) (co-authored with Philip Frickey)

“*Les Jeux Sont Faits*: Structural Origins of the International Debt Problem,” 25 Va. J. Int’l L. 281 (1985)

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“*Dunlop v. Bachowski* & the Limits of Judicial Review under Title IV of the LMRDA,” 86 Yale L.J. 885 (1977) (student note)

#### ENDOWED LECTURES

Sullivan Lecture, Capital University School of Law, “Ohio’s 2004 Super-DOMA and Constitutional Deliberation,” October 2017

Henry J. Miller Lecture, Georgia State University College of Law, “Marriage Equality, 1967-2017,” September 15, 2016

Frankel Lecture, University of Houston Law Center, “Marriage Equality as a Testing Ground for Original Meaning,” November 2014, published as “Marriage Equality and Original Meaning” (2015)

Mathew O. Tobriner Memorial Lecture on Constitutional Law, University of California at Hastings, College of Law, “Marriage Equality’s Cinderella Moment,” September 6, 2013

2012 Distinguished Lecture, Boston University School of Law, “Beyond Backlash: How Constitutional Litigation Has Advanced Marriage Equality in the United States, 1970-2012,” November 15, 2012, published as “Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States” (2013)

Foulston Siefkin Lecture, Washburn University School of Law, March 26, 2010, published as “Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?”

Sibley Lecture at the University of Georgia, School of Law, March 18, 2010, published as “Noah’s Curse and Paul’s Admonition: What the Civil Rights Cases Can Teach Us about the Clash Between Gay Rights and Religious Liberty” (2012)

Centennial Visitor, Public Lecture, Chicago-Kent College of Law, “Administrative Constitutionalism,” March 5, 2009

Edward Barrett Lecture at the University of California, Davis, School of Law January 17, 2007, published as “America’s Statutory constitution” (2008).

Ryan Lecture at Georgetown University Law Center, November 4, 2006, published as “The Supreme Court’s Deference Continuum, An Empirical Study (from *Chevron* to *Hamdan*)” (2008)

Center for Religious Studies at Princeton University, November 2005, “Nordic Bliss: What the American Same-Sex Marriage Debate Can Learn from Scandinavia”

Lockhart Lecture at University of Minnesota School of Law, “Same-Sex Marriage and Equality Practice,” October 2005,

Dunwoody Lecture at University of Florida School of Law, March 2005, published as “Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” Fla. L. Rev. (2005)

President’s Lecture at Davidson College, March 2004, “The Case for Same-Sex Marriage”

Brennan Lecture at Oklahoma City University School of Law, March 2004, “*Lawrence v. Texas* and Constitutional Regime Shifts”

Dean’s Diversity Lecture at Vanderbilt University School of Law, February 2000, “Prejudice and Theories of Equal Protection”

Steintrager Lecture at Wake Forest University, February 1999, “Jeremy Bentham and No Promo Homo Arguments”

Adrian C. Harris Lecture at the University of Indiana School of Law, October 1998, published as “Multivocal Prejudices and Homo Equality” (1999)

Robbins Distinguished Lecture on Political Culture and the Legal Tradition at the University of California at Berkeley School of Law, February 1998, “Implications of Gaylegal History for Current Issues of Sexuality, Gender, and the Law”

Baum Lecture at the University of Illinois School of Law, November 1997, published as “*Hardwick* and Historiography” (1998)

Visiting Scholar in Residence Lecture at Hofstra University School of Law, October 1996, published as “Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981” (1997)

Mason Ladd Lecture at Florida State University College of Law, April 1996, published as “Privacy Jurisprudence and the Apartheid of the Closet” (1997)

Murray Lecture at the University of Iowa, January 1996, published as “From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945” (1998)

Cutler Lecture at William and Mary School of Law, February 1995, published as “The Many Faces of Sexual Consent” (1995)

Donley Lectures at West Virginia University School of Law, published as “Public Law from the Bottom Up” (1994)

## Congressional Testimony and Consultation

Senate Comm. on Labor, Pensions, 111<sup>th</sup> Congress, 1<sup>st</sup> Sess., *Proposed Employment Non-Discrimination Act of 2009* (Nov. 2009) (written testimony only)

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Senate Comm. on the Judiciary, Senator Arlen Specter (Chair), Confirmation of Judge John Roberts as Chief Justice, United States Supreme Court (2005) (consultation only)

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*S. 2279, the Lobbying Disclosure Act of 1992*, Subcomm. On Oversight of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. (1992)

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## APPENDIX 2

### EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

#### **FIGURE 1. *A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English Corpus of Books published in the United States from 1900 to 2008***

This Figure is a comparison of the frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are “Gay” “Queer” “Lesbian” and “LGBT”?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 2. A Depiction of Dependency Relations: Frequency of Various Adjectives (“Gay”, “LGBT”, and “Queer”) Modifying “Community”**

This Figure is a comparison of how often “community” is modified by “gay” “LGBT” and “queer” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 4. *A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”***

This figure is a comparison of how often “gay” modifies “people” “man” “woman” and “individuals” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”**

This figure is a comparison of how often “gay” modifies the word “transgender” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

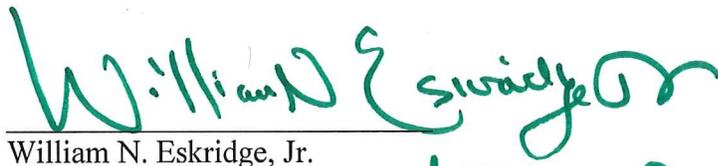
The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpora. Users may scour corpora for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by `"=>"` followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click "Search lots of books," and N-gram will produce the chart.

### Expert Declaration

The Author makes the following declaration:

1. I confirm that this is my own, impartial, objective, unbiased opinion which has not been influenced by the pressures by any party participating in ICANN's New gTLD Application process;
2. I confirm that all matters upon which I have expressed an opinion are within my area of expertise;
3. I confirm that I have referred to all matters which I regard as relevant to the opinions I have expressed and to all matters, of which I am aware, which might adversely affect my opinion;
4. I confirm that, at the time of providing this written opinion, I consider it to be complete and accurate and constitute my true, professional opinion; and
5. I confirm that if, subsequently, I consider this opinion requires any correction, modification or qualification I will notify ICANN, dotgay LLC, and their respective counsel.



William N. Eskridge, Jr.

1/31/2018

# **Exhibit 11**

[English \(/translations\)](#) [العربية \(/ar\)](#) [Español \(/es\)](#)

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[IANA STEWARDSHIP  
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

[LANGUAGE PREFERENCE \(/TRANSLATIONS\)](#)

# BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation

As amended 22 July 2017

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**ARTICLE 1 MISSION, COMMITMENTS AND CORE VALUES**

**Section 1.1. MISSION**

(a) The mission of the Internet Corporation for Assigned Names and Numbers ("**ICANN (Internet Corporation for Assigned Names and Numbers)**") is to ensure the stable and secure operation of the Internet's unique identifier systems as described in this Section 1.1(a) (the "**Mission**"). Specifically, ICANN (Internet Corporation for Assigned Names and Numbers):

- (i) Coordinates the allocation and assignment of names in the root zone of the Domain Name (Domain Name) System ("DNS (Domain Name

**System**)") and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ("**gTLDs**"). In this role, **ICANN (Internet Corporation for Assigned Names and Numbers)**'s scope is to coordinate the development and implementation of policies:

- For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the **DNS (Domain Name System)** including, with respect to **gTLD (generic Top Level Domain)** registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and
- That are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to **gTLD (generic Top Level Domain)** registrars and registries shall be deemed to be within **ICANN (Internet Corporation for Assigned Names and Numbers)**'s Mission.

(ii) Facilitates the coordination of the operation and evolution of the **DNS (Domain Name System)** root name server system.

(ii) Coordinates the allocation and assignment at the top-most level of **Internet Protocol (Protocol)** numbers and **Autonomous System** numbers. In service of its Mission, **ICANN (Internet Corporation for Assigned Names and Numbers)** (A) provides registration services and open access for global number registries as requested by the **Internet Engineering Task Force ("IETF (Internet Engineering Task Force)")** and the **Regional Internet Registries ("RIRs")** and (B) facilitates the development of global number registry policies by the affected community and other related tasks as agreed with the RIRs.

(iv) Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, **ICANN (Internet Corporation for Assigned Names and Numbers)**'s scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

(b) **ICANN (Internet Corporation for Assigned Names and Numbers)** shall not act outside its Mission.

(c) ICANN (Internet Corporation for Assigned Names and Numbers) shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN (Internet Corporation for Assigned Names and Numbers) does not hold any governmentally authorized regulatory authority.

(d) For the avoidance of doubt and notwithstanding the foregoing:

(i) the foregoing prohibitions are not intended to limit ICANN (Internet Corporation for Assigned Names and Numbers)'s authority or ability to adopt or implement policies or procedures that take into account the use of domain names as natural-language identifiers;

(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C) below, and ICANN (Internet Corporation for Assigned Names and Numbers)'s performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (Internet Corporation for Assigned Names and Numbers) (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission or otherwise exceed the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s authority or powers pursuant to these Bylaws ("**Bylaws**") or ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation ("**Articles of Incorporation**"):

(A)

(1) all registry agreements and registrar accreditation agreements between ICANN (Internet Corporation for Assigned Names and Numbers) and registry operators or registrars in force on 1 October 2016 <sup>[1]</sup>, including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;

(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;

(B) any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and

(C) ICANN (Internet Corporation for Assigned Names and Numbers)'s Five-Year Strategic Plan and Five-Year Operating Plan (Five-Year Operating Plan) existing on 10 March 2016.

(iii) Section 1.1(d)(ii) does not limit the ability of a party to any agreement described therein to challenge any provision of such agreement on any other basis, including the other party's interpretation of the provision, in any proceeding or process involving ICANN (Internet Corporation for Assigned Names and Numbers).

(iv) ICANN (Internet Corporation for Assigned Names and Numbers) shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.

## Section 1.2. COMMITMENTS AND CORE VALUES

In performing its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) will act in a manner that complies with and reflects ICANN (Internet Corporation for Assigned Names and Numbers)'s Commitments and respects ICANN (Internet Corporation for Assigned Names and Numbers)'s Core Values, each as described below.

### (a) COMMITMENTS

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

(i) Preserve and enhance the administration of the DNS (Domain Name System) and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS (Domain Name System) and the Internet;

(ii) Maintain the capacity and ability to coordinate the DNS (Domain Name System) at the overall level and work for the maintenance of a single, interoperable Internet;

(iii) Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN (Internet Corporation for Assigned Names and Numbers)'s activities to matters that are within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and require or significantly benefit from global coordination;

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

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

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

## (b) **CORE VALUES**

In performing its Mission, the following "**Core Values**" should also guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):

(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN (Internet Corporation for Assigned Names and Numbers) and relevant external expert bodies;

(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of

policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS (Domain Name System) market;

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

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

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

(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture; and

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

(c) The Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN (Internet Corporation for Assigned Names and Numbers)'s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN (Internet Corporation for Assigned Names and

Numbers)'s activities. The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

## ARTICLE 2 POWERS

### Section 2.1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1). With respect to any matters that would fall within the provisions of Section 3.6(a)-(c), the Board may act only by a majority vote of all Directors. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of the Directors present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean the vote of only those Directors present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "of all Directors."

### Section 2.2. RESTRICTIONS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not act as a Domain Name (Domain Name) System Registry or Registrar or Internet Protocol (Protocol) Address Registry in competition with entities affected by the policies of ICANN (Internet Corporation for Assigned Names and Numbers). Nothing in this Section 2.2 is intended to prevent ICANN (Internet Corporation for Assigned Names and Numbers) from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

### Section 2.3. NON-DISCRIMINATORY TREATMENT

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

## ARTICLE 3 TRANSPARENCY

### Section 3.1. OPEN AND TRANSPARENT

ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN (Internet Corporation for Assigned Names and Numbers) shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN (Internet Corporation for Assigned Names and Numbers)'s constituent bodies (including the detailed explanations discussed above).

### Section 3.2. WEBSITE

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain a publicly-accessible Internet World Wide Web site (the "**Website**"), which may include, among other things, (a) a calendar of scheduled meetings of the Board, the EC (Empowered Community) (as defined in Section 6.1(a)), Supporting Organizations (Supporting Organizations) (as defined in Section 11.1), and Advisory Committees (Advisory Committees) (as defined in Section 12.1); (b) a docket of all pending policy development matters, including their schedule and current status; (c) specific meeting notices and agendas as described below; (d) information on the ICANN (Internet Corporation for Assigned Names and Numbers) Budget (as defined in Section 22.4(a)(i)), the IANA (Internet Assigned Numbers Authority) Budget (as defined in Section 22.4(b)(i)), annual audit, financial contributors and the amount of their contributions, and related matters; (e) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (f) announcements about ICANN (Internet Corporation for Assigned Names and Numbers) activities of interest to significant segments of the ICANN (Internet Corporation for Assigned Names and Numbers) community; (g) comments received from the community on policies being developed and other matters; (h) information about ICANN (Internet Corporation for Assigned Names and Numbers)'s physical meetings and public forums; and (i) other information of interest to the ICANN (Internet Corporation for Assigned Names and Numbers) community.

### Section 3.3. MANAGER OF PUBLIC PARTICIPATION

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

### Section 3.4. MEETING NOTICES AND AGENDAS

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

### Section 3.5. MINUTES AND PRELIMINARY REPORTS

- a. All minutes of meetings of the Board, the Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations) (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary ("Secretary") for posting on the Website. All proceedings of the EC (Empowered Community) Administration (as defined in Section 6.3) and the EC (Empowered Community) shall be provided to the Secretary for posting on the Website.
- b. No later than 11:59 p.m. on the second business day after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any resolutions passed by the Board at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the resolutions made publicly available. The Secretary shall send notice to the Board and the Chairs of the Supporting Organizations (Supporting Organizations) (as set forth in Article 9 through Article 11) and Advisory Committees (Advisory

Committees) (as set forth in Article 12) informing them that the resolutions have been posted.

- c. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 3.5(b) above. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.
- d. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office, then the next immediately following business day), the minutes of the Board shall be made publicly available on the Website; provided, however, that any minutes of the Board relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

## Section 3.6. NOTICE AND COMMENT ON POLICY ACTIONS

(a) With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN (Internet Corporation for Assigned Names and Numbers) shall:

- (i) provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
- (ii) provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to

those comments (such comment period to be aligned with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment practices), prior to any action by the Board; and

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

(b) Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 3.6(a)(ii), prior to any final Board action.

(c) After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS (Domain Name System), financial impacts or other issues that were considered by the Board in approving such resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.

(d) Where a Board resolution is consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice (as defined in Section 12.2(a)(x)), the Board shall make a determination whether the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution, in which case the Board shall so indicate in such resolution approving the decision (a "**GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution**") and shall cite the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. To the extent practical, the Board shall ensure that GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolutions only relate to the matters that were the subject of the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and not matters unrelated to the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. For the avoidance of doubt: (i) a GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution shall not have the effect of making any other Board resolutions in the same set or series so designated, unless other resolutions are specifically identified as such by the Board; and (ii) a

Board resolution approving an action consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice received during a standard engagement process in which input from all Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) has been requested shall not be considered a GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution based solely on that input, unless the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution.

(e) GAC (Governmental Advisory Committee) Carve-out

(i) Where a Board resolution is consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and the Board has determined that the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution as described in the relevant GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution, the Governmental Advisory Committee (Advisory Committee) shall not participate as a decision-maker in the EC (Empowered Community)'s exercise of its right to challenge the Board's implementation of such GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. In such cases, the Governmental Advisory Committee (Advisory Committee) may participate in the EC (Empowered Community) in an advisory capacity only with respect to the applicable processes described in Annex D, but its views will not count as support or an objection for purposes of the thresholds needed to convene a community forum or exercise any right of the EC (Empowered Community) ("**GAC (Governmental Advisory Committee) Carve-out**"). In the case of a Board Recall Process (as defined in Section 3.3 of Annex D), the GAC (Governmental Advisory Committee) Carve-out shall only apply if an IRP Panel has found that, in implementing GAC (Governmental Advisory Committee) Consensus (Consensus) Advice, the Board acted inconsistently with the Articles of Incorporation or these Bylaws.

(ii) When the GAC (Governmental Advisory Committee) Carve-out applies (A) any petition notice provided in accordance with Annex D or Approval Action Board Notice (as defined in Section 1.2 of Annex D) shall include a statement that cites the specific GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution and the line item or provision that implements such specific GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution ("**GAC (Governmental Advisory Committee) Consensus (Consensus) Statement**"), (B) the Governmental Advisory Committee (Advisory Committee) shall not be

eligible to support or object to any petition pursuant to Annex D or Approval Action (as defined in Section 1.1 of Annex D), and (C) any EC (Empowered Community) Decision (as defined in Section 4.1(a) of Annex D) that requires the support of four or more Decisional Participants (as defined in Section 6.1(a)) pursuant to Annex D shall instead require the support of three or more Decisional Participants with no more than one Decisional Participant objecting.

(iii) For the avoidance of doubt, the GAC (Governmental Advisory Committee) Carve-out shall not apply to the exercise of the EC (Empowered Community)'s rights where a material factor in the Board's decision was advice of the Governmental Advisory Committee (Advisory Committee) that was not GAC (Governmental Advisory Committee) Consensus (Consensus) Advice.

## Section 3.7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN (Internet Corporation for Assigned Names and Numbers) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) shall facilitate the translation of final published documents into various appropriate languages.

## ARTICLE 4 ACCOUNTABILITY AND REVIEW

### Section 4.1. PURPOSE

In carrying out its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) shall be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws, including the Mission set forth in Article 1 of these Bylaws. This Article 4 creates reconsideration and independent review processes for certain actions as set forth in these Bylaws and procedures for periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s structure and operations, which are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article 3 and the Board and other selection mechanisms set forth throughout these Bylaws.

### Section 4.2. RECONSIDERATION

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers)

Board or Staff may request ("**Requestor**") the review or reconsideration of that action or inaction by the Board. For purposes of these Bylaws, "**Staff**" includes employees and individual long-term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors directly.

(b) The EC (Empowered Community) may file a Reconsideration Request (as defined in Section 4.2(c)) if approved pursuant to Section 4.3 of Annex D ("**Community Reconsideration Request**") and if the matter relates to the exercise of the powers and rights of the EC (Empowered Community) of these Bylaws. The EC (Empowered Community) Administration shall act as the Requestor for such a Community Reconsideration Request and shall act on behalf of the EC (Empowered Community) for such Community Reconsideration Request as directed by the Decisional Participants, as further described in Section 4.3 of Annex D.

(c) A Requestor may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) action or inaction ("**Reconsideration Request**") to the extent that the Requestor has been adversely affected by:

(i) One or more Board or Staff actions or inactions that contradict ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments, Core Values and/or established ICANN (Internet Corporation for Assigned Names and Numbers) policy(ies);

(ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.

(d) Notwithstanding any other provision in this Section 4.2, the scope of reconsideration shall exclude the following:

(i) Disputes relating to country code top-level domain ("**ccTLD (Country Code Top Level Domain)**") delegations and re-delegations;

- (ii) Disputes relating to Internet numbering resources; and
- (iii) Disputes relating to protocol parameters.

(e) The Board has designated the Board Accountability Mechanisms Committee to review and consider Reconsideration Requests. The Board Accountability Mechanisms Committee shall have the authority to:

- (i) Evaluate Reconsideration Requests;
- (ii) Summarily dismiss insufficient or frivolous Reconsideration Requests;
- (iii) Evaluate Reconsideration Requests for urgent consideration;
- (iv) Conduct whatever factual investigation is deemed appropriate;
- (v) Request additional written submissions from the affected party, or from other parties; and
- (vi) Make a recommendation to the Board on the merits of the Reconsideration Request, if it has not been summarily dismissed.

(f) ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the normal administrative costs of the Reconsideration Request process. Except with respect to a Community Reconsideration Request, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the Requestor, who shall then have the option of withdrawing the request or agreeing to bear such costs.

(g) All Reconsideration Requests must be submitted by the Requestor to an email address designated by the Board Accountability Mechanisms Committee:

- (i) For Reconsideration Requests that are not Community Reconsideration Requests, such Reconsideration Requests must be submitted:
  - (A) for requests challenging Board actions, within 30 days after the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a

rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale;

(B)for requests challenging Staff actions, within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action; or

(C)for requests challenging either Board or Staff inaction, within 30 days after the date on which the Requestor reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

(ii) For Community Reconsideration Requests, such Community Reconsideration Requests must be submitted in accordance with the timeframe set forth in Section 4.3 of Annex D.

(h) To properly initiate a Reconsideration Request, all Requestors must review, complete and follow the Reconsideration Request form posted on the Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>. Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

(i) Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request, not including exhibits. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

(j) Reconsideration Requests from different Requestors may be considered in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

(k) The Board Accountability Mechanisms Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Accountability Mechanisms Committee may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The Board Accountability Mechanisms Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

(m) The Board Accountability Mechanisms Committee may ask ICANN (Internet Corporation for Assigned Names and Numbers) Staff for its views on a Reconsideration Request, which comments shall be made publicly available on the Website.

(n) The Board Accountability Mechanisms Committee may request additional information or clarifications from the Requestor, and may elect to conduct a meeting with the Requestor by telephone, email or, if acceptable to the Requestor, in person. A Requestor may also ask for an opportunity to be heard. The Board Accountability Mechanisms Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation.

(o) The Board Accountability Mechanisms Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation.

Any information collected by ICANN (Internet Corporation for Assigned Names and Numbers) from third parties shall be provided to the Requestor.

(p) The Board Accountability Mechanisms Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the Requestor, by the ICANN (Internet Corporation for Assigned Names and Numbers) Staff, and by any third party.

(q) The Board Accountability Mechanisms Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within 30 days following its receipt of the Ombudsman's evaluation (or 30 days following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable), unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. In any event, the Board Accountability Mechanisms Committee shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request. The final recommendation of the Board Accountability Mechanisms Committee shall be documented and promptly (i.e., as soon as practicable) posted on the Website and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the Board Accountability Mechanisms Committee's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the Board Accountability Mechanisms Committee's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

(r) The Board shall not be bound to follow the recommendations of the Board Accountability Mechanisms Committee. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Accountability Mechanisms Committee within 45 days of receipt of the Board Accountability Mechanisms Committee's recommendation or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on the Website. In any event, the Board's final decision shall be made within 135 days of initial receipt of the Reconsideration Request by the Board Accountability Mechanisms Committee. The Board's decision on the recommendation shall be

posted on the Website in accordance with the Board's posting obligations as set forth in Article 3 of these Bylaws. If the Requestor so requests, the Board shall post both a recording and a transcript of the substantive Board discussion from the meeting at which the Board considered the Board Accountability Mechanisms Committee's recommendation. All briefing materials supplied to the Board shall be provided to the Requestor. The Board may redact such briefing materials and the recording and transcript on the basis that such information (i) relates to confidential personnel matters, (ii) is covered by attorney-client privilege, work product doctrine or other recognized legal privilege, (iii) is subject to a legal obligation that ICANN (Internet Corporation for Assigned Names and Numbers) maintain its confidentiality, (iv) would disclose trade secrets, or (v) would present a material risk of negative impact to the security, stability or resiliency of the Internet. In the case of any redaction, ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Requestor a written rationale for such redaction. If a Requestor believes that a redaction was improper, the Requestor may use an appropriate accountability mechanism to challenge the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s redaction.

(s) If the Requestor believes that the Board action or inaction for which a Reconsideration Request is submitted is so urgent that the timing requirements of the process set forth in this Section 4.2 are too long, the Requestor may apply to the Board Accountability Mechanisms Committee for urgent consideration. Any request for urgent consideration must be made within two business days (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.

(t) The Board Accountability Mechanisms Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Accountability Mechanisms Committee agrees to consider the matter with urgency, it will cause notice to be provided to the Requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Accountability Mechanisms Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Reconsideration Request, or as soon thereafter as feasible. If the Board Accountability Mechanisms Committee does not agree to consider the matter with urgency, the Requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.

(u) The Board Accountability Mechanisms Committee shall submit a report to the Board on an annual basis containing at least the following information for the

preceding calendar year:

- (i) the number and general nature of Reconsideration Requests received, including an identification if the Reconsideration Requests were acted upon, summarily dismissed, or remain pending;
- (ii) for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any Reconsideration Request pending for more than ninety (90) days;
- (iii) an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and
- (iv) whether or not, in the Board Accountability Mechanisms Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN (Internet Corporation for Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

### Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

(a) In addition to the reconsideration process described in Section 4.2, ICANN (Internet Corporation for Assigned Names and Numbers) shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant (as defined in Section 4.3(b)(i)) to be within the scope of the Independent Review Process ("**IRP**"). The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):

- (i) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.
- (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).

(iii) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the global Internet community and Claimants.

(iv) Address claims that ICANN (Internet Corporation for Assigned Names and Numbers) has failed to enforce its rights under the IANA (Internet Assigned Numbers Authority) Naming Function Contract (as defined in Section 16.3(a)).

(v) Provide a mechanism by which direct customers of the IANA (Internet Assigned Numbers Authority) naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.

(vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.

(b) The scope of the IRP is defined with reference to the following terms:

(i) A "**Claimant**" is any legal or natural person, group, or entity including, but not limited to the EC (Empowered Community), a Supporting Organization (Supporting Organization), or an Advisory Committee (Advisory Committee) that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

(A)The EC (Empowered Community) is deemed to be materially affected by all Covered Actions. ICANN (Internet Corporation for Assigned Names

and Numbers) shall not assert any defenses of standing or capacity against the EC (Empowered Community) in any forum.

(B) ICANN (Internet Corporation for Assigned Names and Numbers) shall not object to the standing of the EC (Empowered Community), a Supporting Organization (Supporting Organization), or an Advisory Committee (Advisory Committee) to participate in an IRP, to compel an IRP, or to enforce an IRP decision on the basis that it is not a legal person with capacity to sue. No special pleading of a Claimant's capacity or of the legal existence of a person that is a Claimant shall be required in the IRP proceedings. No Claimant shall be allowed to proceed if the IRP Panel (as defined in Section 4.3(g)) concludes based on evidence submitted to it that the Claimant does not fairly or adequately represent the interests of those on whose behalf the Claimant purports to act.

(ii) "**Covered Actions**" are defined as any actions or failures to act by or within ICANN (Internet Corporation for Assigned Names and Numbers) committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.

(iii) "**Disputes**" are defined as:

(A) Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

(1) exceeded the scope of the Mission;

(2) resulted from action taken in response to advice or input from any Advisory Committee (Advisory Committee) or Supporting Organization (Supporting Organization) that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or

(5) arose from claims involving rights of the EC (Empowered Community) as set forth in the Articles of Incorporation or Bylaws.

(B) Claims that ICANN (Internet Corporation for Assigned Names and Numbers), the Board, individual Directors, Officers or Staff members have not enforced ICANN (Internet Corporation for Assigned Names and Numbers)'s contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, and

(C) Claims regarding PTI service complaints by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions that are not resolved through mediation.

(c) Notwithstanding any other provision in this Section 4.3, the IRP's scope shall exclude all of the following:

(i) EC (Empowered Community) challenges to the result(s) of a PDP (Policy Development Process), unless the Supporting Organization (Supporting Organization)(s) that approved the PDP (Policy Development Process) supports the EC (Empowered Community) bringing such a challenge;

(ii) Claims relating to ccTLD (Country Code Top Level Domain) delegations and re-delegations;

(iii) Claims relating to Internet numbering resources, and

(iv) Claims relating to protocol parameters.

(d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "**Claim**") with the IRP Provider (described in Section 4.3(m) below). For the EC (Empowered Community) to commence an IRP ("**Community IRP**"), the EC (Empowered Community) shall first comply with the procedures set forth in Section 4.2 of Annex D.

(e) Cooperative Engagement Process

(i) Except for Claims brought by the EC (Empowered Community) in accordance with this Section 4.3 and Section 4.2 of Annex D, prior to the filing of a Claim, the parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process ("**CEP**") for the purpose of attempting to resolve and/or narrow the Dispute. CEPs shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time.

(ii) The CEP is voluntary. However, except for Claims brought by the EC (Empowered Community) in accordance with this Section 4.3 and Section 4.2 of Annex D, if the Claimant does not participate in good faith in the CEP and ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party in the IRP, the IRP Panel shall award to ICANN (Internet Corporation for Assigned Names and Numbers) all reasonable fees and costs incurred by ICANN (Internet Corporation for Assigned Names and Numbers) in the IRP, including legal fees.

(iii) Either party may terminate the CEP efforts if that party: (A) concludes in good faith that further efforts are unlikely to produce agreement; or (B) requests the inclusion of an independent dispute resolution facilitator ("**IRP Mediator**") after at least one CEP meeting.

(iv) Unless all parties agree on the selection of a particular IRP Mediator, any IRP Mediator appointed shall be selected from the members of the Standing Panel (described in Section 4.3(j) below) by its Chair, but such IRP Mediator shall not thereafter be eligible to serve as a panelist presiding over an IRP on the matter.

(f) ICANN (Internet Corporation for Assigned Names and Numbers) hereby waives any defenses that may be afforded under Section 5141 of the California Corporations Code ("**CCC**") against any Claimant, and shall not object to the standing of any such Claimant to participate in or to compel an IRP, or to enforce an IRP decision on the basis that such Claimant may not otherwise be able to assert that a Covered Action is ultra vires.

(g) Upon the filing of a Claim, an Independent Review Process Panel ("**IRP Panel**", described in Section 4.3(k) below) shall be selected in accordance with the Rules of Procedure (as defined in Section 4.3(n)(i)). Following the selection of an IRP Panel, that IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN (Internet Corporation for Assigned Names and Numbers)'s written response ("**Response**") in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law. If no Response is timely filed by ICANN (Internet Corporation for Assigned Names and Numbers), the IRP Panel may accept the Claim as unopposed and proceed to evaluate and decide the Claim pursuant to the procedures set forth in these Bylaws.

(h) After a Claim is referred to an IRP Panel, the parties are urged to participate in conciliation discussions for the purpose of attempting to narrow the issues that

are to be addressed by the IRP Panel.

(i) Each IRP Panel shall conduct an objective, de novo examination of the Dispute.

(i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

(ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

(iii) For Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

(iv) With respect to claims that ICANN (Internet Corporation for Assigned Names and Numbers) has not enforced its contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.

(v) For avoidance of doubt, IRPs initiated through the mechanism contemplated at Section 4.3(a)(iv) above, shall be subject to a separate standard of review as defined in the IANA (Internet Assigned Numbers Authority) Naming Function Contract.

(j) Standing Panel

(i) There shall be an omnibus standing panel of at least seven members (the "**Standing Panel**") each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS (Domain Name System) and ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, work, policies, practices, and procedures. Members of

the Standing Panel shall receive at a minimum, training provided by ICANN (Internet Corporation for Assigned Names and Numbers) on the workings and management of the Internet's unique identifiers and other appropriate training as recommended by the IRP Implementation Oversight Team (described in Section 4.3(n)(i)).

(ii) ICANN (Internet Corporation for Assigned Names and Numbers) shall, in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), initiate a four-step process to establish the Standing Panel to ensure the availability of a number of IRP panelists that is sufficient to allow for the timely resolution of Disputes consistent with the Purposes of the IRP.

(A) ICANN (Internet Corporation for Assigned Names and Numbers), in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), shall initiate a tender process for an organization to provide administrative support for the IRP Provider (as defined in Section 4.3(m)), beginning by consulting the "IRP Implementation Oversight Team" (described in Section 4.3(n)(i)) on a draft tender document.

(B) ICANN (Internet Corporation for Assigned Names and Numbers) shall issue a call for expressions of interest from potential panelists, and work with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) and the Board to identify and solicit applications from well-qualified candidates, and to conduct an initial review and vetting of applications.

(C) The Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) shall nominate a slate of proposed panel members from the well-qualified candidates identified per the process set forth in Section 4.3(j)(ii)(B).

(D) Final selection shall be subject to Board confirmation, which shall not be unreasonably withheld.

(iii) Appointments to the Standing Panel shall be made for a fixed term of five years with no removal except for specified cause in the nature of corruption, misuse of position, fraud or criminal activity. The recall process shall be developed by the IRP Implementation Oversight Team.

(iv) Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region (as

defined in [Section 7.5](#)).

(k) IRP Panel

(i) A three-member IRP Panel shall be selected from the Standing Panel to hear a specific Dispute.

(ii) The Claimant and [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shall each select one panelist from the Standing Panel, and the two panelists selected by the parties will select the third panelist from the Standing Panel. In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist. In the event that no Standing Panel is in place when an IRP Panel must be convened and the two party-selected panelists cannot agree on the third panelist, the IRP Provider's rules shall apply to selection of the third panelist.

(iii) Assignment from the Standing Panel to IRP Panels shall take into consideration the Standing Panel members' individual experience and expertise in issues related to highly technical, civil society, business, diplomatic, and regulatory skills as needed by each specific proceeding, and such requests from the parties for any particular expertise.

(iv) Upon request of an IRP Panel, the IRP Panel shall have access to independent skilled technical experts at the expense of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#), although all substantive interactions between the IRP Panel and such experts shall be conducted on the record, except when public disclosure could materially and unduly harm participants, such as by exposing trade secrets or violating rights of personal privacy.

(v) IRP Panel decisions shall be made by a simple majority of the IRP Panel.

(l) All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for Claimants if needed.

(m) IRP Provider

(i) All IRP proceedings shall be administered by a well-respected international dispute resolution provider ("**IRP Provider**"). The IRP Provider shall receive and distribute IRP Claims, Responses, and all other submissions arising from an IRP at the direction of the IRP Panel, and shall function independently from ICANN (Internet Corporation for Assigned Names and Numbers).

(n) Rules of Procedure

(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("**Rules of Procedure**") that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

(ii) The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), and take effect upon approval by the Board, such approval not to be unreasonably withheld.

(iii) The Standing Panel may recommend amendments to such Rules of Procedure as it deems appropriate to fulfill the Purposes of the IRP, however no such amendment shall be effective without approval by the Board after publication and a period of public comment that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements:

(A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute;

(B) Issues relating to joinder, intervention, and consolidation of Claims;

(C) Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN (Internet Corporation for Assigned Names and Numbers)'s Response;

(D) Availability and limitations on discovery methods;

(E) Whether hearings shall be permitted, and if so what form and structure such hearings would take;

(F) Procedures if ICANN (Internet Corporation for Assigned Names and Numbers) elects not to respond to an IRP; and

(G) The standards and rules governing appeals from IRP Panel decisions, including which IRP Panel decisions may be appealed.

(o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;

(ii) Request additional written submissions from the Claimant or from other parties;

(iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN (Internet Corporation for Assigned Names and Numbers) failed to enforce ICANN (Internet Corporation for Assigned Names and Numbers)'s contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or resolve PTI service complaints by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions, as applicable;

(iv) Recommend that ICANN (Internet Corporation for Assigned Names and Numbers) stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;

(v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

(vi) Determine the timing for each IRP proceeding; and

(vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

(p) A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN (Internet Corporation for Assigned Names and Numbers) action or decision until such time as the opinion of the IRP Panel is considered as described in Section 4.3(o)(iv), in order to maintain the *status quo*. A single member of the Standing Panel ("**Emergency Panelist**") shall be selected to adjudicate requests for interim relief. In the event that no Standing Panel is in place when an Emergency Panelist must be selected, the IRP Provider's rules shall apply to the selection of the Emergency Panelist. Interim relief may only be provided if the Emergency Panelist determines that the Claimant has established all of the following factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief;

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.

(q) Conflicts of Interest

(i) Standing Panel members must be independent of ICANN (Internet Corporation for Assigned Names and Numbers) and its Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), and so must adhere to the following criteria:

(A) Upon consideration for the Standing Panel and on an ongoing basis, Panelists shall have an affirmative obligation to disclose any material relationship with ICANN (Internet Corporation for Assigned Names and Numbers), a Supporting Organization (Supporting Organization), an Advisory Committee (Advisory Committee), or any other participant in an IRP proceeding.

(B) Additional independence requirements to be developed by the IRP Implementation Oversight Team, including term limits and restrictions on post-term appointment to other ICANN (Internet Corporation for Assigned Names and Numbers) positions.

(ii) The IRP Provider shall disclose any material relationship with ICANN (Internet Corporation for Assigned Names and Numbers), a Supporting Organization (Supporting Organization), an Advisory Committee (Advisory Committee), or any other participant in an IRP proceeding.

(r) ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

(s) An IRP Panel should complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure. The preceding sentence does not provide the basis for a Covered Action.

(t) Each IRP Panel shall make its decision based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its decision shall specifically designate the prevailing party as to each part of a Claim.

(u) All IRP Panel proceedings shall be conducted on the record, and documents filed in connection with IRP Panel proceedings shall be posted on the Website, except for settlement negotiation or other proceedings that could materially and unduly harm participants if conducted publicly. The Rules of Procedure, and all Claims, petitions, and decisions shall promptly be posted on the Website when they become available. Each IRP Panel may, in its discretion, grant a party's

request to keep certain information confidential, such as trade secrets, but only if such confidentiality does not materially interfere with the transparency of the IRP proceeding.

(v) Subject to this Section 4.3, all IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.

(w) Subject to any limitations established through the Rules of Procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc within sixty (60) days of issuance of such decision.

(x) The IRP is intended as a final, binding arbitration process.

(i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.

(ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN (Internet Corporation for Assigned Names and Numbers) without a *de novo* review of the decision of the IRP Panel or en banc Standing Panel, as applicable, with respect to factual findings or conclusions of law.

(iii) ICANN (Internet Corporation for Assigned Names and Numbers) intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.

(A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.

(B) If an IRP Panel decision in a Community IRP is in favor of the EC (Empowered Community), the Board shall comply within 30 days of such IRP Panel decision.

(C) If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC (Empowered Community) may seek enforcement in a court of competent jurisdiction. In the case of the EC (Empowered Community), the EC (Empowered Community) Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN (Internet Corporation for Assigned Names and Numbers) agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.

(y) ICANN (Internet Corporation for Assigned Names and Numbers) shall seek to establish means by which community, non-profit Claimants and other Claimants that would otherwise be excluded from utilizing the IRP process may meaningfully participate in and have access to the IRP process.

#### Section 4.4. PERIODIC REVIEW OF ICANN (Internet Corporation for Assigned Names and Numbers) STRUCTURE AND OPERATIONS

(a) The Board shall cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each Advisory Committee (Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee (as defined in Section 8.1) by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization, council or committee has a continuing purpose in the ICANN (Internet Corporation for Assigned Names and Numbers) structure, (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness and (iii) whether that organization, council or committee is accountable to its constituencies, stakeholder groups, organizations and other stakeholders.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will

be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN (Internet Corporation for Assigned Names and Numbers) being reviewed by a two-thirds vote of all Directors, subject to any rights of the EC (Empowered Community) under the Articles of Incorporation and these Bylaws.

(b) The Governmental Advisory Committee (Advisory Committee) shall provide its own review mechanisms.

## Section 4.5. ANNUAL REVIEW

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

## Section 4.6. SPECIFIC REVIEWS

(a) Review Teams and Reports

(i) Review teams will be established for each applicable review, which will include both a limited number of members and an open number of observers. The chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) participating in the applicable review shall select a group of up to 21 review team members from among the prospective members nominated by the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), balanced for diversity and skill. In addition, the Board may designate one Director or Liaison to serve as a

member of the review team. Specific guidance on the selection process is provided within the operating standards developed for the conduct of reviews under this Section 4.6 (the "**Operating Standards**"). The Operating Standards shall be developed through community consultation, including public comment opportunities as necessary that comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers). The Operating Standards must be aligned with the following guidelines:

(A) Each Supporting Organization (Supporting Organization) and Advisory Committee (Advisory Committee) participating in the applicable review may nominate up to seven prospective members for the review team;

(B) Any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) nominating at least one, two or three prospective review team members shall be entitled to have those one, two or three nominees selected as members to the review team, so long as the nominees meet any applicable criteria for service on the team; and

(C) If any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) has not nominated at least three prospective review team members, the Chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) shall be responsible for the determination of whether all 21 SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) member seats shall be filled and, if so, how the seats should be allocated from among those nominated.

(ii) Members and liaisons of review teams shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and their applicable review team any conflicts of interest with a specific matter or issue under review in accordance with the most recent Board-approved practices and Operating Standards. The applicable review team may exclude from the discussion of a specific complaint or issue any member deemed by the majority of review team members to have a conflict of interest. Further details on the conflict of interest practices are included in the Operating Standards.

(iii) Review team decision-making practices shall be specified in the Operating Standards, with the expectation that review teams shall try to operate on a consensus basis. In the event a consensus cannot be found among the members of a review team, a majority vote of the members may be taken.

(iv) Review teams may also solicit and select independent experts to render advice as requested by the review team. ICANN (Internet Corporation for Assigned Names and Numbers) shall pay the reasonable fees and expenses of such experts for each review contemplated by this Section 4.6 to the extent such fees and costs are consistent with the budget assigned for such review. Guidelines on how review teams are to work with and consider independent expert advice are specified in the Operating Standards.

(v) Each review team may recommend that the applicable type of review should no longer be conducted or should be amended.

(vi) Confidential Disclosure to Review Teams

(A) To facilitate transparency and openness regarding ICANN (Internet Corporation for Assigned Names and Numbers)'s deliberations and operations, the review teams, or a subset thereof, shall have access to ICANN (Internet Corporation for Assigned Names and Numbers) internal information and documents pursuant to the Confidential Disclosure Framework set forth in the Operating Standards (the "**Confidential Disclosure Framework**"). The Confidential Disclosure Framework must be aligned with the following guidelines:

(1) ICANN (Internet Corporation for Assigned Names and Numbers) must provide a justification for any refusal to reveal requested information. ICANN (Internet Corporation for Assigned Names and Numbers)'s refusal can be appealed to the Ombudsman and/or the ICANN (Internet Corporation for Assigned Names and Numbers) Board for a ruling on the disclosure request.

(2) ICANN (Internet Corporation for Assigned Names and Numbers) may designate certain documents and information as "for review team members only" or for a subset of the review team members based on conflict of interest. ICANN (Internet Corporation for Assigned Names and Numbers)'s designation of documents may also be appealed to the Ombudsman and/or the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

(3) ICANN (Internet Corporation for Assigned Names and Numbers) may require review team members to sign a non-disclosure agreement before accessing documents.

(vii) Reports

(A) Each report of the review team shall describe the degree of consensus or agreement reached by the review team on each recommendation contained in such report. Any member of a review team not in favor of a recommendation of its review team (whether as a result of voting against a matter or objecting to the consensus position) may record a minority dissent to such recommendation, which shall be included in the report of the review team. The review team shall attempt to prioritize each of its recommendations and provide a rationale for such prioritization.

(B) At least one draft report of the review team shall be posted on the Website for public review and comment. The review team must consider the public comments received in response to any posted draft report and shall amend the report as the review team deems appropriate and in the public interest before submitting its final report to the Board. The final report should include an explanation of how public comments were considered as well as a summary of changes made in response to public comments.

(C) Each final report of a review team shall be published for public comment in advance of the Board's consideration. Within six months of receipt of a final report, the Board shall consider such final report and the public comments on the final report, and determine whether to approve the recommendations in the final report. If the Board does not approve any or all of the recommendations, the written rationale supporting the Board's decision shall include an explanation for the decision on each recommendation that was not approved. The Board shall promptly direct implementation of the recommendations that were approved.

(b) Accountability and Transparency Review

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

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

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

(B) assessing the role and effectiveness of the GAC (Governmental Advisory Committee)'s interaction with the Board and with the broader ICANN (Internet Corporation for Assigned Names and Numbers) community, and making recommendations for improvement to ensure effective consideration by ICANN (Internet Corporation for Assigned Names and Numbers) of GAC (Governmental Advisory Committee) input on the public policy aspects of the technical coordination of the DNS (Domain Name System);

(C) assessing and improving the processes by which ICANN (Internet Corporation for Assigned Names and Numbers) receives public input (including adequate explanation of decisions taken and the rationale thereof);

(D) assessing the extent to which ICANN (Internet Corporation for Assigned Names and Numbers)'s decisions are supported and accepted by the Internet community;

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

(F) assessing and improving the Independent Review Process.

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

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

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

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

(c) Security (Security – Security, Stability and Resiliency (SSR)), Stability (Security, Stability and Resiliency), and Resiliency (Security Stability & Resiliency (SSR)) Review

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

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

(A) security, operational stability and resiliency matters, both physical and network, relating to the coordination of the Internet's system of unique identifiers;

(B) conformance with appropriate security contingency planning framework for the Internet's system of unique identifiers; and

(C) maintaining clear and globally interoperable security processes for those portions of the Internet's system of unique identifiers that ICANN (Internet Corporation for Assigned Names and Numbers) coordinates.

(iii) The SSR Review Team shall also assess the extent to which ICANN (Internet Corporation for Assigned Names and Numbers) has successfully implemented its security efforts, the effectiveness of the security efforts to deal with actual and potential challenges and threats to the security and stability of the DNS (Domain Name System), and the extent to which the security efforts are sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the DNS (Domain Name System), consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

(iv) The SSR Review Team shall also assess the extent to which prior SSR Review recommendations have been implemented and the extent to which

implementation of such recommendations has resulted in the intended effect.

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

(d) Competition, Consumer Trust and Consumer Choice Review

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

(ii) After a New gTLD (generic Top Level Domain) Round has been in operation for one year, the Board shall cause a competition, consumer trust and consumer choice review as specified in this Section 4.6(d) ("**CCT (Competition, Consumer Choice & Consumer Trust) Review**").

(iii) The review team for the CCT (Competition, Consumer Choice & Consumer Trust) Review ("**CCT (Competition, Consumer Choice & Consumer Trust) Review Team**") will examine (A) the extent to which the expansion of gTLDs has promoted competition, consumer trust and consumer choice and (B) the effectiveness of the New gTLD (generic Top Level Domain) Round's application and evaluation process and safeguards put in place to mitigate issues arising from the New gTLD (generic Top Level Domain) Round.

(iv) For each of its recommendations, the CCT (Competition, Consumer Choice & Consumer Trust) Review Team should indicate whether the recommendation, if accepted by the Board, must be implemented before opening subsequent rounds of new generic top-level domain applications periods.

(v) The CCT (Competition, Consumer Choice & Consumer Trust) Review Team shall also assess the extent to which prior CCT (Competition, Consumer Choice & Consumer Trust) Review recommendations have

been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

(e) Registration Directory Service Review

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

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

(iii) The review team for the Directory Service Review ("**Directory Service Review Team**") will consider the Organisation for Economic Co-operation and Development ("**OECD (Organization for Economic Co-operation and Development)**") Guidelines on the Protection of Privacy and Transborder Flows of Personal Data as defined by the OECD (Organization for Economic Co-operation and Development) in 1980 and amended in 2013 and as may be amended from time to time.

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

(v) The Directory Service Review shall be conducted no less frequently than every five years, measured from the date the previous Directory Service Review Team was convened, except that the first Directory Service Review to be conducted after 1 October 2016 shall be deemed to be timely if the applicable Directory Service Review Team is convened on or before 31 October 2016.

## Section 4.7. COMMUNITY MEDIATION

(a) If the Board refuses or fails to comply with a duly authorized and valid EC (Empowered Community) Decision under these Bylaws, the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate a mediation process pursuant to this Section 4.7. The Board shall be deemed to have refused or failed to comply with a duly authorized and valid EC (Empowered Community) Decision if the Board has not complied with the EC (Empowered Community) Decision within 30 days of being notified of the relevant EC (Empowered Community) Decision.

(b) If a Mediation Initiation Notice (as defined in Section 4.1(a) of Annex D) is delivered to the Secretary pursuant to and in compliance with Section 4.1(a) of Annex D, as soon as reasonably practicable thereafter, the EC (Empowered Community) Administration shall designate individuals to represent the EC (Empowered Community) in the mediation ("**Mediation Administration**") and the Board shall designate representatives for the mediation ("**Board Mediation Representatives**"). Members of the EC (Empowered Community) Administration and the Board can designate themselves as representatives. ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the Mediation Initiation Notice on the Website.

(c) There shall be a single mediator who shall be selected by the agreement of the Mediation Administration and Board Mediation Representatives. The Mediation Administration shall propose a slate of at least five potential mediators, and the Board Mediation Representatives shall select a mediator from the slate or request a new slate until a mutually-agreed mediator is selected. The Board Mediation Representatives may recommend potential mediators for inclusion on the slates selected by the Mediation Administration. The Mediation Administration shall not unreasonably decline to include mediators recommended by the Board Mediation Representatives on proposed slates and the Board Mediation Representatives shall not unreasonably withhold consent to the selection of a mediator on slates proposed by the Mediation Administration.

(d) The mediator shall be a licensed attorney with general knowledge of contract law and general knowledge of the DNS (Domain Name System) and ICANN (Internet Corporation for Assigned Names and Numbers). The mediator may not have any ongoing business relationship with ICANN (Internet Corporation for Assigned Names and Numbers), any Supporting Organization (Supporting Organization) (or constituent thereof), any Advisory Committee (Advisory Committee) (or constituent thereof), the EC (Empowered Community) Administration or the EC (Empowered Community). The mediator must confirm in

writing that he or she is not, directly or indirectly, and will not become during the term of the mediation, an employee, partner, executive officer, director, consultant or advisor of ICANN (Internet Corporation for Assigned Names and Numbers), any Supporting Organization (Supporting Organization) (or constituent thereof), any Advisory Committee (Advisory Committee) (or constituent thereof), the EC (Empowered Community) Administration or the EC (Empowered Community).

(e) The mediator shall conduct the mediation in accordance with these Bylaws, the laws of California and the rules and procedures of a well-respected international dispute resolution provider, which may be the IRP Provider. The arbitration will be conducted in the English language consistent with the provisions relevant for mediation under the IRP Rules of Procedure and will occur in Los Angeles County, California, unless another location is mutually-agreed between the Mediation Administration and Board Mediation Representatives.

(f) The Mediation Administration and the Board Mediation Representatives shall discuss the dispute in good faith and attempt, with the mediator's assistance, to reach an amicable resolution of the dispute.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all costs of the mediator.

(h) If the Mediation Administration and the Board Mediation Representatives have engaged in good faith participation in the mediation but have not resolved the dispute for any reason, the Mediation Administration or the Board Mediation Representatives may terminate the mediation at any time by declaring an impasse.

(i) If a resolution to the dispute is reached by the Mediation Administration and the Board Mediation Representatives, the Mediation Administration and the Board Mediation Representatives shall document such resolution including recommendations ("**Mediation Resolution**" and the date of such resolution, the "**Mediation Resolution Date**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the Mediation Resolution on the Website (in no event later than 14 days after mediation efforts are completed) and the EC (Empowered Community) Administration shall promptly notify the Decisional Participants of the Mediation Resolution.

(j) The EC (Empowered Community) shall be deemed to have accepted the Mediation Resolution if it has not delivered an EC (Empowered Community) Community IRP Initiation Notice (as defined in Section 4.2(e) of Annex D) pursuant to and in compliance with Section 4.2 of Annex D within eighty (80) days following the Mediation Resolution Date.

## ARTICLE 5 OMBUDSMAN

### Section 5.1. OFFICE OF OMBUDSMAN

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain an Office of Ombudsman ("**Office of Ombudsman**"), to be managed by an ombudsman ("**Ombudsman**") and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

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

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

(d) The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN (Internet Corporation for Assigned Names and Numbers) Budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN (Internet Corporation for Assigned Names and Numbers) Budget recommended by the ICANN (Internet Corporation for Assigned Names and Numbers) President to the Board. Nothing in this Section 5.1 shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

### Section 5.2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who believe that the ICANN (Internet Corporation for Assigned Names and Numbers) staff, Board or an ICANN (Internet Corporation for Assigned Names and Numbers) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN (Internet Corporation for Assigned Names and Numbers) staff, the Board, or ICANN (Internet Corporation for Assigned Names and Numbers) constituent bodies, clarifying the issues and using conflict

resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results. With respect to the Reconsideration Request Process set forth in Section 4.2 , the Ombudsman shall serve the function expressly provided for in Section 4.2 .

## Section 5.3. OPERATIONS

The Office of Ombudsman shall:

(a) facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN (Internet Corporation for Assigned Names and Numbers) community (excluding employees and vendors/suppliers of ICANN (Internet Corporation for Assigned Names and Numbers)) may have with specific actions or failures to act by the Board or ICANN (Internet Corporation for Assigned Names and Numbers) staff which have not otherwise become the subject of either a Reconsideration Request or Independent Review Process;

(b) perform the functions set forth in Section 4.2 relating to review and consideration of Reconsideration Requests;

(c) exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;

(d) have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN (Internet Corporation for Assigned Names and Numbers) staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN (Internet Corporation for Assigned Names and Numbers));

(e) heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN (Internet Corporation for Assigned Names and Numbers) community and online availability;

(f) maintain neutrality and independence, and have no bias or personal stake in an outcome; and

(g) comply with all ICANN (Internet Corporation for Assigned Names and Numbers) conflicts of interest and confidentiality policies.

## Section 5.4. INTERACTION WITH ICANN (Internet Corporation for Assigned Names and Numbers) AND OUTSIDE ENTITIES

(a) No ICANN (Internet Corporation for Assigned Names and Numbers) employee, Board member, or other participant in Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) shall prevent or impede the Ombudsman's contact with the ICANN (Internet Corporation for Assigned Names and Numbers) community (including employees of ICANN (Internet Corporation for Assigned Names and Numbers)). ICANN (Internet Corporation for Assigned Names and Numbers) employees and Board members shall direct members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who voice problems, concerns, or complaints about ICANN (Internet Corporation for Assigned Names and Numbers) to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) staff and other ICANN (Internet Corporation for Assigned Names and Numbers) participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.

(c) Contact with the Ombudsman shall not constitute notice to ICANN (Internet Corporation for Assigned Names and Numbers) of any particular action or cause of action.

(d) The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

(e) The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet

Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.

## Section 5.5. ANNUAL REPORT

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

## ARTICLE 6 EMPOWERED COMMUNITY

### Section 6.1. COMPOSITION AND ORGANIZATION OF THE EMPOWERED COMMUNITY

(a) The Empowered Community ("**EC (Empowered Community)**") shall be a nonprofit association formed under the laws of the State of California consisting of the ASO (Address Supporting Organization), the ccNSO (Country Code Names Supporting Organization) (as defined in Section 10.1), the GNSO (Generic Names Supporting Organization) (as defined in Section 11.1), the ALAC (At-Large Advisory Committee) (as defined in Section 12.2(d)(i)) and the GAC (Governmental Advisory Committee) (each a "**Decisional Participant**" or "associate," and collectively, the "**Decisional Participants**").

(b) This Article 6 shall constitute the articles of association of the EC (Empowered Community) and shall be considered the formational "governing document" (as defined in Section 18008 of the CCC) of the EC (Empowered Community), and the terms contained herein and in these Bylaws relating to the EC (Empowered Community) shall be the EC (Empowered Community)'s "governing principles" (as defined in Section 18010 of the CCC), which may only be amended as set forth in Section 25.2 . Where necessary for purposes of interpretation of these Bylaws, an "associate" shall be deemed to be a "member" of the EC (Empowered Community) as defined in Section 18015 of the CCC. Any change in the number and/or identity of Decisional Participants for any reason (including the resignation of any Decisional Participant or the addition of new Decisional Participants as a result of the creation of additional Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees)), and any corresponding changes in the voting thresholds for exercise of the EC (Empowered Community)'s rights described in Annex D of these Bylaws, will only be effective following the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D. The EC (Empowered

Community) may not be dissolved except upon the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D.

(c) The sole purpose of the EC (Empowered Community) is to exercise its rights and perform its obligations under ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and these Bylaws, and the EC (Empowered Community) shall have no other powers or rights except as expressly provided therein. The EC (Empowered Community) may only act as provided in these Bylaws. Any act of the EC (Empowered Community) that is not in accordance with these Bylaws shall not be effective.

(d) The EC (Empowered Community) shall not acquire, hold, manage, encumber or transfer any interest in real or personal property, nor have any directors, officers or employees. The EC (Empowered Community) shall not merge with or into another entity nor shall it dissolve, except with the approval of the Board and as part of a Fundamental Bylaw Amendment (as defined in Section 25.2(b)).

(e) Decisional Participants shall not transfer their right to be an associate of the EC (Empowered Community). Any attempted transfer by any Decisional Participant of its right to be an associate of the EC (Empowered Community) shall be void ab initio.

(f) The location and street address of the EC (Empowered Community) shall be the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

(g) Each Decisional Participant shall, except as otherwise provided in Annex D, adopt procedures for exercising the rights of such Decisional Participant pursuant to the procedures set forth in Annex D, including (i) who can submit a petition to such Decisional Participant, (ii) the process for an individual to submit a petition to such Decisional Participant, including whether a petition must be accompanied by a rationale, (iii) how the Decisional Participant determines whether to accept or reject a petition, (iv) how the Decisional Participant determines whether an issue subject to a petition has been resolved, (v) how the Decisional Participant determines whether to support or object to actions supported by another Decisional Participant, and (vi) the process for the Decisional Participant to notify its constituents of relevant matters.

## Section 6.2. POWERS AND ACKNOWLEDGMENTS

(a) Pursuant to and in compliance with the terms and conditions of these Bylaws, the EC (Empowered Community) shall have the powers and rights, as set forth more fully elsewhere in these Bylaws, to:

- (i) Appoint and remove individual Directors (other than the President);
- (ii) Recall the entire Board;
- (iii) Reject ICANN (Internet Corporation for Assigned Names and Numbers) Budgets, IANA (Internet Assigned Numbers Authority) Budgets, Operating Plans (as defined in Section 22.5(a)(i)) and Strategic Plans (as defined in Section 22.5(b)(i));
- (iv) Reject Standard Bylaw Amendments (as defined in Section 25.1(a));
- (v) Approve Fundamental Bylaw Amendments, Articles Amendments (as defined in Section 25.2(b)), and Asset Sales (as defined in Article 26(a));
- (vi) Reject PTI Governance Actions (as defined in Section 16.2(d));,
- (vii) Require the ICANN (Internet Corporation for Assigned Names and Numbers) Board to re-review its rejection of IFR Recommendation Decisions (as defined in Section 18.6(d)), Special IFR Recommendation Decisions (as defined in Section 18.12(e)), SCWG Creation Decisions (as defined in Section 19.1(d)) and SCWG Recommendation Decisions (as defined in Section 19.4(d));
- (viii) Initiate a Community Reconsideration Request, mediation or a Community IRP; and
- (ix) Take necessary and appropriate action to enforce its powers and rights, including through the community mechanism contained in Annex D or an action filed in a court of competent jurisdiction.

(b) The EC (Empowered Community) may pursue an action in any court with jurisdiction over ICANN (Internet Corporation for Assigned Names and Numbers) to enforce the EC (Empowered Community)'s rights under these Bylaws. ICANN (Internet Corporation for Assigned Names and Numbers) acknowledges the EC (Empowered Community)'s legal personhood and shall not raise the EC (Empowered Community)'s legal personhood as a defense in any proceeding between ICANN (Internet Corporation for Assigned Names and Numbers) and the EC (Empowered Community). ICANN (Internet Corporation for Assigned Names and Numbers) shall not assert as a defense that prior filing or completion of a Reconsideration Request or an IRP Claim was a prerequisite to an action in court regarding the EC (Empowered Community)'s power to appoint or remove an individual Director or recall the Board (except to the extent an IRP Panel award is applicable pursuant to Section 3.6(e)).

(c) By nominating a Director for designation by the EC (Empowered Community) or exercising the community mechanism contained in Annex D with respect to any rights granted to the EC (Empowered Community) pursuant to these Bylaws, the EC (Empowered Community) and each of its Decisional Participants agrees and consents to the terms of these Bylaws and intends to be legally bound hereby.

### Section 6.3. EC (Empowered Community) ADMINISTRATION

(a) The Decisional Participants shall act through their respective chairs or such other persons as may be designated by the Decisional Participants (collectively, such persons are the "**EC (Empowered Community) Administration**"). Each Decisional Participant shall deliver annually a written certification from its chair or co-chairs to the Secretary designating the individual who shall represent the Decisional Participant on the EC (Empowered Community) Administration.

(b) In representing a Decisional Participant on the EC (Empowered Community) Administration, the representative individual shall act solely as directed by the represented Decisional Participant and in accordance with processes developed by such Decisional Participant in accordance with Section 6.1(g).

(c) In representing the EC (Empowered Community) Administration, the individuals serving thereon shall act as required for the EC (Empowered Community) to follow the applicable procedures in Annex D, and to implement EC (Empowered Community) decisions made in accordance with such procedures.

(d) All communications and notices required or permitted to be given under these Bylaws by a Decisional Participant shall be provided by the Decisional Participant's representative on the EC (Empowered Community) Administration. All communications and notices required or permitted to be given under these Bylaws by the EC (Empowered Community) shall be provided by any member of the EC (Empowered Community) Administration. Where a particular Bylaws notice provision does not require notice to the Secretary, the EC (Empowered Community) and the Decisional Participants shall provide a copy of the notice to the Secretary in accordance with Section 21.5, and ICANN (Internet Corporation for Assigned Names and Numbers) shall post it on the Website.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall be entitled to rely on notices from a Decisional Participant's representative or an individual serving on the EC (Empowered Community) Administration delivered in accordance with Section 21.5 as evidence that the actions set forth therein have been approved by or are the actions of the Decisional Participant, the EC (Empowered Community) or the EC (Empowered Community) Administration, as

applicable, pursuant to and in compliance with the requirements of these Bylaws (including Annex D) .

(f) No person participating in the EC (Empowered Community), the EC (Empowered Community) Administration or a Decisional Participant shall be liable for any debt, obligation or liability of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community), other than in the case of a fraudulent act committed by such person.

## Section 6.4. CONSENT TO BOARD-INITIATED REMOVAL OF DIRECTOR WITHOUT CAUSE

In the event the EC (Empowered Community) Administration receives from the Secretary a valid notice as described in Section 7.11(a)(i)(B), indicating that the Board has voted to remove a Director without cause pursuant to Section 7.11(a)(i)(B), the EC (Empowered Community) shall without deliberation consent to such removal, and the EC (Empowered Community) Administration shall provide notice to the Secretary of such consent.

## ARTICLE 7 BOARD OF DIRECTORS

### Section 7.1. COMPOSITION OF THE BOARD

The ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors ("Board") shall consist of sixteen voting directors ("**Directors**"). In addition, four non-voting liaisons ("**Liaisons**") shall be appointed for the purposes set forth in Section 7.9. Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the Board.

### Section 7.2. DIRECTORS AND THEIR SELECTION; ELECTION OF CHAIR AND VICE-CHAIR

(a) As of the effective date of the amendment and restatement of these Bylaws on 1 October 2016, the EC (Empowered Community) shall be the sole designator of ICANN (Internet Corporation for Assigned Names and Numbers) and shall designate, within the meaning of Section 5220 of the CCC, all Directors except for the President ex officio. The EC (Empowered Community) shall notify promptly the Secretary in writing of the following designations:

- (i) Eight Directors nominated by the Nominating Committee to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seats 1 through 8.

(ii) Two Directors nominated by the ASO (Address Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 9 and Seat 10.

(iii) Two Directors nominated by the ccNSO (Country Code Names Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 11 and Seat 12.

(iv) Two Directors nominated by the GNSO (Generic Names Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 13 and Seat 14.

(v) One Director nominated by the At-Large Community to be designated as Directors by the EC (Empowered Community). This seat on the Board is referred to in these Bylaws as Seat 15.

In addition to the Directors designated by the EC (Empowered Community), the President shall serve ex officio as a Director. The seat held by the President on the Board is referred to in these Bylaws as Seat 16.

(b) In carrying out its responsibilities to nominate the Directors for Seats 1 through 8 for designation by the EC (Empowered Community), the Nominating Committee shall ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4 and Section 7.5. At no time when it makes its nomination shall the Nominating Committee nominate a Director to fill any vacancy or expired term whose designation would cause the total number of Directors (not including the President) from countries in any one Geographic Region to exceed five; and the Nominating Committee shall ensure when it makes its nominations that the Board includes at least one Director who is from a country in each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region ("Diversity Calculation"). For purposes of this Section 7.2(b), if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship ("**Domicile**"), that candidate may be deemed to be from either country and must select in his or her Statement of Interest the country of citizenship or Domicile that he or she wants the Nominating Committee to use for Diversity Calculation purposes. For purposes of this Section 7.2(b), a person can only have one

Domicile, which shall be determined by where the candidate has a permanent residence and place of habitation.

(c) In carrying out their responsibilities to nominate Directors for Seats 9 through 15 for designation by the EC (Empowered Community), the Supporting Organizations (Supporting Organizations) and the At-Large Community shall seek to ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4 and Section 7.5. The Supporting Organizations (Supporting Organizations) shall ensure that, at any given time, no two Directors nominated by a Supporting Organization (Supporting Organization) are citizens from the same country or of countries located in the same Geographic Region. For purposes of this Section 7.2(c), if any candidate for Director maintains citizenship or Domicile of more than one country, that candidate may be deemed to be from either country and must select in his or her Statement of Interest the country of citizenship or Domicile that he or she wants the Supporting Organization (Supporting Organization) or the At-Large Community, as applicable, to use for nomination purposes. For purposes of this Section 7.2(c), a person can only have one Domicile, which shall be determined by where the candidate has a permanent residence and place of habitation.

(d) The Board shall annually elect a Chair and a Vice-Chair from among the Directors, not to include the President.

(e) The EC (Empowered Community) shall designate each person nominated as a Director by the Nominating Committee, the ASO (Address Supporting Organization), the ccNSO (Country Code Names Supporting Organization), the GNSO (Generic Names Supporting Organization) and the At-Large Community in accordance with this Section 7.2.

(f) As a condition to sitting on the Board, each Director other than the President ex officio shall sign a pre-service letter pursuant to which such Director:

(i) acknowledges and agrees to the EC (Empowered Community)'s right to remove the Director at any time and for any reason following the processes set forth in these Bylaws;

(ii) acknowledges and agrees that serving as a Director shall not establish any employment or other relationship (whether to ICANN (Internet Corporation for Assigned Names and Numbers), the EC (Empowered Community), any body entitled to nominate a Director, or any of their agents) that provides any due process rights related to termination of service as a Director; and

(iii) conditionally and irrevocably resigns as a Director automatically effective upon communication to the Director or, in the case of Board recall, communication to the Board of a final determination of removal following the processes set forth in these Bylaws.

## Section 7.3. CRITERIA FOR NOMINATION OF DIRECTORS

Directors shall be:

(a) Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;

(b) Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers) decisions on the global Internet community, and committed to the success of ICANN (Internet Corporation for Assigned Names and Numbers);

(c) Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in this Section 7.3;

(d) Persons who, in the aggregate, have personal familiarity with the operation of gTLD (generic Top Level Domain) registries and registrars; with ccTLD (Country Code Top Level Domain) registries; with IP (Internet Protocol or Intellectual Property) address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet; and

(e) Persons who are able to work and communicate in written and spoken English.

## Section 7.4. ADDITIONAL QUALIFICATIONS

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

(b) No person who serves in any capacity (including as a liaison) on any Supporting Organization (Supporting Organization) Council shall simultaneously serve as a Director or Liaison to the Board. If such a person is identified by, or presents themselves to, the Supporting Organization (Supporting Organization) Council or the At-Large Community for consideration for nomination to serve as a Director, the person shall not thereafter participate in any discussion of, or vote by, the Supporting Organization (Supporting Organization) Council or the committee designated by the At-Large Community relating to the nomination of Directors by the Council or At-Large Community, until the Council or committee(s) specified by the At-Large Community has nominated the full complement of Directors it is responsible for nominating. In the event that a person serving in any capacity on a Supporting Organization (Supporting Organization) Council is considered for nomination to serve as a Director, the constituency group or other group or entity that selected the person may select a replacement for purposes of the Council's nomination process. In the event that a person serving in any capacity on the At-Large Advisory Committee (Advisory Committee) is identified as or accepts a nomination to be considered for nomination by the At-Large Community as a Director, the Regional At-Large Organization or other group or entity that selected the person may select a replacement for purposes of the At-Large Community's nomination process.

(c) Persons serving in any capacity on the Nominating Committee shall be ineligible for nomination or designation to positions on the Board as provided by Section 8.8.

(d) No person who serves on the EC (Empowered Community) Administration while serving in that capacity shall be considered for nomination or designated to the Board, nor serve simultaneously on the EC (Empowered Community) Administration and as a Director or Liaison to the Board.

## Section 7.5. INTERNATIONAL REPRESENTATION

In order to ensure broad international representation on the Board, the nomination of Directors by the Nominating Committee, each Supporting Organization (Supporting Organization) and the At-Large Community shall comply with all applicable diversity provisions of these Bylaws or of any memorandum of understanding referred to in these Bylaws concerning the Supporting Organization (Supporting Organization). One intent of these diversity provisions is to ensure that at all times each Geographic Region shall have at least one Director, and at all times no Geographic Region shall have more than five Directors on the Board (not including the President). As used in these Bylaws, each of the following is considered to be a "**Geographic Region**": (a) Europe; (b) Asia/Australia/Pacific; (c) Latin America/Caribbean islands; (d) Africa;

and (e) North America. The specific countries included in each Geographic Region shall be determined by the Board, and this Section 7.5 shall be reviewed by the Board from time to time (and in any event at least once every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet.

## Section 7.6. DIRECTORS' CONFLICTS OF INTEREST

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

## Section 7.7. DUTIES OF DIRECTORS

Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN (Internet Corporation for Assigned Names and Numbers) and not as representatives of the EC (Empowered Community), the Nominating Committee, Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) that nominated them, as applicable, their employers, or any other organizations or constituencies.

## Section 7.8. TERMS OF DIRECTORS

(a) The regular term of office of Director Seats 1 through 15 shall begin as follows:

- (i) The regular terms of Seats 1 through 3 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2003;

(ii) The regular terms of Seats 4 through 6 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2004;

(iii) The regular terms of Seats 7 and 8 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2005;

(iv) The terms of Seats 9 and 12 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2015;

(v) The terms of Seats 10 and 13 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2013; and

(vi) The terms of Seats 11, 14 and 15 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2014.

(b) Each Director holding any of Seats 1 through 15, including a Director nominated and designated to fill a vacancy, shall hold office for a term that lasts until the next term for that Seat commences and until a successor has been designated and qualified or until that Director resigns or is removed in accordance with these Bylaws. For the avoidance of doubt, the new governance provisions effective as of the amendment and restatement of these Bylaws on 1 October 2016 shall not have the effect of shortening or terminating the terms of any Directors serving at the time of the amendment and restatement.

(c) At least two months before the commencement of each annual meeting, the Nominating Committee shall give the EC (Empowered Community) Administration (with a copy to the Decisional Participants and Secretary) written notice of its nomination of Directors for seats with terms beginning at the conclusion of the annual meeting, and the EC (Empowered Community) Administration shall promptly provide the Secretary (with a copy to the Decisional Participants) with written notice of the designation of those Directors. All such notices shall be posted promptly to the Website.

(d) At least six months before the date specified for the commencement of the term as specified in Section 7.8(a)(iv) through Section 7.8(a)(vi) above, any Supporting Organization (Supporting Organization) or the At-Large Community entitled to nominate a Director for a Seat with a term beginning that year shall give the EC (Empowered Community) Administration (with a copy to the

Secretary and the Decisional Participants) written notice of its nomination of Directors for seats with terms beginning at the conclusion of the annual meeting, and the EC (Empowered Community) Administration shall promptly provide the Secretary (with a copy to the Decisional Participants) with written notice of the designation of those Directors. All such notices shall be posted promptly to the Website.

(e) No Director may serve more than three consecutive terms. For these purposes, a person designated to fill a vacancy in a term shall not be deemed to have served that term.

(f) The term as Director of the person holding the office of President shall be for as long as, and only for as long as, such person holds the office of President.

## Section 7.9. NON-VOTING LIAISONS

(a) The non-voting Liaisons shall include:

(i) One appointed by the Governmental Advisory Committee (Advisory Committee);

(ii) One appointed by the Root Server System Advisory Committee (Advisory Committee) established by Section 12.2(c);

(iii) One appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Section 12.2(b); and

(iv) One appointed by the Internet Engineering Task Force.

(b) The Liaisons shall serve terms that begin at the conclusion of each annual meeting. At least one month before the commencement of each annual meeting, each body entitled to appoint a Liaison shall give the Secretary written notice of its appointment.

(c) Each Liaison may be reappointed, and shall remain in that position until a successor has been appointed or until the Liaison resigns or is removed in accordance with these Bylaws.

(d) The Liaisons shall be entitled to attend Board meetings, participate in Board discussions and deliberations, and have access (under conditions established by the Board) to materials provided to Directors for use in Board discussions, deliberations and meetings, but shall otherwise not have any of the rights and

privileges of Directors. Liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section 7.9(d) for the purpose of consulting with their respective committee or organization.

## Section 7.10. RESIGNATION OF A DIRECTOR OR NON-VOTING LIAISON

Subject to Section 5226 of the CCC, any Director or Liaison may resign at any time by giving written notice thereof to the Chair of the Board, the President, the Secretary, or the Board. Such resignation shall take effect at the time specified, and, unless otherwise specified, the acceptance of such resignation shall not be necessary to make it effective.

## Section 7.11. REMOVAL OF A DIRECTOR OR NON-VOTING LIAISON

(a) Directors

(i) Any Director designated by the EC (Empowered Community) may be removed without cause:

(A) by the EC (Empowered Community) pursuant to and in compliance with procedures in Section 3.1 or Section 3.2 of Annex D, as applicable, or

(B) following notice to that Director, by a three-fourths (3/4) majority vote of all Directors; provided, however, that (x) each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director; and (y) such removal shall not be effective until the Secretary has provided notice to the EC (Empowered Community) Administration of the Board's removal vote and the requirements of Section 6.4 have been met.

(ii) The Board may remove any Director who has been declared of unsound mind by a final order of court, or convicted of a felony, or been found by a final order or judgment of any court to have breached any duty under Sections 5230 through 5239 of the CCC, and in the case of such removal, the Secretary shall promptly notify the EC (Empowered Community) Administration in writing, with a copy to the body that nominated such Director, and shall promptly post such notification to the Website. The vacancies created by such removal shall be filled in accordance with Section 7.12(a).

(iii) All Directors (other than the President) may be removed at the same time by the EC (Empowered Community) by the EC (Empowered Community) Administration delivering an EC (Empowered Community) Board Recall Notice to the Secretary pursuant to and in compliance with Section 3.3 of Annex D. The vacancies created by such removal shall be filled by the EC (Empowered Community) in accordance with Section 7.12(b).

(b) With the exception of the Liaison appointed by the Governmental Advisory Committee (Advisory Committee), any Liaison may be removed following notice to that Liaison and to the organization which selected that Liaison, by a three-fourths (3/4) majority vote of all Directors if the selecting organization fails to promptly remove that Liaison following such notice. The vacancies created by such removal shall be filled in accordance with Section 7.12. The Board may request the Governmental Advisory Committee (Advisory Committee) to consider the replacement of the Governmental Advisory Committee (Advisory Committee) Liaison if the Board, by a three-fourths (3/4) majority vote of all Directors, determines that such an action is appropriate.

## Section 7.12. VACANCIES

(a) This Section 7.12(a) shall apply to Board vacancies other than those occurring by recall of all Directors (other than the President). A vacancy or vacancies in the Board shall be deemed to exist in the case of the death, resignation, or removal of any Director or Interim Director (as defined in Section 7.12(b)), or if the authorized number of Directors is increased. Vacancies occurring in Seats 1 through 15 shall be filled by the EC (Empowered Community) after nomination as provided in Section 7.2 and Articles 8 through 12. A vacancy in Seat 16 shall be filled as provided in Article 15. A Director designated by the EC (Empowered Community) to fill a vacancy on the Board shall serve for the unexpired term of his or her predecessor in office and until a successor has been designated and qualified. No reduction of the authorized number of Directors shall have the effect of removing a Director prior to the expiration of the Director's term of office.

(b) This Section 7.12(b) shall apply to Board vacancies occurring when all Directors (other than the President) are recalled as provided by Section 7.11(a) (iii). Concurrently with delivery of any EC (Empowered Community) Board Recall Notice (as defined in Section 3.3(f) of Annex D), the EC (Empowered Community) Administration shall provide written notice of the EC (Empowered Community)'s designation of individuals to fill such vacancies (each such individual, an "**Interim Director**") to the Decisional Participants and to the Secretary, who shall cause such notice to be promptly posted to the Website. An Interim Director must meet

the criteria specified in Section 7.3, Section 7.4 and Section 7.5, as applicable. An Interim Director shall hold office until the EC (Empowered Community) designates the Interim Director's successor in accordance with Section 7.12(a), and the successor's designation shall occur within 120 days of the Interim Director's designation. For avoidance of doubt, persons designated as Interim Directors may be eligible for designation as Directors as well.

(c) The organizations selecting the Liaisons identified in Section 7.9 are responsible for determining the existence of, and filling, any vacancies in those positions. Such organizations shall give the Secretary written notice of their appointments to fill any such vacancies, subject to the requirements set forth in Section 7.4, as applicable.

### Section 7.13. ANNUAL MEETINGS

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

### Section 7.14. REGULAR MEETINGS

Regular meetings of the Board shall be held on dates to be determined by the Board. In the absence of other designation, regular meetings shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

### Section 7.15. SPECIAL MEETINGS

Special meetings of the Board may be called by or at the request of one-quarter (1/4) of the Directors, by the Chair of the Board or the President. A call for a special meeting shall be made by the Secretary. Special meetings shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers) unless otherwise specified in the notice of the meeting.

### Section 7.16. NOTICE OF MEETINGS

Notice of time and place of all meetings shall be delivered personally or by telephone or by electronic mail to each Director and Liaison, or sent by first-class mail (air mail for addresses outside the United States) or facsimile, charges prepaid, addressed to each Director and Liaison at the Director's or Liaison's address as it is shown on the records of ICANN (Internet Corporation for Assigned Names and Numbers). In case the notice is mailed, it shall be deposited in the United States mail at least fourteen (14) days before the time of the holding of the meeting. In case the notice is delivered personally or by telephone or facsimile or electronic mail it shall be delivered personally or by telephone or facsimile or electronic mail at least forty-eight (48) hours before the time of the holding of the meeting. Notwithstanding anything in this Section 7.16 to the contrary, notice of a meeting need not be given to any Director or Liaison who signed a waiver of notice or a Director who signed a written consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such Director. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

## Section 7.17. QUORUM

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

## Section 7.18. ACTIONS BY TELEPHONE MEETING OR BY OTHER COMMUNICATIONS EQUIPMENT

Directors and Liaisons may participate in a meeting of the Board or Board Committee (as defined in Section 14.1) through use of (a) conference telephone or similar communications equipment, provided that all Directors participating in such a meeting can speak to and hear one another or (b) electronic video screen communication or other communication equipment; provided that (i) all Directors participating in such a meeting can speak to and hear one another, (ii) all Directors are provided the means of fully participating in all matters before the Board or Board Committee, and (iii) ICANN (Internet Corporation for Assigned Names and Numbers) adopts and implements means of verifying that (A) a

person participating in such a meeting is a Director or other person entitled to participate in the meeting and (B) all actions of, or votes by, the Board or Board Committee are taken or cast only by Directors and not persons who are not Directors. Participation in a meeting pursuant to this Section 7.18 constitutes presence in person at such meeting. ICANN (Internet Corporation for Assigned Names and Numbers) shall make available at the place of any meeting of the Board the telecommunications equipment necessary to permit Directors and Liaisons to participate by telephone.

## Section 7.19. ACTION WITHOUT MEETING

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

## Section 7.20. ELECTRONIC MAIL

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

## Section 7.21. BOARD RIGHTS OF INSPECTION

(a) Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of ICANN (Internet Corporation for Assigned Names and Numbers).

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

## Section 7.22. COMPENSATION

(a) Except for the President of ICANN (Internet Corporation for Assigned Names and Numbers), who serves ex officio as a Director, each of the Directors shall be entitled to receive compensation for his or her services as a Director. The President shall receive only his or her compensation for service as President and shall not receive additional compensation for service as a Director.

(b) If the Board determines to offer a compensation arrangement to one or more Directors (other than the President) for services to ICANN (Internet Corporation for Assigned Names and Numbers) as Directors, the Board shall follow the process that is calculated to pay an amount for service as a Director that is not an excess benefit under the standards set forth in Section 4958 of the Internal Revenue Code of 1986, as amended (the "**Code**").

(c) As part of the process, the Board shall retain an Independent Valuation Expert (as defined in Section 7.22(g)(i)) to consult with and to advise the Board regarding Director compensation arrangements and to issue to the Board a Reasoned Written Opinion (as defined in Section 7.22(g)(ii)) from such expert regarding the ranges of Reasonable Compensation (as defined in Section 7.22(g)(iii)) for any such services by a Director. The expert's opinion shall address all relevant factors affecting the level of compensation to be paid a Director, including offices held on the Board, attendance at Board and Board Committee meetings, the nature of service on the Board and on Board Committees, and appropriate data as to comparability regarding director compensation arrangements for U.S.-based, nonprofit, tax-exempt organizations possessing a global employee base.

(d) After having reviewed the Independent Valuation Expert's Reasoned Written Opinion, the Board shall meet with the expert to discuss the expert's opinion and to ask questions of the expert regarding the expert's opinion, the comparability data obtained and relied upon, and the conclusions reached by the expert.

(e) The Board shall adequately document the basis for any determination the Board makes regarding a Director compensation arrangement concurrently with making that determination.

(f) In addition to authorizing payment of compensation for services as Directors as set forth in this Section 7.22, the Board may also authorize the reimbursement of actual and necessary reasonable expenses incurred by any Director and by Liaisons performing their duties as Directors or Liaisons.

(g) As used in this Section 7.22, the following terms shall have the following meanings:

(i) An "**Independent Valuation Expert**" means a person retained by ICANN (Internet Corporation for Assigned Names and Numbers) to value compensation arrangements that: (A) holds itself out to the public as a compensation consultant; (B) performs valuations regarding compensation arrangements on a regular basis, with a majority of its compensation consulting services performed for persons other than ICANN (Internet

Corporation for Assigned Names and Numbers); (C) is qualified to make valuations of the type of services involved in any engagement by and for ICANN (Internet Corporation for Assigned Names and Numbers); (D) issues to ICANN (Internet Corporation for Assigned Names and Numbers) a Reasoned Written Opinion regarding a particular compensation arrangement; and (E) includes in its Reasoned Written Opinion a certification that it meets the requirements set forth in (A) through (D) of this definition.

(ii) A **"Reasoned Written Opinion"** means a written opinion of a valuation expert who meets the requirements of Section 7.22(g)(i)(A) through (D). To be reasoned, the opinion must be based upon a full disclosure by ICANN (Internet Corporation for Assigned Names and Numbers) to the valuation expert of the factual situation regarding the compensation arrangement that is the subject of the opinion, the opinion must articulate the applicable valuation standards relevant in valuing such compensation arrangement, the opinion must apply those standards to such compensation arrangement, and the opinion must arrive at a conclusion regarding whether the compensation arrangement is within the range of Reasonable Compensation for the services covered by the arrangement. A written opinion is reasoned even though it reaches a conclusion that is subsequently determined to be incorrect so long as the opinion addresses itself to the facts and the applicable standards. However, a written opinion is not reasoned if it does nothing more than recite the facts and express a conclusion.

(iii) **"Reasonable Compensation"** shall have the meaning set forth in §53.4958-4(b)(1)(ii) of the Regulations issued under §4958 of the Code.

(h) Each of the Liaisons, with the exception of the Governmental Advisory Committee (Advisory Committee) Liaison, shall be entitled to receive compensation for his or her services as a Liaison. If the Board determines to offer a compensation arrangement to one or more Liaisons, the Board shall approve that arrangement by a required three-fourths (3/4) vote.

## Section 7.23. PRESUMPTION OF ASSENT

A Director present at a Board meeting at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention is entered in the minutes of the meeting, or unless such Director files a written dissent or abstention to such action with the person acting as the secretary of the meeting before the adjournment thereof, or forwards such dissent or abstention by registered mail to the Secretary immediately after the

adjournment of the meeting. Such right to dissent or abstain shall not apply to a Director who voted in favor of such action.

## **Section 7.24 INTERIM BOARD**

Except in circumstances in which urgent decisions are needed to protect the security, stability or resilience of the DNS (Domain Name System) or to the extent necessary to comply with its fiduciary obligations under applicable law, a Board that consists of a majority or more of Interim Directors (an "**Interim Board**") shall (a) consult with the chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) before making major decisions and (b) consult through a community forum (in a manner consistent with the process for a Rejection Action Community Forum pursuant to Section 2.3 of Annex D) prior to taking any action that would, if implemented, materially change ICANN (Internet Corporation for Assigned Names and Numbers)'s strategy, policies or management, including replacement of the then-serving President. Interim Directors shall be entitled to compensation as provided in this Article 7.

## **Section 7.25 COMMUNICATION OF DESIGNATION**

Upon its receipt of nominations as provided in Articles 7 through 12, the EC (Empowered Community) Administration, on behalf of the EC (Empowered Community), shall promptly notify the Secretary of the EC (Empowered Community)'s designation of individuals to fill seats on the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall post all such designations promptly to the Website.

## **ARTICLE 8 NOMINATING COMMITTEE**

### **Section 8.1. DESCRIPTION**

There shall be a Nominating Committee of ICANN (Internet Corporation for Assigned Names and Numbers) ("**Nominating Committee**"), responsible for nominating all Directors except the President and those Directors nominated by Decisional Participants; for nominating two directors of PTI (in accordance with the articles of incorporation and bylaws of PTI); and for such other selections as are set forth in these Bylaws. Notification of the Nominating Committee's Director nominations shall be given by the Nominating Committee Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25. Notification of the Nominating Committee's PTI director nomination shall be given to the Secretary.

## Section 8.2. COMPOSITION

The Nominating Committee shall be composed of the following persons:

- (a) A non-voting Chair, appointed by the Board;
- (b) A non-voting Chair-Elect, appointed by the Board as a non-voting advisor;
- (c) A non-voting liaison appointed by the Root Server System Advisory Committee (Advisory Committee) established by Section 12.2(c);
- (d) A non-voting liaison appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Section 12.2(b);
- (e) A non-voting liaison appointed by the Governmental Advisory Committee (Advisory Committee);
- (f) Five voting delegates selected by the At-Large Advisory Committee (Advisory Committee) established by Section 12.2(d);
- (g) Voting delegates to the Nominating Committee shall be selected from the Generic Names Supporting Organization (Supporting Organization) established by Article 11, as follows:
  - (i) One delegate from the Registries Stakeholder Group;
  - (ii) One delegate from the Registrars Stakeholder Group;
  - (iii) Two delegates from the Business Constituency, one representing small business users and one representing large business users;
  - (iv) One delegate from the Internet Service Providers and Connectivity Providers Constituency (as defined in Section 11.5(a)(iii));
  - (v) One delegate from the Intellectual Property Constituency; and
  - (vi) One delegate from consumer and civil society groups, selected by the Non-Commercial Users Constituency.
- (h) One voting delegate each selected by the following entities:

- (i) The Council of the Country Code Names Supporting Organization (Supporting Organization) established by Section 10.3;
- (ii) The Council of the Address Supporting Organization (Supporting Organization) established by Section 9.2; and
- (iii) The Internet Engineering Task Force.

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

### Section 8.3. TERMS

- (a) Each voting delegate shall serve a one-year term. A delegate may serve at most two successive one-year terms, after which at least two years must elapse before the individual is eligible to serve another term.
- (b) The regular term of each voting delegate shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the immediately following ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.
- (c) Non-voting liaisons shall serve during the term designated by the entity that appoints them. The Chair, the Chair-Elect, and any Associate Chair shall serve as such until the conclusion of the next ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.
- (d) It is anticipated that upon the conclusion of the term of the Chair-Elect, the Chair-Elect will be appointed by the Board to the position of Chair. However, the Board retains the discretion to appoint any other person to the position of Chair. At the time of appointing a Chair-Elect, if the Board determines that the person identified to serve as Chair shall be appointed as Chair for a successive term, the Chair-Elect position shall remain vacant for the term designated by the Board.
- (e) Vacancies in the positions of delegate, non-voting liaison, Chair or Chair-Elect shall be filled by the entity entitled to select the delegate, non-voting liaison, Chair or Chair-Elect involved. For any term that the Chair-Elect position is vacant pursuant to Section 8.3(d), or until any other vacancy in the position of Chair-Elect can be filled, a non-voting advisor to the Chair may be appointed by the Board from among persons with prior service on the Board or a Nominating

Committee, including the immediately previous Chair of the Nominating Committee. A vacancy in the position of Associate Chair may be filled by the Chair in accordance with the criteria established by Section 8.2(i).

(f) The existence of any vacancies shall not affect the obligation of the Nominating Committee to carry out the responsibilities assigned to it in these Bylaws.

## Section 8.4. CRITERIA FOR SELECTION OF NOMINATING COMMITTEE DELEGATES

Delegates to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee shall be:

- (a) Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and with experience and competence with collegial large group decision-making;
- (b) Persons with wide contacts, broad experience in the Internet community, and a commitment to the success of ICANN (Internet Corporation for Assigned Names and Numbers);
- (c) Persons whom the selecting body is confident will consult widely and accept input in carrying out their responsibilities;
- (d) Persons who are neutral and objective, without any fixed personal commitments to particular individuals, organizations, or commercial objectives in carrying out their Nominating Committee responsibilities;
- (e) Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers)'s activities on the broader Internet community who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and
- (f) Persons who are able to work and communicate in written and spoken English.

## Section 8.5. DIVERSITY

In carrying out its responsibilities to nominate Directors to fill Seats 1 through 8 (and selections to any other ICANN (Internet Corporation for Assigned Names and Numbers) bodies as the Nominating Committee is responsible for under these Bylaws), the Nominating Committee shall take into account the continuing

membership of the Board (and such other bodies), and seek to ensure that the persons it nominates to serve as Director and selects shall, to the extent feasible and consistent with the other criteria required to be applied by Section 8.4, be guided by Section 1.2(b)(ii).

## Section 8.6. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the Nominating Committee to carry out its responsibilities.

## Section 8.7. PROCEDURES

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

## Section 8.8. INELIGIBILITY FOR SELECTION BY NOMINATING COMMITTEE

No person who serves on the Nominating Committee in any capacity shall be eligible for nomination by any means to any position on the Board or any other ICANN (Internet Corporation for Assigned Names and Numbers) body having one or more membership positions that the Nominating Committee is responsible for filling, until the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting that coincides with, or is after, the conclusion of that person's service on the Nominating Committee.

## Section 8.9. INELIGIBILITY FOR SERVICE ON NOMINATING COMMITTEE

No person who is an employee of or paid consultant to ICANN (Internet Corporation for Assigned Names and Numbers) (including the Ombudsman) shall simultaneously serve in any of the Nominating Committee positions described in Section 8.2.

# ARTICLE 9 ADDRESS SUPPORTING ORGANIZATION

## Section 9.1. DESCRIPTION

(a) The Address Supporting Organization (Supporting Organization) ("**Address Supporting Organization (Supporting Organization)**") or "**ASO (Address**

**Supporting Organization**") shall advise the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses.

(b) The ASO (Address Supporting Organization) shall be the entity established by the Memorandum of Understanding entered on 21 October 2004 between ICANN (Internet Corporation for Assigned Names and Numbers) and the Number Resource Organization ("**NRO (Number Resource Organization)**"), an organization of the existing RIRs.

## Section 9.2. ADDRESS COUNCIL

(a) The ASO (Address Supporting Organization) shall have an Address Council, consisting of the members of the NRO (Number Resource Organization) Number Council.

(b) The Address Council shall nominate individuals to fill Seats 9 and 10 on the Board. Notification of the Address Council's nominations shall be given by the Address Council in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

## ARTICLE 10 COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

### Section 10.1. DESCRIPTION

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

(a) developing and recommending to the Board global policies relating to country-code top-level domains;

(b) Nurturing consensus across the ccNSO (Country Code Names Supporting Organization)'s community, including the name-related activities of ccTLDs;

(c) Coordinating with other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), committees, and constituencies under ICANN (Internet Corporation for Assigned Names and Numbers);

(d) Nominating individuals to fill Seats 11 and 12 on the Board; and

(e) Other responsibilities of the ccNSO (Country Code Names Supporting Organization) as set forth in these Bylaws.

Policies that apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership are only those policies developed according to Section 10.4(j) and Section 10.4(k). However, the ccNSO (Country Code Names Supporting Organization) may also engage in other activities authorized by its members. Adherence to the results of these activities will be voluntary and such activities may include: seeking to develop voluntary best practices for ccTLD (Country Code Top Level Domain) managers, assisting in skills building within the global community of ccTLD (Country Code Top Level Domain) managers, and enhancing operational and technical cooperation among ccTLD (Country Code Top Level Domain) managers.

## Section 10.2. ORGANIZATION

The ccNSO (Country Code Names Supporting Organization) shall consist of (a) ccTLD (Country Code Top Level Domain) managers that have agreed in writing to be members of the ccNSO (Country Code Names Supporting Organization) (see Section 10.4(b)) and (b) a ccNSO (Country Code Names Supporting Organization) Council responsible for managing the policy-development process of the ccNSO (Country Code Names Supporting Organization).

## Section 10.3. ccNSO (Country Code Names Supporting Organization) COUNCIL

(a) The ccNSO (Country Code Names Supporting Organization) Council shall consist of three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each of ICANN (Internet Corporation for Assigned Names and Numbers)'s Geographic Regions in the manner described in Section 10.4(g) through Section 10.4(i); (ii) three ccNSO (Country Code Names Supporting Organization) Council members selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee; (iii) liaisons as described in Section 10.3(b); and (iv) observers as described in Section 10.3(c).

(b) There shall also be one liaison to the ccNSO (Country Code Names Supporting Organization) Council from each of the following organizations, to the extent they choose to appoint such a liaison: (i) the Governmental Advisory Committee (Advisory Committee); (ii) the At-Large Advisory Committee (Advisory Committee); and (iii) each of the Regional Organizations described in Section 10.5. These liaisons shall not be members of or entitled to vote on the ccNSO

(Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. Appointments of liaisons shall be made by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair, and shall be for the term designated by the appointing organization as stated in the written notice. The appointing organization may recall from office or replace its liaison at any time by providing written notice of the recall or replacement to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

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

(d) (i) the regular term of each ccNSO (Country Code Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the third ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter; (ii) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region shall be staggered so that one member's term begins in a year divisible by three, a second member's term begins in the first year following a year divisible by three, and the third member's term begins in the second year following a year divisible by three; and (iii) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the Nominating Committee shall be staggered in the same manner. Each ccNSO (Country Code Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been

selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

(e) A ccNSO (Country Code Names Supporting Organization) Council member may resign at any time by giving written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(f) ccNSO (Country Code Names Supporting Organization) Council members may be removed for not attending three consecutive meetings of the ccNSO (Country Code Names Supporting Organization) Council without sufficient cause or for grossly inappropriate behavior, both as determined by at least a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council.

(g) A vacancy on the ccNSO (Country Code Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any ccNSO (Country Code Names Supporting Organization) Council member. Vacancies in the positions of the three members selected by the Nominating Committee shall be filled for the unexpired term involved by the Nominating Committee giving the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of its selection, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair. Vacancies in the positions of the ccNSO (Country Code Names Supporting Organization) Council members selected by ccNSO (Country Code Names Supporting Organization) members shall be filled for the unexpired term by the procedure described in Section 10.4(g) through (i).

(h) The role of the ccNSO (Country Code Names Supporting Organization) Council is to administer and coordinate the affairs of the ccNSO (Country Code Names Supporting Organization) (including coordinating meetings, including an annual meeting, of ccNSO (Country Code Names Supporting Organization) members as described in Section 10.4(f)) and to manage the development of policy recommendations in accordance with Section 10.6(a). The ccNSO (Country Code Names Supporting Organization) Council shall also undertake such other roles as the members of the ccNSO (Country Code Names Supporting Organization) shall decide from time to time.

(i) The ccNSO (Country Code Names Supporting Organization) Council shall nominate individuals to fill Seats 11 and 12 on the Board by written ballot or by action at a meeting; any such nomination must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office. Notification of the ccNSO (Country Code

Names Supporting Organization) Council's nominations shall be given by the ccNSO (Country Code Names Supporting Organization) Council Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

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

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

(l) Except as provided by Section 10.3(i) and Section 10.3(j), the ccNSO (Country Code Names Supporting Organization) Council shall act at meetings. The ccNSO (Country Code Names Supporting Organization) Council shall meet regularly on a schedule it determines, but not fewer than four times each calendar year. At the discretion of the ccNSO (Country Code Names Supporting Organization) Council, meetings may be held in person or by other means, provided that all ccNSO (Country Code Names Supporting Organization) Council members are permitted to participate by at least one means described in Section 10.3(n). Except where determined by a majority vote of the members of the ccNSO (Country Code Names Supporting Organization) Council present that a closed session is appropriate, physical meetings shall be open to attendance by all interested persons. To the extent practicable, ccNSO (Country Code Names Supporting Organization) Council meetings should be held in conjunction with meetings of

the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

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

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

## Section 10.4. MEMBERSHIP

(a) The ccNSO (Country Code Names Supporting Organization) shall have a membership consisting of ccTLD (Country Code Top Level Domain) managers.

Any ccTLD (Country Code Top Level Domain) manager that meets the membership qualifications stated in Section 10.4(b) shall be entitled to be members of the ccNSO (Country Code Names Supporting Organization). For purposes of this Article 10, a ccTLD (Country Code Top Level Domain) manager is the organization or entity responsible for managing an ISO (International Organization for Standardization) 3166 country-code top-level domain, or under any later variant, for that country-code top-level domain.

(b) Any ccTLD (Country Code Top Level Domain) manager may become a ccNSO (Country Code Names Supporting Organization) member by submitting an application to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive applications. The application shall be in writing in a form designated by the ccNSO (Country Code Names Supporting Organization) Council. The application shall include the ccTLD (Country Code Top Level Domain) manager's recognition of the role of the ccNSO (Country Code Names Supporting Organization) within the ICANN (Internet Corporation for Assigned Names and Numbers) structure as well as the ccTLD (Country Code Top Level Domain) manager's agreement, for the duration of its membership in the ccNSO (Country Code Names Supporting Organization), (i) to adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (ii) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by Section 10.4(j) and Section 10.4(k), and (ii) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under Section 10.7(c). A ccNSO (Country Code Names Supporting Organization) member may resign from membership at any time by giving written notice to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive notices of resignation. Upon resignation the ccTLD (Country Code Top Level Domain) manager ceases to agree to (A) adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (B) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by Section 10.4(j) and Section 10.4(k), and (C) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under Section 10.7(c). In the absence of designation by the ccNSO (Country Code Names Supporting Organization) Council of a person to receive applications and notices of resignation, they shall be sent to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall notify the ccNSO (Country Code Names Supporting Organization) Council of receipt of any such applications and notices.

(c) Neither membership in the ccNSO (Country Code Names Supporting Organization) nor membership in any Regional Organization described in Section 10.5 shall be a condition for access to or registration in the IANA (Internet Assigned Numbers Authority) database. Any individual relationship a ccTLD (Country Code Top Level Domain) manager has with ICANN (Internet Corporation for Assigned Names and Numbers) or the ccTLD (Country Code Top Level Domain) manager's receipt of IANA (Internet Assigned Numbers Authority) services is not in any way contingent upon membership in the ccNSO (Country Code Names Supporting Organization).

(d) The Geographic Regions of ccTLDs shall be as described in Section 7.5. For purposes of this Article 10, managers of ccTLDs within a Geographic Region that are members of the ccNSO (Country Code Names Supporting Organization) are referred to as ccNSO (Country Code Names Supporting Organization) members "within" the Geographic Region, regardless of the physical location of the ccTLD (Country Code Top Level Domain) manager. In cases where the Geographic Region of a ccNSO (Country Code Names Supporting Organization) member is unclear, the ccTLD (Country Code Top Level Domain) member should self-select according to procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council.

(e) Each ccTLD (Country Code Top Level Domain) manager may designate in writing a person, organization, or entity to represent the ccTLD (Country Code Top Level Domain) manager. In the absence of such a designation, the ccTLD (Country Code Top Level Domain) manager shall be represented by the person, organization, or entity listed as the administrative contact in the IANA (Internet Assigned Numbers Authority) database.

(f) There shall be an annual meeting of ccNSO (Country Code Names Supporting Organization) members, which shall be coordinated by the ccNSO (Country Code Names Supporting Organization) Council. Annual meetings should be open for all to attend, and a reasonable opportunity shall be provided for ccTLD (Country Code Top Level Domain) managers that are not members of the ccNSO (Country Code Names Supporting Organization) as well as other non-members of the ccNSO (Country Code Names Supporting Organization) to address the meeting. To the extent practicable, annual meetings of the ccNSO (Country Code Names Supporting Organization) members shall be held in person and should be held in conjunction with meetings of the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

(g) The ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting

Organization) members from each Geographic Region (see Section 10.3(a)(i)) shall be selected through nomination, and if necessary election, by the ccNSO (Country Code Names Supporting Organization) members within that Geographic Region. At least 90 days before the end of the regular term of any ccNSO (Country Code Names Supporting Organization)-member-selected member of the ccNSO (Country Code Names Supporting Organization) Council, or upon the occurrence of a vacancy in the seat of such a ccNSO (Country Code Names Supporting Organization) Council member, the ccNSO (Country Code Names Supporting Organization) Council shall establish a nomination and election schedule, which shall be sent to all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region and posted on the Website.

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

(i) If at the close of nominations there are no more candidates nominated (with seconds and acceptances) in a particular Geographic Region than there are seats on the ccNSO (Country Code Names Supporting Organization) Council available for that Geographic Region, then the nominated candidates shall be selected to serve on the ccNSO (Country Code Names Supporting Organization) Council. Otherwise, an election by written ballot (which may be by e-mail) shall be held to select the ccNSO (Country Code Names Supporting Organization) Council members from among those nominated (with seconds and acceptances), with ccNSO (Country Code Names Supporting Organization) members from the Geographic Region being entitled to vote in the election through their designated representatives. In such an election, a majority of all ccNSO (Country Code Names Supporting Organization) members in the Geographic Region entitled to vote shall constitute a quorum, and the selected candidate must receive the votes of a majority of those cast by ccNSO (Country Code Names Supporting Organization) members within the Geographic Region. The ccNSO (Country Code Names Supporting Organization) Council Chair shall provide the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary prompt written notice of the selection of ccNSO (Country Code Names Supporting Organization) Council members under this paragraph.

(j) Subject to Section 10.4(k), ICANN (Internet Corporation for Assigned Names and Numbers) policies shall apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership to the extent, and only to the extent, that the policies (i) only address issues that are within scope of the ccNSO (Country Code Names Supporting Organization) according to Section 10.6(a) and Annex C; (ii) have been developed through the ccPDP as described in Section 10.6, and (iii) have been recommended as such by the ccNSO (Country Code Names Supporting Organization) to the Board, and (iv) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD (Country Code Top Level Domain) manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN (Internet Corporation for Assigned Names and Numbers) in its activities concerning ccTLDs.

(k) A ccNSO (Country Code Names Supporting Organization) member shall not be bound if it provides a declaration to the ccNSO (Country Code Names Supporting Organization) Council stating that (i) implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in Section 10.4(j)), and (ii) failure to implement the policy would not impair DNS (Domain Name System) operations or interoperability, giving detailed reasons supporting its statements. After investigation, the ccNSO (Country Code Names Supporting Organization) Council will provide a response to the ccNSO (Country Code Names Supporting Organization) member's declaration. If there is a ccNSO (Country Code Names Supporting Organization) Council consensus disagreeing with the declaration, which may be demonstrated by a vote of 14 or more members of the ccNSO (Country Code Names Supporting Organization) Council, the response shall state the ccNSO (Country Code Names Supporting Organization) Council's disagreement with the declaration and the reasons for disagreement. Otherwise, the response shall state the ccNSO (Country Code Names Supporting Organization) Council's agreement with the declaration. If the ccNSO (Country Code Names Supporting Organization) Council disagrees, the ccNSO (Country Code Names Supporting Organization) Council shall review the situation after a six-month period. At the end of that period, the ccNSO (Country Code Names Supporting Organization) Council shall make findings as to (A) whether the ccNSO (Country Code Names Supporting Organization) members' implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in Section 10.4(j)) and (B) whether failure to implement the policy would impair DNS (Domain Name System) operations or interoperability. In making any findings disagreeing with the declaration, the ccNSO (Country Code Names Supporting Organization) Council shall proceed by consensus, which may be demonstrated

by a vote of 14 or more members of the ccNSO (Country Code Names Supporting Organization) Council.

## Section 10.5. REGIONAL ORGANIZATIONS

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

## Section 10.6. ccNSO (Country Code Names Supporting Organization) POLICY-DEVELOPMENT PROCESS AND SCOPE

(a) The scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role shall be as stated in Annex C to these Bylaws; any modifications to the scope shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

(b) In developing global policies within the scope of the ccNSO (Country Code Names Supporting Organization) and recommending them to the Board, the ccNSO (Country Code Names Supporting Organization) shall follow the ccNSO (Country Code Names Supporting Organization) Policy-Development Process ("ccPDP"). The ccPDP shall be as stated in Annex B to these Bylaws; modifications shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

## Section 10.7. STAFF SUPPORT AND FUNDING

(a) Upon request of the ccNSO (Country Code Names Supporting Organization) Council, a member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff may be assigned to support the ccNSO (Country Code Names Supporting Organization) and shall be designated as the ccNSO (Country Code Names Supporting Organization) Staff Manager. Alternatively, the ccNSO (Country Code Names Supporting Organization) Council may designate, at ccNSO (Country Code Names Supporting Organization) expense, another person

to serve as ccNSO (Country Code Names Supporting Organization) Staff Manager. The work of the ccNSO (Country Code Names Supporting Organization) Staff Manager on substantive matters shall be assigned by the Chair of the ccNSO (Country Code Names Supporting Organization) Council, and may include the duties of ccPDP Issue Manager.

(b) Upon request of the ccNSO (Country Code Names Supporting Organization) Council, ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the ccNSO (Country Code Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by ccNSO (Country Code Names Supporting Organization) participants for travel to any meeting of the ccNSO (Country Code Names Supporting Organization) or for any other purpose. The ccNSO (Country Code Names Supporting Organization) Council may make provision, at ccNSO (Country Code Names Supporting Organization) expense, for administrative and operational support in addition or as an alternative to support provided by ICANN (Internet Corporation for Assigned Names and Numbers).

(c) The ccNSO (Country Code Names Supporting Organization) Council shall establish fees to be paid by ccNSO (Country Code Names Supporting Organization) members to defray ccNSO (Country Code Names Supporting Organization) expenses as described in Section 10.7(a) and Section 10.7(b), as approved by the ccNSO (Country Code Names Supporting Organization) members.

(d) Written notices given to the Secretary under this Article 10 shall be permanently retained, and shall be made available for review by the ccNSO (Country Code Names Supporting Organization) Council on request. The Secretary shall also maintain the roll of members of the ccNSO (Country Code Names Supporting Organization), which shall include the name of each ccTLD (Country Code Top Level Domain) manager's designated representative, and which shall be posted on the Website.

## ARTICLE 11 GENERIC NAMES SUPPORTING ORGANIZATION

### Section 11.1. DESCRIPTION

There shall be a policy-development body known as the Generic Names Supporting Organization (Supporting Organization) (the "**Generic Names Supporting Organization (Supporting Organization)**") or "**GNSO (Generic**

**Names Supporting Organization**", and collectively with the ASO (Address Supporting Organization) and ccNSO (Country Code Names Supporting Organization), the "**Supporting Organizations (Supporting Organizations)**"), which shall be responsible for developing and recommending to the Board substantive policies relating to generic top-level domains and other responsibilities of the GNSO (Generic Names Supporting Organization) as set forth in these Bylaws.

## Section 11.2. ORGANIZATION

The GNSO (Generic Names Supporting Organization) shall consist of:

- (a) A number of Constituencies, where applicable, organized within the Stakeholder Groups as described in Section 11.5;
- (b) Four Stakeholder Groups organized within Houses as described in Section 11.5;
- (c) Two Houses within the GNSO (Generic Names Supporting Organization) Council as described in Section 11.3(h);
- (d) A GNSO (Generic Names Supporting Organization) Council responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization), as described in Section 11.3; and
- (e) Except as otherwise defined in these Bylaws, the four Stakeholder Groups and the Constituencies will be responsible for defining their own charters with the approval of their members and of the Board.

## Section 11.3. GNSO (Generic Names Supporting Organization) COUNCIL

(a) Subject to Section 11.5, the GNSO (Generic Names Supporting Organization) Council shall consist of:

- (i) three representatives selected from the Registries Stakeholder Group;
- (ii) three representatives selected from the Registrars Stakeholder Group;
- (iii) six representatives selected from the Commercial Stakeholder Group;
- (iv) six representatives selected from the Non-Commercial Stakeholder Group; and

(v) three representatives selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSO (Generic Names Supporting Organization) Council including, e.g. the making and seconding of motions and of serving as Chair if elected. One Nominating Committee appointee voting representative shall be assigned to each House (as described in Section 11.3(h)) by the Nominating Committee.

No individual representative may hold more than one seat on the GNSO (Generic Names Supporting Organization) Council at the same time.

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

There may also be liaisons to the GNSO (Generic Names Supporting Organization) Council from other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and/or Advisory Committees (Advisory Committees), from time to time. The appointing organization shall designate, revoke, or change its liaison on the GNSO (Generic Names Supporting Organization) Council by providing written notice to the Chair of the GNSO (Generic Names Supporting Organization) Council and to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary. Liaisons shall not be members of or entitled to vote, to make or second motions, or to serve as an officer on the GNSO (Generic Names Supporting Organization) Council, but otherwise liaisons shall be entitled to participate on equal footing with members of the GNSO (Generic Names Supporting Organization) Council.

(b) The regular term of each GNSO (Generic Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter. The regular term of two representatives selected from Stakeholder Groups with three Council seats shall begin in even-numbered years and the regular term of the other representative selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of three representatives selected from Stakeholder Groups with six Council seats shall begin in even-numbered years and the regular term of the other three representatives selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of one of the three members selected by the

Nominating Committee shall begin in even-numbered years and the regular term of the other two of the three members selected by the Nominating Committee shall begin in odd-numbered years. Each GNSO (Generic Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

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

(c) A vacancy on the GNSO (Generic Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any member. Vacancies shall be filled for the unexpired term by the appropriate Nominating Committee or Stakeholder Group that selected the member holding the position before the vacancy occurred by giving the GNSO (Generic Names Supporting Organization) Secretariat written notice of its selection. Procedures for handling Stakeholder Group-appointed GNSO (Generic Names Supporting Organization) Council member vacancies, resignations, and removals are prescribed in the applicable Stakeholder Group Charter.

A GNSO (Generic Names Supporting Organization) Council member selected by the Nominating Committee may be removed for cause: (i) stated by a three-fourths (3/4) vote of all members of the applicable House to which the Nominating Committee appointee is assigned; or (ii) stated by a three-fourths (3/4) vote of all members of each House in the case of the non-voting Nominating Committee appointee (see Section 11.3(h)). Such removal shall be subject to reversal by the ICANN (Internet Corporation for Assigned Names and Numbers) Board on appeal by the affected GNSO (Generic Names Supporting Organization) Council member.

(d) The GNSO (Generic Names Supporting Organization) Council is responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization). It shall adopt such procedures (the "**GNSO (Generic Names Supporting Organization) Operating Procedures**") as it sees fit to carry out that responsibility, provided that such procedures are approved by a

majority vote of each House. The GNSO (Generic Names Supporting Organization) Operating Procedures shall be effective upon the expiration of a twenty-one (21) day public comment period, and shall be subject to Board oversight and review. Until any modifications are recommended by the GNSO (Generic Names Supporting Organization) Council, the applicable procedures shall be as set forth in Section 11.6.

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

(f) The GNSO (Generic Names Supporting Organization) shall nominate by written ballot or by action at a meeting individuals to fill Seats 13 and 14 on the Board. Each of the two voting Houses of the GNSO (Generic Names Supporting Organization), as described in Section 11.3(h), shall make a nomination to fill one of two Board seats, as outlined below; any such nomination must have affirmative votes comprising sixty percent (60%) of all the respective voting House members:

(i) the Contracted Parties House (as described in Section 11.3(h)(i)) shall select a representative to fill Seat 13; and

(ii) the Non-Contracted Parties House (as described in Section 11.3(h)(ii)) shall select a representative to fill Seat 14.

Election procedures are defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

Notification of the Board seat nominations shall be given by the GNSO (Generic Names Supporting Organization) Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(g) The GNSO (Generic Names Supporting Organization) Council shall select the GNSO (Generic Names Supporting Organization) Chair for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. Each House (as described in Section 11.3(h)) shall select a Vice-Chair, who will be a Vice-Chair of the whole of the GNSO (Generic Names Supporting Organization) Council, for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. The procedures for selecting the Chair and any other officers are contained in the GNSO (Generic Names Supporting Organization) Operating Procedures. In the event that the

GNSO (Generic Names Supporting Organization) Council has not elected a GNSO (Generic Names Supporting Organization) Chair by the end of the previous Chair's term, the Vice-Chairs will serve as Interim GNSO (Generic Names Supporting Organization) Co-Chairs until a successful election can be held.

(h) Except as otherwise required in these Bylaws, for voting purposes, the GNSO (Generic Names Supporting Organization) Council (see Section 11.3(a)) shall be organized into a bicameral House structure as described below:

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

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

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

(i) Except as otherwise specified in these Bylaws, Annex A, Annex A-1 or Annex A-2 hereto, or the GNSO (Generic Names Supporting Organization) Operating Procedures, the default threshold to pass a GNSO (Generic Names Supporting Organization) Council motion or other voting action requires a simple majority vote of each House. The voting thresholds described below shall apply to the following GNSO (Generic Names Supporting Organization) actions:

(i) Create an Issues Report: requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House.

(ii) Initiate a Policy Development Process ("**PDP (Policy Development Process)**") Within Scope (as described in Annex A): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(iii) Initiate a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of GNSO (Generic Names Supporting Organization) Supermajority (as defined in Section 11.3(i)(xix)).

(iv) Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Within Scope: requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(v) Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(vi) Changes to an Approved PDP (Policy Development Process) Team Charter: For any PDP (Policy Development Process) Team Charter approved under (iv) or (v) above, the GNSO (Generic Names Supporting Organization) Council may approve an amendment to the Charter through a simple majority vote of each House.

(vii) Terminate a PDP (Policy Development Process): Once initiated, and prior to the publication of a Final Report, the GNSO (Generic Names Supporting Organization) Council may terminate a PDP (Policy Development Process) only for significant cause, upon a motion that passes with a GNSO (Generic Names Supporting Organization) Supermajority Vote in favor of termination.

(viii) Approve a PDP (Policy Development Process) Recommendation Without a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO (Generic Names Supporting Organization) Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation.

(ix) Approve a PDP (Policy Development Process) Recommendation With a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority,

(x) Approve a PDP (Policy Development Process) Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence

of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

(xi) Modification of Approved PDP (Policy Development Process) Recommendation: Prior to Final Approval by the Board, an Approved PDP (Policy Development Process) Recommendation may be modified or amended by the GNSO (Generic Names Supporting Organization) Council with a GNSO (Generic Names Supporting Organization) Supermajority vote.

(xii) Initiation of an Expedited Policy Development Process ("**EPDP**"): requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xiii) Approve an EPDP Team Charter: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xiv) Approval of EPDP Recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xv) Approve an EPDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

(xvi) Initiation of a GNSO (Generic Names Supporting Organization) Guidance Process ("**GGP**"): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(xvii) Rejection of Initiation of a GGP Requested by the Board: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xviii) Approval of GGP Recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xix) A "**GNSO (Generic Names Supporting Organization) Supermajority**" shall mean: (A) two-thirds (2/3) of the Council members of each House, or (B) three-fourths (3/4) of the Council members of one House and a majority of the Council members of the other House.

## Section 11.4. STAFF SUPPORT AND FUNDING

(a) A member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff shall be assigned to support the GNSO (Generic Names Supporting Organization), whose work on substantive matters shall be assigned by the Chair of the GNSO (Generic Names Supporting Organization) Council, and shall be designated as the GNSO (Generic Names Supporting Organization) Staff Manager ("**Staff Manager**").

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the GNSO (Generic Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by GNSO (Generic Names Supporting Organization) participants for travel to any meeting of the GNSO (Generic Names Supporting Organization) or for any other purpose. ICANN (Internet Corporation for Assigned Names and Numbers) may, at its discretion, fund travel expenses for GNSO (Generic Names Supporting Organization) participants under any travel support procedures or guidelines that it may adopt from time to time.

## Section 11.5. STAKEHOLDER GROUPS

(a) The following "**Stakeholder Groups**" are hereby recognized as representative of a specific group of one or more "**Constituencies**" or interest groups:

(i) Registries Stakeholder Group representing all gTLD (generic Top Level Domain) registries under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

(ii) Registrars Stakeholder Group representing all registrars accredited by and under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

(iii) Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet ("**Commercial Stakeholder Group**"), which includes the Business Constituency ("**Business Constituency**"), Intellectual Property Constituency ("**Intellectual Property Constituency**") and the Internet Service Providers and Connectivity Providers Constituency ("**Internet Service Providers and Connectivity Providers Constituency**"); and

(iv) Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.

(b) Each Stakeholder Group is assigned a specific number of GNSO (Generic Names Supporting Organization) Council seats in accordance with Section 11.3(a).

(c) Each Stakeholder Group identified in Section 11.3(a) and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Recognition is granted by the Board based upon the extent to which, in fact, the entity represents the global interests of the stakeholder communities it purports to represent and operates to the maximum extent feasible in an open and transparent manner consistent with procedures designed to ensure fairness. Stakeholder Group and Constituency Charters may be reviewed periodically as prescribed by the Board.

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

- (i) A detailed explanation of why the addition of such a Constituency will improve the ability of the GNSO (Generic Names Supporting Organization) to carry out its policy-development responsibilities;
- (ii) A detailed explanation of why the proposed new Constituency adequately represents, on a global basis, the stakeholders it seeks to represent;
- (iii) A recommendation for organizational placement within a particular Stakeholder Group; and
- (iv) A proposed charter that adheres to the principles and procedures contained in these Bylaws.

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

(e) The Board may create new Constituencies as described in Section 11.5(c) in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of ICANN (Internet Corporation for Assigned Names and Numbers). In the event the Board is considering acting on its own motion it shall post a detailed explanation of why such action is necessary or desirable, set a reasonable time for public comment, and not make a final

decision on whether to create such new Constituency until after reviewing all comments received. Whenever the Board posts a petition or recommendation for a new Constituency for public comment, the Board shall notify the GNSO (Generic Names Supporting Organization) Council and the appropriate Stakeholder Group affected and shall consider any response to that notification prior to taking action.

## Section 11.6. POLICY DEVELOPMENT PROCESS

The policy-development procedures to be followed by the GNSO (Generic Names Supporting Organization) shall be as stated in Annex A to these Bylaws. These procedures may be supplemented or revised in the manner stated in Section 11.3(d).

## ARTICLE 12 ADVISORY COMMITTEES

### Section 12.1. GENERAL

The Board may create one or more "**Advisory Committees (Advisory Committees)**" in addition to those set forth in this Article 12. Advisory Committee (Advisory Committee) membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees (Advisory Committees) shall have no legal authority to act for ICANN (Internet Corporation for Assigned Names and Numbers), but shall report their findings and recommendations to the Board.

### Section 12.2. SPECIFIC ADVISORY COMMITTEES

There shall be at least the following Advisory Committees (Advisory Committees):

(a) Governmental Advisory Committee (Advisory Committee)

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

(ii) Membership in the Governmental Advisory Committee (Advisory Committee) shall be open to all national governments. Membership shall also be open to Distinct Economies as recognized in international fora, and

multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee (Advisory Committee) through its Chair.

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

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

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

(vi) The Governmental Advisory Committee (Advisory Committee) shall annually appoint one Liaison to the Board, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee.

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

(viii) The Board shall notify the Chair of the Governmental Advisory Committee (Advisory Committee) in a timely manner of any proposal raising public policy issues on which it or any of the Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

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

(x) The advice of the Governmental Advisory Committee (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 Board determines to take an action that is not consistent with Governmental Advisory Committee (Advisory Committee) advice, it shall so inform the Governmental Advisory Committee (Advisory Committee) and state the reasons why it decided not to follow that advice. Any Governmental Advisory Committee (Advisory Committee) advice approved by a full Governmental Advisory Committee (Advisory Committee) consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection ("**GAC (Governmental Advisory Committee) Consensus (Consensus) Advice**"), may only be rejected by a vote of no less than 60% of the Board, and the Governmental Advisory Committee (Advisory Committee) and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. The Governmental Advisory Committee (Advisory Committee) will state whether any advice it gives to the Board is GAC (Governmental Advisory Committee) Consensus (Consensus) Advice.

(xi) If GAC (Governmental Advisory Committee) Consensus (Consensus) Advice is rejected by the Board pursuant to Section 12.2(a)(x) and if no such mutually acceptable solution can be found, the Board will state in its final decision the reasons why the Governmental Advisory Committee (Advisory Committee) advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee (Advisory Committee) members with regard to public policy issues falling within their responsibilities.

(b) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)

(i) The role of the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) ("**Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)**") or "**SSAC (Security and Stability Advisory Committee)**") is to advise the ICANN (Internet

Corporation for Assigned Names and Numbers) community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. It shall have the following responsibilities:

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

(B) To engage in ongoing threat assessment and risk analysis of the Internet naming and address allocation services to assess where the principal threats to stability and security lie, and to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community accordingly. The SSAC (Security and Stability Advisory Committee) shall recommend any necessary audit activity to assess the current status of DNS (Domain Name System) and address allocation security in relation to identified risks and threats.

(C) To communicate with those who have direct responsibility for Internet naming and address allocation security matters (IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (as defined in Section 12.2(c)(i)), RIRs, name registries, etc.), to ensure that its advice on security risks, issues, and priorities is properly synchronized with existing standardization, deployment, operational, and coordination activities. The SSAC (Security and Stability Advisory Committee) shall monitor these activities and inform the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on their progress, as appropriate.

(D) To report periodically to the Board on its activities.

(E) To make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.

(ii) The SSAC (Security and Stability Advisory Committee)'s chair and members shall be appointed by the Board. SSAC (Security and Stability Advisory Committee) membership appointment shall be for a three-year

term, commencing on 1 January and ending the second year thereafter on 31 December. The chair and members may be re-appointed, and there are no limits to the number of terms the chair or members may serve. The SSAC (Security and Stability Advisory Committee) chair may provide recommendations to the Board regarding appointments to the SSAC (Security and Stability Advisory Committee). The SSAC (Security and Stability Advisory Committee) chair shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the SSAC (Security and Stability Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have the power to remove SSAC (Security and Stability Advisory Committee) appointees as recommended by or in consultation with the SSAC (Security and Stability Advisory Committee).

(iii) The SSAC (Security and Stability Advisory Committee) shall annually appoint a Liaison to the Board according to Section 7.9.

(c) Root Server System Advisory Committee (Advisory Committee)

(i) The role of the Root Server System Advisory Committee (Advisory Committee) ("**Root Server System Advisory Committee (Advisory Committee)**" or "**RSSAC (Root Server System Advisory Committee)**") is to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System. It shall have the following responsibilities:

(A) Communicate on matters relating to the operation of the Root Servers (Root Servers) and their multiple instances with the Internet technical community and the ICANN (Internet Corporation for Assigned Names and Numbers) community. The RSSAC (Root Server System Advisory Committee) shall gather and articulate requirements to offer to those engaged in technical revision of the protocols and best common practices related to the operation of DNS (Domain Name System) servers.

(B) Communicate on matters relating to the administration of the Root Zone (Root Zone) with those who have direct responsibility for that administration. These matters include the processes and procedures for the production of the Root Zone (Root Zone) File.

(C) Engage in ongoing threat assessment and risk analysis of the Root Server System and recommend any necessary audit activity to assess the

current status of root servers and the root zone.

(D) Respond to requests for information or opinions from the Board.

(E) Report periodically to the Board on its activities.

(F) Make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.

(ii) The RSSAC (Root Server System Advisory Committee) shall be led by two co-chairs. The RSSAC (Root Server System Advisory Committee)'s chairs and members shall be appointed by the Board.

(A) RSSAC (Root Server System Advisory Committee) membership appointment shall be for a three-year term, commencing on 1 January and ending the second year thereafter on 31 December. Members may be re-appointed, and there are no limits to the number of terms the members may serve. The RSSAC (Root Server System Advisory Committee) chairs shall provide recommendations to the Board regarding appointments to the RSSAC (Root Server System Advisory Committee). If the Board declines to appoint a person nominated by the RSSAC (Root Server System Advisory Committee), then it will provide the rationale for its decision. The RSSAC (Root Server System Advisory Committee) chairs shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the RSSAC (Root Server System Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have the power to remove RSSAC (Root Server System Advisory Committee) appointees as recommended by or in consultation with the RSSAC (Root Server System Advisory Committee).

(B) The RSSAC (Root Server System Advisory Committee) shall recommend the appointment of the chairs to the Board following a nomination process that it devises and documents.

(iii) The RSSAC (Root Server System Advisory Committee) shall annually appoint a Liaison to the Board according to Section 7.9.

(d) At-Large Advisory Committee (Advisory Committee)

(i) The At-Large Advisory Committee (Advisory Committee) ("**At-Large Advisory Committee (Advisory Committee)**" or "**ALAC (At-Large Advisory Committee)**") is the primary organizational home within ICANN (Internet Corporation for Assigned Names and Numbers) for individual

Internet users. The role of the ALAC (At-Large Advisory Committee) shall be to consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers), insofar as they relate to the interests of individual Internet users. This includes policies created through ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations), as well as the many other issues for which community input and advice is appropriate. The ALAC (At-Large Advisory Committee), which plays an important role in ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, also coordinates some of ICANN (Internet Corporation for Assigned Names and Numbers)'s outreach to individual Internet users.

(ii) The ALAC (At-Large Advisory Committee) shall consist of (A) two members selected by each of the Regional At-Large Organizations ("**RALOs**") established according to Section 12.2(d)(vii), and (B) five members selected by the Nominating Committee. The five members selected by the Nominating Committee shall include one citizen of a country within each of the five Geographic Regions established according to Section 7.5.

(iii) The regular terms of members of the ALAC (At-Large Advisory Committee) shall be as follows:

(A) The term of one member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an even-numbered year.

(B) The term of the other member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an odd-numbered year.

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

(D) The regular term of each member shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the term began.

(iv) The Chair of the ALAC (At-Large Advisory Committee) shall be elected by the members of the ALAC (At-Large Advisory Committee) pursuant to procedures adopted by the ALAC (At-Large Advisory Committee).

(v) The ALAC (At-Large Advisory Committee) shall, after consultation with each RALO, annually appoint five voting delegates (no two of whom shall be citizens of countries in the same Geographic Region) to the Nominating Committee.

(vi) The At-Large Advisory Committee (Advisory Committee) may designate non-voting liaisons to each of the ccNSO (Country Code Names Supporting Organization) Council and the GNSO (Generic Names Supporting Organization) Council.

(vii) There shall be one RALO for each Geographic Region established according to Section 7.5. Each RALO shall serve as the main forum and coordination point for public input to ICANN (Internet Corporation for Assigned Names and Numbers) in its Geographic Region and shall be a non-profit organization certified by ICANN (Internet Corporation for Assigned Names and Numbers) according to criteria and standards established by the Board based on recommendations of the At-Large Advisory Committee (Advisory Committee). An organization shall become the recognized RALO for its Geographic Region upon entering a Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) addressing the respective roles and responsibilities of ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO regarding the process for selecting ALAC (At-Large Advisory Committee) members and requirements of openness, participatory opportunities, transparency, accountability, and diversity in the RALO's structure and procedures, as well as criteria and standards for the RALO's constituent At-Large Structures ("**At-Large Structures**").

(viii) Each RALO shall be comprised of self-supporting At-Large Structures within its Geographic Region that have been certified to meet the requirements of the RALO's Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) according to Section 12.2(d)(ix). If so provided by its Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers), a RALO may also include individual Internet users who are citizens or residents of countries within the RALO's Geographic Region.

(ix) Membership in the At-Large Community

(A) The criteria and standards for the certification of At-Large Structures within each Geographic Region shall be established by the Board based on recommendations from the ALAC (At-Large Advisory Committee) and shall be stated in the Memorandum of Understanding between ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO for each Geographic Region.

(B) The criteria and standards for the certification of At-Large Structures shall be established in such a way that participation by individual Internet users who are citizens or residents of countries within the Geographic Region of the RALO will predominate in the operation of each At-Large Structure within the RALO, while not necessarily excluding additional participation, compatible with the interests of the individual Internet users within the region, by others.

(C) Each RALO's Memorandum of Understanding shall also include provisions designed to allow, to the greatest extent possible, every individual Internet user who is a citizen of a country within the RALO's Geographic Region to participate in at least one of the RALO's At-Large Structures.

(D) To the extent compatible with these objectives, the criteria and standards should also afford to each RALO the type of structure that best fits the customs and character of its Geographic Region.

(E) Once the criteria and standards have been established as provided in this Section 12.2(d)(ix), the ALAC (At-Large Advisory Committee), with the advice and participation of the RALO where the applicant is based, shall be responsible for certifying organizations as meeting the criteria and standards for At-Large Structure accreditation.

(F) Decisions to certify or decertify an At-Large Structure shall be made as decided by the ALAC (At-Large Advisory Committee) in its rules of procedure, save always that any changes made to the rules of procedure in respect of an At-Large Structure applications shall be subject to review by the RALOs and by the Board.

(G) Decisions as to whether to accredit, not to accredit, or disaccredit an At-Large Structure shall be subject to review according to procedures established by the Board.

(H) On an ongoing basis, the ALAC (At-Large Advisory Committee) may also give advice as to whether a prospective At-Large Structure meets the

applicable criteria and standards.

(x) The ALAC (At-Large Advisory Committee) is also responsible, working in conjunction with the RALOs, for coordinating the following activities:

(A) Nominating individuals to fill Seat 15 on the Board. Notification of the At-Large Community's nomination shall be given by the ALAC (At-Large Advisory Committee) Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(B) Keeping the community of individual Internet users informed about the significant news from ICANN (Internet Corporation for Assigned Names and Numbers);

(C) Distributing (through posting or otherwise) an updated agenda, news about ICANN (Internet Corporation for Assigned Names and Numbers), and information about items in the ICANN (Internet Corporation for Assigned Names and Numbers) policy-development process;

(D) Promoting outreach activities in the community of individual Internet users;

(E) Developing and maintaining on-going information and education programs, regarding ICANN (Internet Corporation for Assigned Names and Numbers) and its work;

(F) Establishing an outreach strategy about ICANN (Internet Corporation for Assigned Names and Numbers) issues in each RALO's Geographic Region;

(G) Participating in the ICANN (Internet Corporation for Assigned Names and Numbers) policy development processes and providing input and advice that accurately reflects the views of individual Internet users;

(H) Making public, and analyzing, ICANN (Internet Corporation for Assigned Names and Numbers)'s proposed policies and its decisions and their (potential) regional impact and (potential) effect on individuals in the region;

(I) Offering Internet-based mechanisms that enable discussions among members of At-Large Structures; and

(xi) Establishing mechanisms and processes that enable two-way communication between members of At-Large Structures and those involved in ICANN (Internet Corporation for Assigned Names and Numbers) decision-making, so interested individuals can share their views on pending ICANN (Internet Corporation for Assigned Names and Numbers) issues.

### Section 12.3. PROCEDURES

Each Advisory Committee (Advisory Committee) shall determine its own rules of procedure and quorum requirements; provided that each Advisory Committee (Advisory Committee) shall ensure that the advice provided to the Board by such Advisory Committee (Advisory Committee) is communicated in a clear and unambiguous written statement, including the rationale for such advice. The Board will respond in a timely manner to formal advice from all Advisory Committees (Advisory Committees) explaining what action it took and the rationale for doing so.

### Section 12.4. TERM OF OFFICE

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

### Section 12.5. VACANCIES

Vacancies on any Advisory Committee (Advisory Committee) shall be filled in the same manner as provided in the case of original appointments.

### Section 12.6. COMPENSATION

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

## ARTICLE 13 OTHER ADVISORY MECHANISMS

## Section 13.1. EXTERNAL EXPERT ADVICE

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

### (b) Types of Expert Advisory Panels

(i) On its own initiative or at the suggestion of any ICANN (Internet Corporation for Assigned Names and Numbers) body, the Board may appoint, or authorize the President to appoint, Expert Advisory Panels consisting of public or private sector individuals or entities. If the advice sought from such Panels concerns issues of public policy, the provisions of Section 13.1(c) shall apply.

(ii) In addition, in accordance with Section 13.1(c), the Board may refer issues of public policy pertinent to matters within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission to a multinational governmental or treaty organization.

### (c) Process for Seeking Advice: Public Policy Matters

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

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

(iii) The Board shall, as appropriate, transmit any request for advice from a multinational governmental or treaty organization, including specific terms of reference, to the Governmental Advisory Committee (Advisory

Committee), with the suggestion that the request be transmitted by the Governmental Advisory Committee (Advisory Committee) to the multinational governmental or treaty organization.

(d) Process for Seeking and Advice: Other Matters. Any reference of issues not concerning public policy to an Expert Advisory Panel by the Board or President in accordance with Section 13.1(b)(i) shall be made pursuant to terms of reference describing the issues on which input and advice is sought and the procedures and schedule to be followed.

(e) Receipt of Expert Advice and its Effect. External advice pursuant to this Section 13.1 shall be provided in written form. Such advice is advisory and not binding, and is intended to augment the information available to the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body in carrying out its responsibilities.

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

## Section 13.2. TECHNICAL LIAISON GROUP

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

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

(c) Role. The role of the TLG organizations shall be to channel technical information and guidance to the Board and to other ICANN (Internet Corporation for Assigned Names and Numbers) entities. This role has both a responsive component and an active "watchdog" component, which involve the following responsibilities:

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

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

(d) TLG Procedures. The TLG shall not have officers or hold meetings, nor shall it provide policy advice to the Board as a committee (although TLG organizations may individually be asked by the Board to do so as the need arises in areas relevant to their individual charters). Neither shall the TLG debate or otherwise coordinate technical issues across the TLG organizations; establish or attempt to establish unified positions; or create or attempt to create additional layers or structures within the TLG for the development of technical standards or for any other purpose.

(e) Technical Work with the IETF (Internet Engineering Task Force). The TLG shall have no involvement with ICANN (Internet Corporation for Assigned Names and Numbers)'s work for the Internet Engineering Task Force (IETF (Internet Engineering Task Force)), Internet Research Task Force, or the Internet Architecture Board (IAB (Internet Architecture Board)), as described in the IETF (Internet Engineering Task Force)-ICANN (Internet Corporation for Assigned Names and Numbers) Memorandum of Understanding Concerning the Technical

Work of the Internet Assigned Numbers Authority ratified by the Board on 10 March 2000 and any supplemental agreements thereto.

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

## ARTICLE 14 BOARD AND TEMPORARY COMMITTEES

### Section 14.1. BOARD COMMITTEES

The Board may establish one or more committees of the Board (each, a "**Board Committee**"), which shall continue to exist until otherwise determined by the Board. Only Directors may be appointed to a Committee of the Board; provided, that a Liaison may be appointed as a liaison to a Committee of the Board consistent with their non-voting capacity. If a person appointed to a Committee of the Board ceases to be a Director, such person shall also cease to be a member of any Committee of the Board. Each Committee of the Board shall consist of two or more Directors. The Board may designate one or more Directors as alternate members of any such committee, who may replace any absent member at any meeting of the committee. Committee members may be removed from a committee at any time by a two-thirds (2/3) majority vote of all Directors; provided, however, that in no event shall a Director be removed from a committee unless such removal is approved by not less than a majority of all Directors.

### Section 14.2. POWERS OF BOARD COMMITTEES

(a) The Board may delegate to Committees of the Board all legal authority of the Board except with respect to:

- (i) The filling of vacancies on the Board or on any committee;
- (ii) The amendment or repeal of Bylaws or the Articles of Incorporation or the adoption of new Bylaws or Articles of Incorporation;
- (iii) The amendment or repeal of any resolution of the Board which by its express terms is not so amendable or repealable;

- (iv) The appointment of committees of the Board or the members thereof;
- (v) The approval of any self-dealing transaction, as such transactions are defined in Section 5233(a) of the CCC;
- (vi) The approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget required by Section 22.4 or the Operating Plan or Strategic Plan required by Section 22.5; or
- (vii) The compensation of any Officer described in Article 15.

(b) The Board shall have the power to prescribe the manner in which proceedings of any Committee of the Board shall be conducted. In the absence of any such prescription, such committee shall have the power to prescribe the manner in which its proceedings shall be conducted. Unless these Bylaws, the Board or such committee shall otherwise provide, the regular and special meetings of committees shall be governed by the provisions of Article 7 applicable to meetings and actions of the Board. Each committee shall keep regular minutes of its proceedings and shall report the same to the Board from time to time, as the Board may require.

### Section 14.3. TEMPORARY COMMITTEES

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

## ARTICLE 15 OFFICERS

### Section 15.1. OFFICERS

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

### Section 15.2. ELECTION OF OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be elected annually by the Board, pursuant to the recommendation of the President or, in the case of the President, of the Chair of the Board. Each such officer shall hold his or her office until he or she resigns, is removed, is otherwise disqualified to serve, or his or her successor is elected.

### Section 15.3. REMOVAL OF OFFICERS

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

### Section 15.4. PRESIDENT

The President shall be the Chief Executive Officer (CEO) of ICANN (Internet Corporation for Assigned Names and Numbers) in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio Director, and shall have all the same rights and privileges of any Director. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.

### Section 15.5. SECRETARY

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

### Section 15.6. CHIEF FINANCIAL OFFICER

The Chief Financial Officer ("**CFO**") shall be the chief financial officer of ICANN (Internet Corporation for Assigned Names and Numbers). If required by the Board, the CFO shall give a bond for the faithful discharge of his or her duties in such form and with such surety or sureties as the Board shall determine. The CFO shall have charge and custody of all the funds of ICANN (Internet Corporation for Assigned Names and Numbers) and shall keep or cause to be kept, in books belonging to ICANN (Internet Corporation for Assigned Names and Numbers), full and accurate amounts of all receipts and disbursements, and shall

deposit all money and other valuable effects in the name of ICANN (Internet Corporation for Assigned Names and Numbers) in such depositories as may be designated for that purpose by the Board. The CFO shall disburse the funds of ICANN (Internet Corporation for Assigned Names and Numbers) as may be ordered by the Board or the President and, whenever requested by them, shall deliver to the Board and the President an account of all his or her transactions as CFO and of the financial condition of ICANN (Internet Corporation for Assigned Names and Numbers). The CFO shall be responsible for ICANN (Internet Corporation for Assigned Names and Numbers)'s financial planning and forecasting and shall assist the President in the preparation of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget, the IANA (Internet Assigned Numbers Authority) Budget and Operating Plan. The CFO shall coordinate and oversee ICANN (Internet Corporation for Assigned Names and Numbers)'s funding, including any audits or other reviews of ICANN (Internet Corporation for Assigned Names and Numbers) or its Supporting Organizations (Supporting Organizations). The CFO shall be responsible for all other matters relating to the financial operation of ICANN (Internet Corporation for Assigned Names and Numbers).

## Section 15.7. ADDITIONAL OFFICERS

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

## Section 15.8. COMPENSATION AND EXPENSES

The compensation of any Officer of ICANN (Internet Corporation for Assigned Names and Numbers) shall be approved by the Board. Expenses incurred in connection with performance of their officer duties may be reimbursed to Officers upon approval of the President (in the case of Officers other than the President), by another Officer designated by the Board (in the case of the President), or the Board.

## Section 15.9. CONFLICTS OF INTEREST

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

# ARTICLE 16 POST-TRANSITION IANA (Internet Assigned Numbers Authority) ENTITY

## Section 16.1. DESCRIPTION

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain as a separate legal entity a California nonprofit public benefit corporation (["PTI"]) for the purpose of providing IANA (Internet Assigned Numbers Authority) services, including providing IANA (Internet Assigned Numbers Authority) naming function services pursuant to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, as well as other services as determined by ICANN (Internet Corporation for Assigned Names and Numbers) in coordination with the direct and indirect customers of the IANA (Internet Assigned Numbers Authority) functions. ICANN (Internet Corporation for Assigned Names and Numbers) shall at all times be the sole member of PTI as that term is defined in Section 5056 of the CCC ("**Member**"). For the purposes of these Bylaws, the "IANA (Internet Assigned Numbers Authority) naming function" does not include the Internet Protocol (Protocol) numbers and Autonomous System numbers services (as contemplated by Section 1.1(a)(iii)), the protocol ports and parameters services and the root zone maintainer function.

## Section 16.2. PTI Governance

(a) ICANN (Internet Corporation for Assigned Names and Numbers), in its capacity as the sole Member of PTI, shall elect the directors of PTI in accordance with the articles of incorporation and bylaws of PTI and have all other powers of a sole Member under the CCC except as otherwise provided in these Bylaws.

(b) No amendment or modification of the articles of incorporation of PTI shall be effective unless approved by the EC (Empowered Community) (pursuant to the procedures applicable to Articles Amendments described in Section 25.2, as if such Article Amendment referenced therein refers to an amendment of PTI's articles of incorporation).

(c) ICANN (Internet Corporation for Assigned Names and Numbers) shall not amend or modify the bylaws of PTI in a manner that would effect any of the matters set forth in clauses (i) through (xiv) below (a "**PTI Bylaw Amendment**") if such PTI Bylaw Amendment has been rejected by the EC (Empowered Community) pursuant to the procedures described in Section 16.2(e):

(i) any change to the corporate form of PTI to an entity that is not a California nonprofit public benefit corporation organized under the CCC or

any successor statute;

(ii) any change in the corporate mission of PTI that is materially inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as set forth in these Bylaws;

(iii) any change to the status of PTI as a corporation with members;

(iv) any change in the rights of ICANN (Internet Corporation for Assigned Names and Numbers) as the sole Member of PTI, including voting, classes of membership, rights, privileges, preferences, restrictions and conditions;

(v) any change that would grant rights to any person or entity (other than ICANN (Internet Corporation for Assigned Names and Numbers)) with respect to PTI as designators or otherwise to: (A) elect or designate directors of PTI; or (B) approve any amendments to the articles of incorporation or bylaws of PTI;

(vi) any change in the number of directors of the board of directors of PTI (the "**PTI Board**");

(vii) any changes in the allocation of directors on the PTI Board between independent directors and employees of ICANN (Internet Corporation for Assigned Names and Numbers) or employees of PTI or to the definition of "independent" (as used in PTI's bylaws) for purposes of determining whether a director of PTI is independent;

(viii) the creation of any committee of the PTI Board with the power to exercise the authority of the PTI Board;

(ix) any change in the procedures for nominating independent PTI directors;

(x) the creation of classes of PTI directors or PTI directors with different terms or voting rights;

(xi) any change in PTI Board quorum requirements or voting requirements;

(xii) any change to the powers and responsibilities of the PTI Board or the PTI officers;

(xiii) any change to the rights to exculpation and indemnification that is adverse to the exculpated or indemnified party, including with respect to

advancement of expenses and insurance, provided to directors, officers, employees or other agents of PTI; or

(xiv) any change to the requirements to amend the articles of incorporation or bylaws of PTI.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall not take any of the following actions (together with the PTI Bylaw Amendments, "**PTI Governance Actions**") if such PTI Governance Action has been rejected by the EC (Empowered Community) pursuant to the procedures described in Section 16.2(e).

(i) Any resignation by ICANN (Internet Corporation for Assigned Names and Numbers) as sole Member of PTI or any transfer, disposition, cession, expulsion, suspension or termination by ICANN (Internet Corporation for Assigned Names and Numbers) of its membership in PTI or any transfer, disposition, cession, expulsion, suspension or termination by ICANN (Internet Corporation for Assigned Names and Numbers) of any right arising from its membership in PTI.

(ii) Any sale, transfer or other disposition of PTI's assets, other than (A) in the ordinary course of PTI's business, (B) in connection with an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process (as defined in Section 19.1(a)) that has been approved in accordance with Article 19 or (C) the disposition of obsolete, damaged, redundant or unused assets.

(iii) Any merger, consolidation, sale or reorganization of PTI.

(iv) Any dissolution, liquidation or winding-up of the business and affairs of PTI or the commencement of any other voluntary bankruptcy proceeding of PTI.

(e) Promptly after the Board approves a PTI Governance Action (a "**PTI Governance Action Approval**"), the Secretary shall provide a notice of the Board's decision to the EC (Empowered Community) Administration and the Decisional Participants ("**Board Notice**"), which Board Notice shall enclose a copy of the PTI Governance Action that is the subject of the PTI Governance Action Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC

(Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) A PTI Governance Action shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice (as defined in Section 2.2(c)(i) of Annex D) is not timely delivered by the Rejection Action Petitioning Decisional Participant (as defined in Section 2.2(c)(i) of Annex D) to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice (as defined in Section 2.2(c)(ii) of Annex D) is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Period (as defined in Section 2.2(b) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition (as defined in Section 2.2(d)(i) of Annex D) is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period (as defined in Section 2.2(d)(i) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice (as defined in Section 2.4(b) of Annex D) is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the

Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period (as defined in Section 2.4(a) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(ii) A PTI Governance Action that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(iii) Following receipt of an EC (Empowered Community) Rejection Notice relating to a PTI Governance Action, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the PTI Governance Action in determining whether or not to develop a new PTI Governance Action and the substance of such new PTI Governance Action, which shall be subject to the procedures of this Section 16.2.

### Section 16.3. IANA (Internet Assigned Numbers Authority) NAMING FUNCTION CONTRACT

(a) On or prior to 1 October 2016, ICANN (Internet Corporation for Assigned Names and Numbers) shall enter into a contract with PTI for the performance of the IANA (Internet Assigned Numbers Authority) naming function (as it may be amended or modified, the "**IANA (Internet Assigned Numbers Authority) Naming Function Contract**") and a related statement of work (the "**IANA (Internet Assigned Numbers Authority) Naming Function SOW**"). Except as to implement any modification, waiver or amendment to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW related to an IFR Recommendation or Special IFR Recommendation approved pursuant to Section 18.6 or an SCWG Recommendation approved pursuant to Section 19.4 (which, for the avoidance of doubt, shall not be subject to this Section 16.3(a)), ICANN (Internet Corporation for Assigned Names and Numbers) shall not agree to modify, amend or waive any Material Terms (as defined below) of the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW if a majority of

each of the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils reject the proposed modification, amendment or waiver. The following are the "**Material Terms**" of the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW:

- (i) The parties to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;
- (ii) The initial term and renewal provisions of the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;
- (iii) The manner in which the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW may be terminated;
- (iv) The mechanisms that are available to enforce the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW;
- (v) The role and responsibilities of the CSC (as defined in Section 17.1), escalation mechanisms and/or the IFR (as defined in Section 18.1);
- (vi) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's provisions requiring that fees charged by PTI be based on direct costs and resources incurred by PTI;
- (vii) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's prohibition against subcontracting;
- (viii) The availability of the IRP as a point of escalation for claims of PTI's failure to meet defined service level expectations;
- (ix) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's audit requirements; and
- (x) The requirements related to ICANN (Internet Corporation for Assigned Names and Numbers) funding of PTI.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall enforce its rights under the IANA (Internet Assigned Numbers Authority) Naming Function

Contract and the IANA (Internet Assigned Numbers Authority) Naming Function SOW.

## ARTICLE 17 CUSTOMER STANDING COMMITTEE

### Section 17.1. DESCRIPTION

ICANN (Internet Corporation for Assigned Names and Numbers) shall establish a Customer Standing Committee ("**CSC**") to monitor PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW.

The mission of the CSC is to ensure continued satisfactory performance of the IANA (Internet Assigned Numbers Authority) naming function for the direct customers of the naming services. The direct customers of the naming services are top-level domain registry operators as well as root server operators and other non-root zone functions.

The CSC will achieve this mission through regular monitoring of the performance of the IANA (Internet Assigned Numbers Authority) naming function against the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW and through mechanisms to engage with PTI to remedy identified areas of concern.

The CSC is not authorized to initiate a change in PTI through a Special IFR (as defined in Section 18.1), but may escalate a failure to correct an identified deficiency to the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), which might then decide to take further action using consultation and escalation processes, which may include a Special IFR. The ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) may address matters escalated by the CSC, pursuant to their operating rules and procedures.

### Section 17.2. COMPOSITION, APPOINTMENT, TERM AND REMOVAL

(a) The CSC shall consist of:

- (i) Two individuals representing gTLD (generic Top Level Domain) registry operators appointed by the Registries Stakeholder Group;
- (ii) Two individuals representing ccTLD (Country Code Top Level Domain) registry operators appointed by the ccNSO (Country Code Names

Supporting Organization); and

(iii) One individual liaison appointed by PTI,

each appointed in accordance with the rules and procedures of the appointing organization; provided that such individuals should have direct experience and knowledge of the IANA (Internet Assigned Numbers Authority) naming function.

(b) If so determined by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), the CSC may, but is not required to, include one additional member: an individual representing top-level domain registry operators that are not considered a ccTLD (Country Code Top Level Domain) or gTLD (generic Top Level Domain), who shall be appointed by the ccNSO (Country Code Names Supporting Organization) and the GNSO (Generic Names Supporting Organization). Such representative shall be required to submit a letter of support from the registry operator it represents.

(c) Each of the following organizations may also appoint one liaison to the CSC in accordance with the rules and procedures of the appointing organization: (i) GNSO (Generic Names Supporting Organization) (from the Registrars Stakeholder Group or the Non-Contracted Parties House), (ii) ALAC (At-Large Advisory Committee), (iii) either the NRO (Number Resource Organization) or ASO (Address Supporting Organization) (as determined by the ASO (Address Supporting Organization)), (iv) GAC (Governmental Advisory Committee), (v) RSSAC (Root Server System Advisory Committee), (vi) SSAC (Security and Stability Advisory Committee) and (vii) any other Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) established under these Bylaws.

(d) The GNSO (Generic Names Supporting Organization) and ccNSO (Country Code Names Supporting Organization) shall approve the initial proposed members and liaisons of the CSC, and thereafter, the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) shall approve each annual slate of members and liaisons being recommended for a new term.

(e) The CSC members and liaisons shall select from among the CSC members who will serve as the CSC's liaison to the IFRT (as defined in Section 18.1) and any Separation Cross-Community Working Group ("**SCWG**").

(f) Any CSC member or liaison may be removed and replaced at any time and for any reason or no reason by the organization that appointed such member or liaison.

(g) In addition, the Chair of the CSC may recommend that a CSC member or liaison be removed by the organization that appointed such member or liaison, upon any of the following: (i) (A) for not attending without sufficient cause a minimum of nine CSC meetings in a one-year period (or at least 75% of all CSC meetings in a one-year period if less than nine meetings were held in such one-year period) or (B) if such member or liaison has been absent for more than two consecutive meetings without sufficient cause; or (ii) for grossly inappropriate behavior.

(h) A vacancy on the CSC shall be deemed to exist in the event of the death, resignation or removal of any CSC member or liaison. Vacancies shall be filled by the organization(s) that appointed such CSC member or liaison. The appointing organization(s) shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the Chair of the CSC. The organization(s) responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

### Section 17.3.CSC CHARTER; PERIODIC REVIEW

(a) The CSC shall act in accordance with its charter (the "**CSC Charter**").

(b) The effectiveness of the CSC shall be reviewed two years after the first meeting of the CSC; and then every three years thereafter. The method of review will be determined by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) and the findings of the review will be published on the Website.

(c) The CSC Charter shall be reviewed by a committee of representatives from the ccNSO (Country Code Names Supporting Organization) and the Registries Stakeholder Group selected by such organizations. This review shall commence one year after the first meeting of the CSC. Thereafter, the CSC Charter shall be reviewed by such committee of representatives from the ccNSO (Country Code Names Supporting Organization) and the Registries Stakeholder Group selected by such organizations at the request of the CSC, ccNSO (Country Code Names Supporting Organization), GNSO (Generic Names Supporting Organization), the Board and/or the PTI Board and/or by an IFRT in connection with an IFR.

(d) Amendments to the CSC Charter shall not be effective unless ratified by the vote of a simple majority of each of the ccNSO (Country Code Names Supporting

Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to each such organizations' procedures. Prior to any action by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), any recommended changes to the CSC Charter shall be subject to a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers). Notwithstanding the foregoing, to the extent any provision of an amendment to the CSC Charter conflicts with the terms of the Bylaws, the terms of the Bylaws shall control.

## Section 17.4. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the CSC to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the CSC.

## ARTICLE 18 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION REVIEWS

### Section 18.1. IANA (Internet Assigned Numbers Authority) NAMING FUNCTION REVIEW

The Board, or an appropriate committee thereof, shall cause periodic and/or special reviews (each such review, an "**IFR**") of PTI's performance of the IANA (Internet Assigned Numbers Authority) naming function against the contractual requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract and the IANA (Internet Assigned Numbers Authority) Naming Function SOW to be carried out by an IANA (Internet Assigned Numbers Authority) Function Review Team ("**IFRT**") established in accordance with Article 18, as follows:

- (a) Regularly scheduled periodic IFRs, to be conducted pursuant to Section 18.2 below ("**Periodic IFRs**"); and
- (b) IFRs that are not Periodic IFRs, to be conducted pursuant to Section 18.12 below ("**Special IFRs**").

### Section 18.2. FREQUENCY OF PERIODIC IFRS

- (a) The first Periodic IFR shall be convened no later than [1 October 2018].

(b) Periodic IFRs after the first Periodic IFR shall be convened no less frequently than every five years, measured from the date the previous IFRT for a Periodic IFR was convened.

(c) In the event a Special IFR is ongoing at the time a Periodic IFR is required to be convened under this Section 18.2, the Board shall cause the convening of the Periodic IFR to be delayed if such delay is approved by the vote of (i) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (ii) a GNSO (Generic Names Supporting Organization) Supermajority. Any decision by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) to delay a Periodic IFR must identify the period of delay, which should generally not exceed 12 months after the completion of the Special IFR.

### Section 18.3. IFR RESPONSIBILITIES

For each Periodic IFR, the IFRT shall:

(a) Review and evaluate the performance of PTI against the requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract in relation to the needs of its direct customers and the expectations of the broader ICANN (Internet Corporation for Assigned Names and Numbers) community, and determine whether to make any recommendations with respect to PTI's performance;

(b) Review and evaluate the performance of PTI against the requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(c) Review the IANA (Internet Assigned Numbers Authority) Naming Function SOW and determine whether to recommend any amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW to account for the needs of the direct customers of the naming services and/or the community at large;

(d) Review and evaluate the openness and transparency procedures of PTI and any oversight structures for PTI's performance, including reporting requirements and budget transparency;

(e) Review and evaluate the performance and effectiveness of the EC (Empowered Community) with respect to actions taken by the EC (Empowered Community), if any, pursuant to Section 16.2, Section 18.6, Section 18.12, Section 19.1, Section 19.4, Section 22.4(b) and Annex D;

(f) Review and evaluate the performance of the IANA (Internet Assigned Numbers Authority) naming function according to established service level expectations during the IFR period being reviewed and compared to the immediately preceding Periodic IFR period;

(g) Review and evaluate whether there are any systemic issues that are impacting PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(h) Initiate public comment periods and other processes for community input on PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW (such public comment periods shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers));

(i) Consider input from the CSC and the community on PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(j) Identify process or other areas for improvement in the performance of the IANA (Internet Assigned Numbers Authority) naming function under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW and the performance of the CSC and the EC (Empowered Community) as it relates to oversight of PTI; and

(k) Consider and assess any changes implemented since the immediately preceding IFR and their implications for the performance of PTI under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW.

## Section 18.4. IFR REQUIRED INPUTS

In conducting an IFR, the IFRT shall review and analyze the following information:

(a) Reports provided by PTI pursuant to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and/or IANA (Internet Assigned Numbers Authority) Naming Function SOW;

Authority) Naming Function SOW during the IFR period being reviewed, any portion of which may be redacted pursuant to the Confidential Disclosure Framework set forth in the Operating Standards in accordance with Section 4.6(a)(vi);

(b) Reports provided by the CSC in accordance with the CSC Charter during the IFR period being reviewed;

(c) Community inputs through public consultation procedures as reasonably determined by the IFRT, including, among other things, public comment periods, input provided at in-person sessions during ICANN (Internet Corporation for Assigned Names and Numbers) meetings, responses to public surveys related to PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW, and public inputs during meetings of the IFRT;

(d) Recommendations for technical, process and/or other improvements relating to the mandate of the IFR provided by the CSC or the community; and

(e) Results of any site visit conducted by the IFRT, which shall be conducted in consultation with ICANN (Internet Corporation for Assigned Names and Numbers) (i) upon reasonable notice, (ii) in a manner so as to not affect PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW and (iii) pursuant to procedures and requirements reasonably developed by ICANN (Internet Corporation for Assigned Names and Numbers) and reasonably acceptable to the IFRT. Any such site visit shall be limited to matters reasonably related to the IFRT's responsibilities pursuant to Section 18.3.

## Section 18.5. IFR RESULTS AND RECOMMENDATIONS

(a) The results of the IFR are not limited and could include a variety of recommendations or no recommendation; provided, however, that any recommendations must directly relate to the matters discussed in Section 18.3 and comply with this Section 18.5.

(b) Any IFRT recommendations should identify improvements that are supported by data and associated analysis about existing deficiencies and how they could be addressed. Each recommendation of the IFRT shall include proposed remedial procedures and describe how those procedures are expected to address such issues. The IFRT's report shall also propose timelines for implementing the IFRT's recommendations. The IFRT shall attempt to prioritize each of its recommendations and provide a rationale for such prioritization.

(c) In any case where a recommendation of an IFRT focuses on a service specific to gTLD (generic Top Level Domain) registry operators, no such recommendation shall be made by the IFRT in any report to the community (including any report to the Board) if opposition to such recommendation is expressed by any IFRT member appointed by the Registries Stakeholder Group. In any case where a recommendation of an IFRT focuses on a service specific to ccTLD (Country Code Top Level Domain) registry operators, no such recommendation shall be made by the IFRT in any report to the community (including any report to the Board) if opposition to such recommendation is expressed by any IFRT member appointed by the ccNSO (Country Code Names Supporting Organization).

(d) Notwithstanding anything herein to the contrary, the IFRT shall not have the authority to review or make recommendations relating to policy or contracting issues that are not included in the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW, including, without limitation, policy development, adoption processes or contract enforcement measures between contracted registries and ICANN (Internet Corporation for Assigned Names and Numbers).

Section 18.6.Recommendations to Amend the IANA (Internet Assigned Numbers Authority) Naming Function contract, iana naming function SOW or CSC charter

(a) The IFRT may recommend, among other things to the extent reasonably related to the IFR responsibilities set forth in Section 18.3, amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, IANA (Internet Assigned Numbers Authority) Naming Function SOW and/or the CSC Charter. The IFRT shall, at a minimum, take the following steps before an amendment to either the IANA (Internet Assigned Numbers Authority) Naming Function Contract, IANA (Internet Assigned Numbers Authority) Naming Function SOW or CSC Charter is proposed:

(i) Consult with the Board (such consultation to be conducted in parallel with other processes set forth in this Section 18.6(a)) and PTI;

(ii) Consult with the CSC;

(iii) Conduct a public input session for ccTLD (Country Code Top Level Domain) and gTLD (generic Top Level Domain) registry operators; and

(iv) Seek public comment on the amendments that are under consideration by the IFRT through a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

(b) A recommendation of an IFRT for a Periodic IFR that would amend the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW shall only become effective if, with respect to each such recommendation (each, an "**IFR Recommendation**"), each of the following occurs:

(i) The IFR Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the IFR Recommendation; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the IFR Recommendation pursuant to and in compliance with Section 18.6(d).

(c) If the Board (x) rejects an IFR Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 18.6(b)(i) or (y) does not resolve to either accept or reject an IFR Recommendation within 45 days of the later of (1) the date that the condition in Section 18.6(b)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 18.6(b)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable IFR Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum (as defined in Section

2.3(a) of Annex D), which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants (as defined in Section 2.2(d)(i) of Annex D) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the IFR Recommendation or approve the IFR Recommendation (either, a "**Post-Forum IFR Recommendation Decision**").

(A) If the Board resolves to approve the IFR Recommendation, such IFR Recommendation will be subject to Section 18.6(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the IFR Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum IFR Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an IFR Recommendation (an "**IFR Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the IFR Recommendation that is the subject of the IFR Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An IFR Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such IFR Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such IFR Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such IFR Recommendation Decision.

(ii) An IFR Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(e) For the avoidance of doubt, Section 18.6(d) shall not apply when the Board acts in a manner that is consistent with an IFR Recommendation unless such IFR Recommendation relates to an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process as described in Article 19.

(f) Timelines for implementing any amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW shall be reasonably agreed between the IFRT, ICANN (Internet Corporation for Assigned Names and Numbers) and PTI.

(g) A recommendation of an IFRT that would amend the CSC Charter shall only become effective if approved pursuant to Section 17.3(d).

## Section 18.7. COMPOSITION OF IFR TEAMS

Each IFRT shall consist of the following members and liaisons to be appointed in accordance with the rules and procedures of the appointing organization:

(a) Two representatives appointed by the ccNSO (Country Code Names Supporting Organization) from its ccTLD (Country Code Top Level Domain) registry operator representatives;

(b) One non-ccNSO (Country Code Names Supporting Organization) ccTLD (Country Code Top Level Domain) representative who is associated with a ccTLD (Country Code Top Level Domain) registry operator that is not a representative of the ccNSO (Country Code Names Supporting Organization), appointed by the ccNSO (Country Code Names Supporting Organization); it is strongly recommended that the ccNSO (Country Code Names Supporting Organization) consult with the regional ccTLD (Country Code Top Level Domain) organizations (i.e., AfTLD, APTLD (Council of the Asia Pacific country code Top Level Domains), LACTLD (Latin American and Caribbean ccTLDs), and CENTR (Council of European National Top level domain Registries)) in making its appointment;

(c) Two representatives appointed by the Registries Stakeholder Group;

(d) One representative appointed by the Registrars Stakeholder Group;

(e) One representative appointed by the Commercial Stakeholder Group;

(f) One representative appointed by the Non-Commercial Stakeholder Group;

(g) One representative appointed by the GAC (Governmental Advisory Committee);

(h) One representative appointed by the SSAC (Security and Stability Advisory Committee);

- (i) One representative appointed by the RSSAC (Root Server System Advisory Committee);
- (j) One representative appointed by the ALAC (At-Large Advisory Committee);
- (k) One liaison appointed by the CSC;
- (l) One liaison who may be appointed by the ASO (Address Supporting Organization); and
- (m) One liaison who may be appointed by the IAB (Internet Architecture Board).
- (n) The IFRT shall also include an unlimited number of non-member, non-liaison participants.
- (o) The IFRT shall not be a standing body. A new IFRT shall be constituted for each IFR and the IFRT shall automatically dissolve following the end of the process for approving such IFRT's IFR Recommendations pursuant to Section 18.6.

## Section 18.8. MEMBERSHIP; ELECTION OF CO-CHAIRS, AND LIAISONS

- (a) All candidates for appointment to the IFRT as a member or liaison shall submit an expression of interest to the organization that would appoint such candidate as a member or liaison to the IFRT, which shall state: (i) why the candidate is interested in becoming involved in the IFRT, (ii) what particular skills the candidate would bring to the IFRT, (iii) the candidate's knowledge of the IANA (Internet Assigned Numbers Authority) functions, (iv) the candidate's understanding of the purpose of the IFRT, and (v) that the candidate understands the time necessary to participate in the IFR process and can commit to the role.
- (b) Members, liaisons and participants of the IFRT shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and the IFRT any conflicts of interest with a specific complaint or issue under review. The IFRT may exclude from the discussion of a specific complaint or issue any member deemed by the majority of IFRT members to have a conflict of interest. The co-chairs of the IFRT shall record any such conflict of interest in the minutes of the IFRT.
- (c) To the extent reasonably possible, the appointing organizations for the IFRT members and liaisons shall work together to achieve an IFRT that is balanced for diversity (including functional, geographic and cultural) and skill, and should seek to broaden the number of individuals participating across the various reviews;

provided, that the IFRT should include members from each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, and the ccNSO (Country Code Names Supporting Organization) and Registries Stakeholder Group shall not appoint multiple members who are citizens of countries from the same ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region.

(d) The IFRT shall be led by two co-chairs: one appointed by the GNSO (Generic Names Supporting Organization) from one of the members appointed pursuant to clauses (c)-(f) of Section 18.7 and one appointed by the ccNSO (Country Code Names Supporting Organization) from one of the members appointed pursuant to clauses (a)-(b) of Section 18.7.

(e) The PTI Board shall select a PTI staff member to serve as a point of contact to facilitate formal lines of communication between the IFRT and PTI. The Board shall select an ICANN (Internet Corporation for Assigned Names and Numbers) staff member to serve as a point of contact to facilitate formal lines of communication between the IFRT and ICANN (Internet Corporation for Assigned Names and Numbers).

(f) Liaisons to the IFRT are not members of or entitled to vote on any matters before the IFRT, but otherwise are entitled to participate on equal footing with members of the IFRT.

(g) Other participants are entitled to participate in the IFRT, but are not entitled to vote.

(h) Removal and Replacement of IFRT Members and Liaisons

(i) The IFRT members and liaisons may be removed from the IFRT by their respective appointing organization at any time upon such organization providing written notice to the Secretary and the co-chairs of the IFRT.

(ii) A vacancy on the IFRT shall be deemed to exist in the event of the death, resignation or removal of any IFRT member or liaison. Vacancies shall be filled by the organization that appointed such IFRT member or liaison. The appointing organization shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the IFRT co-chairs. The organization responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

## Section 18.9. MEETINGS

- (a) All actions of the IFRT shall be taken by consensus of the IFRT, which is where a small minority may disagree, but most agree. If consensus cannot be reached with respect to a particular issue, actions by the majority of all of the members of the IFRT shall be the action of the IFRT.
- (b) Any members of the IFRT not in favor of an action (whether as a result of voting against a matter or objecting to the consensus position) may record a minority dissent to such action, which shall be included in the IFRT minutes and/or report, as applicable.
- (c) IFRT meetings, deliberations and other working procedures shall be open to the public and conducted in a transparent manner to the fullest extent possible.
- (d) The IFRT shall transmit minutes of its meetings to the Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following each IFRT meeting. Recordings and transcripts of meetings, as well as mailing lists, shall also be posted to the Website.

## Section 18.10. COMMUNITY REVIEWS AND REPORTS

- (a) The IFRT shall seek community input as to the issues relevant to the IFR through one or more public comment periods that shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers) and through discussions during ICANN (Internet Corporation for Assigned Names and Numbers)'s public meetings in developing and finalizing its recommendations and any report.
- (b) The IFRT shall provide a draft report of its findings and recommendations to the community for public comment. The public comment period is required to comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).
- (c) After completion of the IFR, the IFRT shall submit its final report containing its findings and recommendations to the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall thereafter promptly post the IFRT's final report on the Website.

## Section 18.11. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for each IFRT to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the IFRT.

## Section 18.12. SPECIAL IFRS

(a) A Special IFR may be initiated outside of the cycle for the Periodic IFRs to address any deficiency, problem or other issue that has adversely affected PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW (a "PTI Performance Issue"), following the satisfaction of each of the following conditions:

(i) The Remedial Action Procedures of the CSC set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract shall have been followed and failed to correct the PTI Performance Issue and the outcome of such procedures shall have been reviewed by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) according to each organization's respective operating procedures;

(ii) The IANA (Internet Assigned Numbers Authority) Problem Resolution Process set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract shall have been followed and failed to correct the PTI Performance Issue and the outcome of such process shall have been reviewed by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) according to each organization's respective operating procedures;

(iii) The ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) shall have considered the outcomes of the processes set forth in the preceding clauses (i) and (ii) and shall have conducted meaningful consultation with the other Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) with respect to the PTI Performance Issue and whether or not to initiate a Special IFR; and

(iv) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), if a public comment period is requested by the ccNSO (Country Code Names Supporting Organization) and the GNSO (Generic Names Supporting Organization), a Special IFR shall have

been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or if such procedures do not define a supermajority, two-thirds (2/3) of the Council members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority.

(b) Each Special IFR shall be conducted by an IFRT and shall follow the same procedures and requirements applicable to Periodic IFRs as set forth in this Section 18, except that:

(i) The scope of the Special IFR and the related inputs that are required to be reviewed by the IFRT shall be focused primarily on the PTI Performance Issue, its implications for overall IANA (Internet Assigned Numbers Authority) naming function performance by PTI and how to resolve the PTI Performance Issue;

(ii) The IFRT shall review and analyze the information that is relevant to the scope of the Special IFR; and

(iii) Each recommendation of the IFRT relating to the Special IFR, including but not limited to any recommendation to initiate an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process, must be related to remediating the PTI Performance Issue or other issue with PTI's performance that is related to the IFRT responsibilities set forth in Section 18.3, shall include proposed remedial procedures and describe how those procedures are expected to address the PTI Performance Issue or other relevant issue with PTI's performance.

(c) A recommendation of an IFRT for a Special IFR shall only become effective if, with respect to each such recommendation (each, a "**Special IFR Recommendation**"), each of the following occurs:

(i) The Special IFR Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the Special IFR Recommendation; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the Special IFR Recommendation pursuant to and in compliance with Section 18.12(e).

(d) If the Board (x) rejects a Special IFR Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 18.12(c)(i) or (y) does not resolve to either accept or reject a Special IFR Recommendation within 45 days of the later of (1) the date that the condition in Section 18.12(c)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 18.12(c)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable Special IFR Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the Special IFR Recommendation or approve the Special IFR

Recommendation (either, a "**Post-Forum Special IFR Recommendation Decision**").

(A) If the Board resolves to approve the Special IFR Recommendation, such Special IFR Recommendation will be subject to Section 18.6(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the Special IFR Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum Special IFR Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(e) Promptly after the Board approves a Special IFR Recommendation (a "**Special IFR Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Special IFR Recommendation that is the subject of the Special IFR Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) A Special IFR Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such Special IFR Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary

pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Special IFR Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Special IFR Recommendation Decision.

(ii) A Special IFR Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(f) For the avoidance of doubt, Section 18.12(e) shall not apply when the Board acts in a manner that is consistent with a Special IFR Recommendation unless such Special IFR Recommendation relates to an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process as described in Article 19.

## Section 18.13. PROPOSED SEPARATION PROCESS

The IFRT conducting either a Special IFR or Periodic IFR may, upon conclusion of a Special IFR or Periodic IFR, as applicable, determine that an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process is necessary and, if so, it shall recommend the creation of an SCWG pursuant to Article 19.

## ARTICLE 19 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION SEPARATION PROCESS

### Section 19.1. ESTABLISHING AN SCWG

(a) An "IANA (Internet Assigned Numbers Authority) Naming Function Separation Process" is the process initiated in accordance with this Article 19

pursuant to which PTI may cease to perform the IANA (Internet Assigned Numbers Authority) naming function including, without limitation, the initiation of a request for proposal to select an operator to perform the IANA (Internet Assigned Numbers Authority) naming function instead of PTI ("**IANA (Internet Assigned Numbers Authority) Naming Function RFP**"), the selection of an IANA (Internet Assigned Numbers Authority) naming function operator other than PTI, termination or non-renewal of the IANA (Internet Assigned Numbers Authority) Naming Function Contract, and/or divestiture, or other reorganization of PTI by ICANN (Internet Corporation for Assigned Names and Numbers).

(b) The Board shall establish an SCWG if each of the following occurs:

(i) The IFRT conducting either a Special IFR or Periodic IFR, upon conclusion of a Special IFR or Periodic IFR, as applicable, has recommended that an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process is necessary and has recommended the creation of an SCWG (an "**SCWG Creation Recommendation**");

(ii) The SCWG Creation Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(iii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the SCWG Creation Recommendation. A determination by the Board to not approve an SCWG Creation Recommendation, where such creation has been approved by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to Section 19.1(b)(ii), shall require a vote of at least two-thirds (2/3) of the Board and the Board shall follow the same consultation procedures set forth in Section 9 of Annex A of these Bylaws that relate to Board rejection of a PDP (Policy Development Process) recommendation that is supported by a GNSO (Generic Names Supporting Organization) Supermajority; and

(iv) The EC (Empowered Community) has not rejected the Board's approval of the SCWG Creation Recommendation pursuant to and in compliance with Section 19.1(d).

(c) If the Board (x) rejects an SCWG Creation Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 19.1(b)(ii) or (y) does not resolve to either accept or reject an SCWG Creation Recommendation within 45 days of the later of (1) the date that the condition in Section 19.1(b)(ii) is satisfied or (2) the expiration of the public comment period contemplated by Section 19.1(b)(iii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable SCWG Creation Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the SCWG Creation Recommendation or approve the SCWG Creation Recommendation (either, a "**Post-Forum SCWG Creation Recommendation Decision**").

(A) If the Board resolves to approve the SCWG Creation Recommendation, such SCWG Creation Recommendation will be subject to Section 19.1(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the SCWG Creation Recommendation as a result of the Rejection Action Community Forum.

(C)The Board's Post-Forum SCWG Creation Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an SCWG Creation Recommendation (an "**SCWG Creation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the SCWG Creation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An SCWG Creation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such SCWG Creation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such SCWG Creation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC

(Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such SCWG Creation Decision.

(ii) An SCWG Creation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

## Section 19.2. SCWG RESPONSIBILITIES

The responsibilities of the SCWG shall be as follows:

(a) The SCWG shall determine how to resolve the PTI Performance Issue(s) which the IFRT that conducted the Special IFR or Periodic IFR, as applicable, identified as triggering formation of this SCWG.

(b) If the SCWG recommends the issuance of an IANA (Internet Assigned Numbers Authority) Naming Function RFP, the SCWG shall:

(i) Develop IANA (Internet Assigned Numbers Authority) Naming Function RFP guidelines and requirements for the performance of the IANA (Internet Assigned Numbers Authority) naming function, in a manner consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s publicly available procurement guidelines (as in effect immediately prior to the formation of the SCWG); and

(ii) Solicit input from ICANN (Internet Corporation for Assigned Names and Numbers) as well as the global Internet community (through community consultation, including public comment opportunities as necessary that comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers)) on requirements to plan and participate in the IANA (Internet Assigned Numbers Authority) Naming Function RFP process.

(c) If an SCWG Recommendation (as defined in Section 19.4(b)) to issue the IANA (Internet Assigned Numbers Authority) Naming Function RFP is approved pursuant to Section 19.4(b) and the EC (Empowered Community) does not reject the relevant SCWG Recommendation Decision pursuant to Section 19.4(d), the SCWG, in consultation with ICANN (Internet Corporation for Assigned Names and Numbers), shall:

(i) Issue the IANA (Internet Assigned Numbers Authority) Naming Function RFP;

(ii) Review responses from interested candidates to the IANA (Internet Assigned Numbers Authority) Naming Function RFP, which may be received from PTI and/or any other entity or person; and

(iii) Recommend the entity that ICANN (Internet Corporation for Assigned Names and Numbers) should contract with to perform the IANA (Internet Assigned Numbers Authority) naming function.

(d) If the SCWG recommends an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process other than the issuance of an IANA (Internet Assigned Numbers Authority) Naming Function RFP, the SCWG shall develop recommendations to be followed with respect to that process and its implementation consistent with the terms of this Article 19. The SCWG shall monitor and manage the implementation of such IANA (Internet Assigned Numbers Authority) Naming Function Separation Process.

### Section 19.3. COMMUNITY REVIEWS AND REPORTS

(a) The SCWG shall seek community input through one or more public comment periods (such public comment period shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers)) and may recommend discussions during ICANN (Internet Corporation for Assigned Names and Numbers)'s public meetings in developing and finalizing its recommendations and any report.

(b) The SCWG shall provide a draft report of its findings and recommendations to the community after convening of the SCWG, which such draft report will be posted for public comment on the Website. The SCWG may post additional drafts of its report for public comment until it has reached its final report.

(c) After completion of its review, the SCWG shall submit its final report containing its findings and recommendations to the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the SCWG's final report on the Website.

### Section 19.4. SCWG RECOMMENDATIONS

(a) The recommendations of the SCWG are not limited and could include a variety of recommendations or a recommendation that no action is required;

provided, however, that any recommendations must directly relate to the matters discussed in Section 19.2 and comply with this Section 19.4.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall not implement an SCWG recommendation (including an SCWG recommendation to issue an IANA (Internet Assigned Numbers Authority) Naming Function RFP) unless, with respect to each such recommendation (each, an "**SCWG Recommendation**"), each of the following occurs:

(i) The SCWG Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the SCWG Recommendation. A determination by the Board to not approve an SCWG Recommendation, where such SCWG Recommendation has been approved by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to Section 19.4(b)(i), shall require a vote of at least two-thirds (2/3) of the Board and the Board shall follow the same consultation procedures set forth in Section 9 of Annex A of these Bylaws that relate to Board rejection of a PDP (Policy Development Process) recommendation that is supported by a GNSO (Generic Names Supporting Organization) Supermajority; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the SCWG Recommendation pursuant to and in compliance with Section 19.4(d).

(c) If the Board (x) rejects an SCWG Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 19.4(b)(i) or (y) does not resolve to either accept or reject an SCWG Recommendation within 45 days of the later of (1) the date that the condition in Section 19.4(b)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 19.4(b)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which

Board Notice shall enclose a copy of the applicable SCWG Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the SCWG Recommendation or approve the SCWG Recommendation (either, a "**Post-Forum SCWG Recommendation Decision**").

(A) If the Board resolves to approve the SCWG Recommendation, such SCWG Recommendation will be subject to Section 19.4(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the SCWG Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum SCWG Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an SCWG Recommendation (an "**SCWG Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the SCWG Recommendation that is

the subject of the SCWG Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An SCWG Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such SCWG Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such SCWG Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such SCWG Recommendation Decision.

(ii) An SCWG Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the costs relating to recommendations made by the SCWG, including, without limitation, costs related to the process of selecting or potentially selecting a new operator for the IANA (Internet Assigned Numbers Authority) naming function and the operating costs of the successor operator that are necessary for the successor operator's performance of the IANA (Internet Assigned Numbers Authority) naming function as ICANN (Internet Corporation for Assigned Names and Numbers)'s independent contractor. ICANN (Internet Corporation for Assigned Names and Numbers) shall not be authorized to raise fees from any TLD (Top Level Domain) registry operators to cover the costs associated with implementation of any SCWG Recommendations that specifically relate to the transition to a successor operator. For avoidance of doubt, this restriction shall not apply to collecting appropriate fees necessary to maintain the ongoing performance of the IANA (Internet Assigned Numbers Authority) naming function, including those relating to the operating costs of the successor operator.

(f) In the event that (i) an SCWG Recommendation that selects an entity (other than PTI) as a new operator of the IANA (Internet Assigned Numbers Authority) naming function is approved pursuant to Section 19.4(b) and (ii) the EC (Empowered Community) does not reject the relevant SCWG Recommendation Decision pursuant to Section 19.4(d), ICANN (Internet Corporation for Assigned Names and Numbers) shall enter into a contract with the new operator on substantially the same terms recommended by the SCWG and approved as part of such SCWG Recommendation.

(g) As promptly as practical following an SCWG Recommendation Decision becoming final in accordance with this Section 19.4, ICANN (Internet Corporation for Assigned Names and Numbers) shall take all steps reasonably necessary to effect such SCWG Recommendation Decision as soon as practicable.

## Section 19.5. SCWG COMPOSITION

(a) Each SCWG shall consist of the following members and liaisons to be appointed in accordance with the rules and procedures of the appointing organization:

(i) Two representatives appointed by the ccNSO (Country Code Names Supporting Organization) from its ccTLD (Country Code Top Level Domain) registry operator representatives;

(ii) One non-ccNSO (Country Code Names Supporting Organization) ccTLD (Country Code Top Level Domain) representative who is associated with a ccTLD (Country Code Top Level Domain) registry operator that is not a representative of the ccNSO (Country Code Names Supporting Organization), appointed by the ccNSO (Country Code Names Supporting Organization); it is strongly recommended that the ccNSO (Country Code Names Supporting Organization) consult with the regional ccTLD (Country Code Top Level Domain) organizations (i.e., AfTLD, APTLD (Council of the Asia Pacific country code Top Level Domains), LACTLD (Latin American and Caribbean ccTLDs) and CENTR (Council of European National Top level domain Registries)) in making its appointment;

(iii) Three representatives appointed by the Registries Stakeholder Group;

(iv) One representative appointed by the Registrars Stakeholder Group;

(v) One representative appointed by the Commercial Stakeholder Group;

(vi) One representative appointed by the Non-Commercial Stakeholder Group;

(vii) One representative appointed by the GAC (Governmental Advisory Committee);

(viii) One representative appointed by the SSAC (Security and Stability Advisory Committee);

(ix) One representative appointed by the RSSAC (Root Server System Advisory Committee);

(x) One representative appointed by the ALAC (At-Large Advisory Committee);

(xi) One liaison appointed by the CSC;

(xii) One liaison appointed by the IFRT that conducted the Special IFR or Periodic IFR, as applicable, that recommended the creation of the SCWG, who shall be named in the IFRT's recommendation to convene the Special IFR;

(xiii) One liaison who may be appointed by the ASO (Address Supporting Organization);

(xiv) One liaison who may be appointed by the IAB (Internet Architecture Board); and

(xv) One liaison who may be appointed by the Board.

(xvi) The SCWG may also include an unlimited number of non-member, non-liaison participants.

(b) All candidates for appointment to the SCWG as a member or liaison shall submit an expression of interest to the organization that would appoint such candidate as a member or liaison, which shall state (i) why the candidate is interested in becoming involved in the SCWG, (ii) what particular skills the candidate would bring to the SCWG, (iii) the candidate's knowledge of the IANA (Internet Assigned Numbers Authority) naming function, (iv) the candidate's understanding of the purpose of the SCWG, and (v) that the candidate understands the time necessary to participate in the SCWG process and can commit to the role.

(c) Members and liaisons of the SCWG shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and the SCWG any conflicts of interest with a specific complaint or issue under review. The SCWG may exclude from the discussion of a specific complaint or issue any member, liaison or participant deemed by the majority of SCWG members to have a conflict of interest. The co-chairs of the SCWG shall record any such conflict of interest in the minutes of the SCWG.

(d) To the extent reasonably possible, the appointing organizations for SCWG members and liaisons shall work together to:

(i) achieve an SCWG that is balanced for diversity (including functional, geographic and cultural) and skill, and should seek to broaden the number of individuals participating across the various reviews; provided, that the SCWG should include members from each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, and the ccNSO (Country Code Names Supporting Organization) and Registries Stakeholder Group shall not appoint multiple members who are citizens of countries from the same ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region;

(ii) ensure that the SCWG is comprised of individuals who are different from those individuals who comprised the IFRT that conducted the Special IFR or Periodic IFR, as applicable, that recommended the creation of the SCWG, other than the liaison to the IFRT appointed by the CSC; and

(iii) seek to appoint as representatives of the SCWG as many individuals as practicable with experience managing or participating in RFP processes.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall select an ICANN (Internet Corporation for Assigned Names and Numbers) staff member and a PTI staff member to serve as points of contact to facilitate formal lines of communication between the SCWG and ICANN (Internet Corporation for Assigned Names and Numbers) and the SCWG and PTI. Communications between the SCWG and the ICANN (Internet Corporation for Assigned Names and Numbers) and PTI points of contact shall be communicated by the SCWG co-chairs.

(f) The SCWG shall not be a standing body. Each SCWG shall be constituted when and as required under these Bylaws and shall dissolve following the end of the process for approving such SCWG's SCWG Recommendations pursuant to Section 19.4(d).

## Section 19.6. ELECTION OF CO-CHAIRS AND LIAISONS

(a) The SCWG shall be led by two co-chairs: one appointed by the GNSO (Generic Names Supporting Organization) from one of the members appointed pursuant to clauses (iii)-(vi) of Section 19.5(a) and one appointed by the ccNSO (Country Code Names Supporting Organization) from one of the members appointed pursuant to clauses (i)-(ii) of Section 19.5(a).

(b) Liaisons to the SCWG shall not be members of or entitled to vote on any matters before the SCWG, but otherwise shall be entitled to participate on equal footing with SCWG members.

(c) Removal and Replacement of SCWG Members and Liaisons

(i) The SCWG members and liaisons may be removed from the SCWG by their respective appointing organization at any time upon such organization providing written notice to the Secretary and the co-chairs of the SCWG.

(ii) A vacancy on the SCWG shall be deemed to exist in the event of the death, resignation or removal of any SCWG member or liaison. Vacancies

shall be filled by the organization that appointed such SCWG member or liaison. The appointing organization shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the SCWG co-chairs. The organization responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

## Section 19.7. MEETINGS

- (a) The SCWG shall act by consensus, which is where a small minority may disagree, but most agree.
- (b) Any members of the SCWG not in favor of an action may record a minority dissent to such action, which shall be included in the SCWG minutes and/or report, as applicable.
- (c) SCWG meetings and other working procedures shall be open to the public and conducted in a transparent manner to the fullest extent possible.
- (d) The SCWG shall transmit minutes of its meetings to the Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following each SCWG meeting, and no later than five business days following the meeting.
- (e) Except as otherwise provided in these Bylaws, the SCWG shall follow the guidelines and procedures applicable to ICANN (Internet Corporation for Assigned Names and Numbers) Cross Community Working Groups that will be publicly available and may be amended from time to time.

## Section 19.8. ADMINISTRATIVE SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the SCWG to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the SCWG.

## Section 19.9. CONFLICTING PROVISIONS

In the event any SCWG Recommendation that is approved in accordance with this Article 19 requires ICANN (Internet Corporation for Assigned Names and Numbers) to take any action that is inconsistent with a provision of the Bylaws (including any action taken in implementing such SCWG Recommendation), the requirements of such provision of these Bylaws shall not apply to the extent of that inconsistency.

## ARTICLE 20 INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS

### Section 20.1. INDEMNIFICATION GENERALLY

ICANN (Internet Corporation for Assigned Names and Numbers) shall, to the maximum extent permitted by the CCC, indemnify each of its agents against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with any proceeding arising by reason of the fact that any such person is or was an agent of ICANN (Internet Corporation for Assigned Names and Numbers), provided that the indemnified person's acts were done in good faith and in a manner that the indemnified person reasonably believed to be in ICANN (Internet Corporation for Assigned Names and Numbers)'s best interests and not criminal. For purposes of this Article 20, an "agent" of ICANN (Internet Corporation for Assigned Names and Numbers) includes any person who is or was a Director, Officer, employee, or any other agent of ICANN (Internet Corporation for Assigned Names and Numbers) (including a member of the EC (Empowered Community), the EC (Empowered Community) Administration, any Supporting Organization (Supporting Organization), any Advisory Committee (Advisory Committee), the Nominating Committee, any other ICANN (Internet Corporation for Assigned Names and Numbers) committee, or the Technical Liaison Group) acting within the scope of his or her responsibility; or is or was serving at the request of ICANN (Internet Corporation for Assigned Names and Numbers) as a Director, Officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise. The Board may adopt a resolution authorizing the purchase and maintenance of insurance on behalf of any agent of ICANN (Internet Corporation for Assigned Names and Numbers) against any liability asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not ICANN (Internet Corporation for Assigned Names and Numbers) would have the power to indemnify the agent against that liability under the provisions of this Article 20.

### Section 20.2. INDEMNIFICATION WITH RESPECT TO DIRECTOR REMOVAL

If a Director initiates any proceeding in connection with his or her removal or recall pursuant to the Bylaws, to which a person who is a member of the leadership council (or equivalent body) of a Decisional Participant or representative of a Decisional Participant in the EC (Empowered Community) Administration is a party or is threatened to be made a party (as a party or witness) (a "**Director Removal Proceeding**"), ICANN (Internet Corporation for

Assigned Names and Numbers) shall, to the maximum extent permitted by the CCC, indemnify any such person, against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred by such person in connection with such Director Removal Proceeding, for actions taken by such person in his or her representative capacity within his or her Decisional Participant pursuant to the processes and procedures set forth in these Bylaws, provided that all such actions were taken by such person in good faith and in a manner that such person reasonably believed to be in ICANN (Internet Corporation for Assigned Names and Numbers)'s best interests and not criminal. The actual and reasonable legal fees of a single firm of counsel and other expenses actually and reasonably incurred by such person in defending against a Director Removal Proceeding shall be paid by ICANN (Internet Corporation for Assigned Names and Numbers) in advance of the final disposition of such Director Removal Proceeding, provided, however, that such expenses shall be advanced only upon delivery to the Secretary of an undertaking (which shall be in writing and in a form provided by the Secretary) by such person to repay the amount of such expenses if it shall ultimately be determined that such person is not entitled to be indemnified by ICANN (Internet Corporation for Assigned Names and Numbers). ICANN (Internet Corporation for Assigned Names and Numbers) shall not be obligated to indemnify such person against any settlement of a Director Removal Proceeding, unless such settlement is approved in advance by the Board in its reasonable discretion. Notwithstanding Section 20.1, the indemnification provided in this Section 20.2 shall be ICANN (Internet Corporation for Assigned Names and Numbers)'s sole indemnification obligation with respect to the subject matter set forth in this Section 20.2.

## ARTICLE 21 GENERAL PROVISIONS

### Section 21.1. CONTRACTS

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

### Section 21.2. DEPOSITS

All funds of ICANN (Internet Corporation for Assigned Names and Numbers) not otherwise employed shall be deposited from time to time to the credit of ICANN (Internet Corporation for Assigned Names and Numbers) in such banks, trust companies, or other depositories as the Board, or the President under its delegation, may select.

### Section 21.3. CHECKS

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

### Section 21.4. LOANS

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

### Section 21.5. NOTICES

All notices to be given to the EC (Empowered Community) Administration, the Decisional Participants, or the Secretary pursuant to any provision of these Bylaws shall be given either (a) in writing at the address of the appropriate party as set forth below or (b) via electronic mail as provided below, unless that party has given a notice of change of postal or email address, as provided in this Section 21.5. Any change in the contact information for notice below will be given by the party within 30 days of such change. Any notice required by these Bylaws will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via electronic mail, upon confirmation of receipt by the recipient's email server, provided that such notice via electronic mail shall be followed by a copy sent by regular postal mail service within three days. In the event other means of notice become practically achievable, such as notice via a secure website, the EC (Empowered Community) Administration, the Decisional Participants, and ICANN (Internet Corporation for Assigned Names and Numbers) will work together to implement such notice means.

If to ICANN (Internet Corporation for Assigned Names and Numbers), addressed to:

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

USA

Email: [ ]

Attention: Secretary

If to a Decisional Participant or the EC (Empowered Community) Administration, addressed to the contact information available at [insert Website reference].

## ARTICLE 22 FISCAL AND STRATEGIC MATTERS, INSPECTION AND INDEPENDENT INVESTIGATION

### Section 22.1. ACCOUNTING

The fiscal year end of ICANN (Internet Corporation for Assigned Names and Numbers) shall be determined by the Board.

### Section 22.2. AUDIT

At the end of the fiscal year, the books of ICANN (Internet Corporation for Assigned Names and Numbers) shall be closed and audited by certified public accountants. The appointment of the fiscal auditors shall be the responsibility of the Board.

### Section 22.3. ANNUAL REPORT AND ANNUAL STATEMENT

The Board shall publish, at least annually, a report describing its activities, including an audited financial statement, a description of any payments made by ICANN (Internet Corporation for Assigned Names and Numbers) to Directors (including reimbursements of expenses) and a description of ICANN (Internet Corporation for Assigned Names and Numbers)'s progress towards the obligations imposed under the Bylaws as revised on 1 October 2016 and the Operating Plan and Strategic Plan. ICANN (Internet Corporation for Assigned Names and Numbers) shall cause the annual report and the annual statement of

certain transactions as required by the CCC to be prepared and sent to each member of the Board and to such other persons as the Board may designate, no later than one hundred twenty (120) days after the close of ICANN (Internet Corporation for Assigned Names and Numbers)'s fiscal year.

## Section 22.4. BUDGETS

### (a) ICANN (Internet Corporation for Assigned Names and Numbers) Budget

(i) In furtherance of its Commitment to transparent and accountable budgeting processes, at least forty-five (45) days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed annual operating plan and budget of ICANN (Internet Corporation for Assigned Names and Numbers) for the next fiscal year (the "**ICANN (Internet Corporation for Assigned Names and Numbers) Budget**"), which shall be posted on the Website. The ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall identify anticipated revenue sources and levels and shall, to the extent practical, identify anticipated material expense items by line item.

(ii) Prior to approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the ICANN (Internet Corporation for Assigned Names and Numbers) Budget development process, and comply with the requirements of this Section 22.4(a).

(iii) Prior to approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the Board, a draft of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget and may direct ICANN (Internet Corporation for Assigned Names and Numbers) Staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an ICANN (Internet Corporation for Assigned Names and Numbers) Budget (an "ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) An ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date (as defined in Section 2.2(a) of Annex D) relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the ICANN (Internet

Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An ICANN (Internet Corporation for Assigned Names and Numbers) Budget that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the ICANN (Internet Corporation for Assigned Names and Numbers) Budget in determining the substance of such new ICANN (Internet Corporation for Assigned Names and Numbers) Budget, which shall be subject to the procedures of this Section 22.4(a).

(ix) If an ICANN (Internet Corporation for Assigned Names and Numbers) Budget has not come into full force and effect pursuant to this Section 22.4(a) on or prior to the first date of any fiscal year of ICANN (Internet Corporation for Assigned Names and Numbers), the Board shall adopt a temporary budget in accordance with Annex E hereto ("**Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget**"), which Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall be effective until such time as an ICANN (Internet Corporation for Assigned Names and Numbers) Budget has been effectively approved by the Board and not rejected by the EC (Empowered Community) pursuant to this Section 22.4(a).

(b) IANA (Internet Assigned Numbers Authority) Budget

(i) At least 45 days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) shall prepare and submit to the Board a proposed annual operating plan and budget of PTI and the IANA (Internet Assigned Numbers Authority) department, which budget shall include itemization of the direct costs for ICANN (Internet Corporation for Assigned Names and Numbers)'s IANA (Internet Assigned Numbers Authority) department, all costs for PTI, direct costs for shared resources between ICANN (Internet Corporation for Assigned Names and Numbers) and PTI and support functions provided by ICANN (Internet Corporation for Assigned Names and Numbers) to PTI and ICANN (Internet Corporation for Assigned Names and Numbers)'s IANA (Internet Assigned Numbers Authority) department for the next fiscal year (the "**IANA (Internet Assigned Numbers Authority) Budget**"), which shall be posted on the Website. Separately and in addition to the general ICANN (Internet Corporation for Assigned Names and Numbers) planning process, ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to prepare and submit to the PTI Board a proposed annual operating plan and budget for PTI's performance of the IANA (Internet Assigned Numbers Authority) functions for the next fiscal year ("**PTI Budget**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), as well as the Registries Stakeholder Group, the IAB (Internet Architecture Board) and RIRs, during the PTI Budget development process, and shall seek public comment on the draft PTI Budget prior to approval of the PTI Budget by PTI. ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to submit the PTI Budget to ICANN (Internet Corporation for Assigned Names and Numbers) as an input prior to and for the purpose

of being included in the proposed Operating Plan (as defined in Section 22.5(a)) and ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

(ii) Prior to approval of the IANA (Internet Assigned Numbers Authority) Budget by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), as well as the Registries Stakeholder Group, IAB (Internet Architecture Board) and RIRs, during the IANA (Internet Assigned Numbers Authority) Budget development process, and comply with the requirements of this Section 22.4(b).

(iii) Prior to approval of the IANA (Internet Assigned Numbers Authority) Budget by the Board, a draft of the IANA (Internet Assigned Numbers Authority) Budget shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the IANA (Internet Assigned Numbers Authority) Budget and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an IANA (Internet Assigned Numbers Authority) Budget (an "**IANA (Internet Assigned Numbers Authority) Budget Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) An IANA (Internet Assigned Numbers Authority) Budget shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the date immediately following the expiration of

the Rejection Action Decision Period relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An IANA (Internet Assigned Numbers Authority) Budget that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an IANA (Internet Assigned Numbers Authority) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the IANA (Internet Assigned Numbers Authority) Budget in determining the substance of such new IANA (Internet Assigned Numbers Authority) Budget, which shall be subject to the procedures of this Section 22.4(b).

(ix) If an IANA (Internet Assigned Numbers Authority) Budget has not come into full force and effect pursuant to this Section 22.4(b) on or prior to the first date of any fiscal year of ICANN (Internet Corporation for Assigned Names and Numbers), the Board shall adopt a temporary budget in accordance with Annex F hereto ("**Caretaker IANA (Internet Assigned Numbers Authority) Budget**"), which Caretaker IANA (Internet Assigned Numbers Authority) Budget shall be effective until such time as an IANA (Internet Assigned Numbers Authority) Budget has been effectively approved by the Board and not rejected by the EC (Empowered Community) pursuant to this Section 22.4(b).

(c) If an IANA (Internet Assigned Numbers Authority) Budget does not receive an EC (Empowered Community) Rejection Notice but an ICANN (Internet Corporation for Assigned Names and Numbers) Budget receives an EC (Empowered Community) Rejection Notice, any subsequent revised ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not alter the expenditures allocated for the IANA (Internet Assigned Numbers Authority) Budget.

(d) If an ICANN (Internet Corporation for Assigned Names and Numbers) Budget does not receive an EC (Empowered Community) Rejection Notice but an IANA

(Internet Assigned Numbers Authority) Budget receives an EC (Empowered Community) Rejection Notice, any subsequent revised IANA (Internet Assigned Numbers Authority) Budget shall, once approved, be deemed to automatically modify the ICANN (Internet Corporation for Assigned Names and Numbers) Budget in a manner determined by the Board without any further right of the EC (Empowered Community) to reject the ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

(e) Under all circumstances, the Board will have the ability to make out-of-budget funding decisions for unforeseen expenses necessary to maintaining ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission or to fulfilling ICANN (Internet Corporation for Assigned Names and Numbers)'s pre-existing legal obligations and protecting ICANN (Internet Corporation for Assigned Names and Numbers) from harm or waste.

(f) To maintain ongoing operational excellence and financial stability of the IANA (Internet Assigned Numbers Authority) functions (so long as they are performed by ICANN (Internet Corporation for Assigned Names and Numbers) or pursuant to contract with ICANN (Internet Corporation for Assigned Names and Numbers)) and PTI, ICANN (Internet Corporation for Assigned Names and Numbers) shall be required to plan for and allocate funds to ICANN (Internet Corporation for Assigned Names and Numbers)'s performance of the IANA (Internet Assigned Numbers Authority) functions and to PTI, as applicable, that are sufficient to cover future expenses and contingencies to ensure that the performance of those IANA (Internet Assigned Numbers Authority) functions and PTI in the future are not interrupted due to lack of funding.

(g) The ICANN (Internet Corporation for Assigned Names and Numbers) Budget and the IANA (Internet Assigned Numbers Authority) Budget shall be published on the Website.

## Section 22.5. PLANS

### (a) Operating Plan

(i) At least 45 days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed operating plan of ICANN (Internet Corporation for Assigned Names and Numbers) for the next five fiscal years (the "**Operating Plan**"), which shall be posted on the Website.

(ii) Prior to approval of the Operating Plan by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the

Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the Operating Plan development process, and comply with the requirements of this [Section 22.5\(a\)](#).

(iii) Prior to approval of the Operating Plan by the Board, a draft of the Operating Plan shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the Operating Plan and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an Operating Plan (an "**Operating Plan Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Operating Plan that is the subject of the Operating Plan Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in [Article 2](#) of Annex D.

(vi) An Operating Plan shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with [Section 2.2\(c\)](#) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with [Section 2.2\(c\)](#) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating

to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An Operating Plan that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an Operating Plan, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Operating Plan in

determining the substance of such new Operating Plan, which shall be subject to the procedures of this Section 22.5(a).

(b) Strategic Plan

(i) At least 45 days prior to the commencement of each five fiscal year period, with the first such period covering fiscal years 2021 through 2025, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed strategic plan of ICANN (Internet Corporation for Assigned Names and Numbers) for the next five fiscal years (the "**Strategic Plan**"), which shall be posted on the Website.

(ii) Prior to approval of the Strategic Plan by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the Strategic Plan development process, and comply with the requirements of this Section 22.5(b).

(iii) Prior to approval of the Strategic Plan by the Board, a draft of the Strategic Plan shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Strategic Plan and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves a Strategic Plan (a "**Strategic Plan Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Strategic Plan that is the subject of the Strategic Plan Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and

comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) A Strategic Plan shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further

challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) A Strategic Plan that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to a Strategic Plan, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Strategic Plan in determining the substance of such new Strategic Plan, which shall be subject to the procedures of this Section 22.5(b).

## Section 22.6. FEES AND CHARGES

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

## Section 22.7. INSPECTION

(a) A Decisional Participant (the "**Inspecting Decisional Participant**") may request to inspect the accounting books and records of ICANN (Internet Corporation for Assigned Names and Numbers), as interpreted pursuant to the provisions of Section 6333 of the CCC, and the minutes of the Board or any Board Committee for a purpose reasonably related to such Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community). The Inspecting Decisional Participant shall make such a request by providing written notice from the chair of the Inspecting Decisional Participant to the Secretary stating the nature of the documents the Inspecting Decisional Participant seeks to inspect ("**Inspection Request**"). Any Inspection Request must be limited to the accounting books and records of ICANN (Internet Corporation for Assigned Names and Numbers) relevant to the operation of ICANN (Internet Corporation for Assigned Names and Numbers) as a whole, and

shall not extend to the underlying sources of such accounting books or records or to documents only relevant to a small or isolated aspect of ICANN (Internet Corporation for Assigned Names and Numbers)'s operations or that relate to the minutiae of ICANN (Internet Corporation for Assigned Names and Numbers)'s financial records or details of its management and administration (the "**Permitted Scope**"). Unless ICANN (Internet Corporation for Assigned Names and Numbers) declines such request (as provided below), ICANN (Internet Corporation for Assigned Names and Numbers) shall make the records requested under an Inspection Request available for inspection by such Inspecting Decisional Participant within 30 days of the date the Inspection Request is received by the Secretary or as soon as reasonably practicable thereafter. All materials and information made available by ICANN (Internet Corporation for Assigned Names and Numbers) for inspection pursuant to an Inspection Request may only be used by the Inspecting Decisional Participant for purposes reasonably related to such Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community). ICANN (Internet Corporation for Assigned Names and Numbers) shall post all Inspection Requests to the Website.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) may decline an Inspection Request on the basis that such Inspection Request (i) is motivated by a Decisional Participant's financial, commercial or political interests, or those of one or more of its constituents, (ii) relates to documents that are not reasonably related to the purpose specified in the Inspection Request or the Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community), (iii) requests identical records provided in a prior request of such Decisional Participant, (iv) is not within the Permitted Scope, (v) relates to personnel records, (vi) relates to documents or communications covered by attorney-client privilege, work product doctrine or other legal privilege or (vii) relates to documents or communications that ICANN (Internet Corporation for Assigned Names and Numbers) may not make available under applicable law because such documents or communications contain confidential information that ICANN (Internet Corporation for Assigned Names and Numbers) is required to protect. If an Inspection Request is overly broad, ICANN (Internet Corporation for Assigned Names and Numbers) may request a revised Inspection Request from the Inspecting Decisional Participant.

(c) Any such inspections shall be conducted at the times and locations reasonably determined by ICANN (Internet Corporation for Assigned Names and Numbers) and shall not be conducted in a manner that unreasonably interferes with ICANN (Internet Corporation for Assigned Names and Numbers)'s operations. All such inspections shall be subject to reasonable procedures established by ICANN (Internet Corporation for Assigned Names and Numbers), including, without limitation, the number of individuals authorized to conduct any

such inspection on behalf of the Inspecting Decisional Participant. ICANN (Internet Corporation for Assigned Names and Numbers) may require the inspectors to sign a non-disclosure agreement. The Inspecting Decisional Participant may, at its own cost, copy or otherwise reproduce or make a record of materials inspected. ICANN (Internet Corporation for Assigned Names and Numbers) may redact or determine not to provide requested materials on the same basis that such information is of a category or type described in Section 22.7(b), in which case ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Inspecting Decisional Participant a written rationale for such redactions or determination.

(d) The inspection rights provided to the Decisional Participants pursuant to this Section 22.7 are granted to the Decisional Participants and are not granted or available to any other person or entity. Notwithstanding the foregoing, nothing in this Section 22.7 shall be construed as limiting the accessibility of ICANN (Internet Corporation for Assigned Names and Numbers)'s document information disclosure policy ("**DIDP**").

(e) If the Inspecting Decisional Participant believes that ICANN (Internet Corporation for Assigned Names and Numbers) has violated the provisions of this Section 22.7, the Inspecting Decisional Participant may seek one or more of the following remedies: (i) appeal such matter to the Ombudsman and/or the Board for a ruling on the matter, (ii) initiate the Reconsideration Request process in accordance with Section 4.2, (iii) initiate the Independent Review Process in accordance with Section 4.3, or (iv) petition the EC (Empowered Community) to initiate (A) a Community IRP pursuant to Section 4.2 of Annex D or (B) a Board Recall Process pursuant to Section 3.3 of Annex D. Any determination by the Ombudsman is not binding on ICANN (Internet Corporation for Assigned Names and Numbers) staff, but may be submitted by the Inspecting Decisional Participant when appealing to the Board for a determination, if necessary.

## Section 22.8. INDEPENDENT INVESTIGATION

If three or more Decisional Participants deliver to the Secretary a joint written certification from the respective chairs of each such Decisional Participant that the constituents of such Decisional Participants have, pursuant to the internal procedures of such Decisional Participants, determined that there is a credible allegation that ICANN (Internet Corporation for Assigned Names and Numbers) has committed fraud or that there has been a gross mismanagement of ICANN (Internet Corporation for Assigned Names and Numbers)'s resources, ICANN (Internet Corporation for Assigned Names and Numbers) shall retain a third-party, independent firm to investigate such alleged fraudulent activity or gross mismanagement. ICANN (Internet Corporation for Assigned Names and

Numbers) shall post all such certifications to the Website. The independent firm shall issue a report to the Board. The Board shall consider the recommendations and findings set forth in such report. Such report shall be posted on the Website, which may be in a redacted form as determined by the Board, in order to preserve attorney-client privilege, work product doctrine or other legal privilege or where such information is confidential, in which case ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Decisional Participants that submitted the certification a written rationale for such redactions.

## ARTICLE 23 MEMBERS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not have members, as contemplated by Section 5310 of the CCC, notwithstanding the use of the term "member" in these Bylaws, in any ICANN (Internet Corporation for Assigned Names and Numbers) document, or in any action of the Board or staff. For the avoidance of doubt, the EC (Empowered Community) is not a member of ICANN (Internet Corporation for Assigned Names and Numbers).

## ARTICLE 24 OFFICES AND SEAL

### Section 24.1. OFFICES

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

### Section 24.2. SEAL

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

## ARTICLE 25 AMENDMENTS

### Section 25.1. AMENDMENTS TO THE STANDARD BYLAWS

(a) Except as otherwise provided in the Articles of Incorporation or these Bylaws, these Bylaws may be altered, amended, or repealed and new Bylaws adopted only upon approval by a two-thirds vote of all Directors and in compliance with the terms of this Section 25.1 (a "**Standard Bylaw Amendment**").

(b) Prior to approval of a Standard Bylaw Amendment by the Board, a draft of the Standard Bylaw Amendment shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(c) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the Standard Bylaw Amendment and may conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) Within seven days after the Board's approval of a Standard Bylaw Amendment ("**Standard Bylaw Amendment Approval**"), the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the approved amendment and the Board's rationale for adopting such amendment, and (ii) post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website. The steps contemplated in Article 2 of Annex D shall then be followed.

(e) A Standard Bylaw Amendment shall become effective upon the earliest to occur of the following:

(i) (A) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the 30th day following the Rejection Action Board Notification Date relating to such Standard Bylaw Amendment Approval and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(ii) (A) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered

Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Standard Bylaw Amendment and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; or

(iii) (A) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Standard Bylaw Amendment and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(f) If an EC (Empowered Community) Rejection Notice is timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and compliance with Section 2.4 of Annex D, the Standard Bylaw Amendment contained in the Board Notice shall be deemed to have been rejected by the EC (Empowered Community). A Standard Bylaw Amendment that has been rejected by the EC (Empowered Community) shall be null and void and shall not become part of these Bylaws, notwithstanding its approval by the Board.

(g) The Secretary shall promptly inform the Board of the receipt and substance of any Rejection Action Petition, Rejection Action Supported Petition or EC (Empowered Community) Rejection Notice delivered by the Rejection Action Petitioning Decisional Participant or the EC (Empowered Community) Administration, as applicable, to the Secretary hereunder.

(h) Following receipt of an EC (Empowered Community) Rejection Notice pertaining to a Standard Bylaw Amendment, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Standard Bylaw

Amendment in determining whether or not to develop a new Standard Bylaw Amendment and the substance of such new Standard Bylaw Amendment, which shall be subject to the procedures of this Section 25.1.

## Section 25.2. AMENDMENTS TO THE FUNDAMENTAL BYLAWS AND ARTICLES OF INCORPORATION

(a) Article 1; Sections 4.2, 4.3 and 4.7; Article 6; Sections 7.1 through 7.5, inclusive, and Sections 7.8, 7.11, 7.12, 7.17, 7.24 and 7.25; those portions of Sections 8.1, 9.2(b), 10.3(i), 11.3(f) and 12.2(d)(x)(A) relating to the provision to the EC (Empowered Community) of nominations of Directors by the nominating body, Articles 16, 17, 18 and 19, Sections 22.4, 22.5, 22.7 and 22.8, Article 26, Section 27.1; Annexes D, E and F; and this Article 25 are each a "**Fundamental Bylaw**" and, collectively, are the "**Fundamental Bylaws**".

(b) Notwithstanding any other provision of these Bylaws, a Fundamental Bylaw or the Articles of Incorporation may be altered, amended, or repealed (a "**Fundamental Bylaw Amendment**" or an "**Articles Amendment**"), only upon approval by a three-fourths vote of all Directors and the approval of the EC (Empowered Community) as set forth in this Section 25.2.

(c) Prior to approval of a Fundamental Bylaw Amendment, or an Articles Amendment by the Board, a draft of the Fundamental Bylaw Amendment or Articles Amendment, as applicable, shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Fundamental Bylaw Amendment or Articles Amendment, as applicable, and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(e) Within seven days after the Board's approval of a Fundamental Bylaw Amendment or Articles Amendment, as applicable, the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the approved amendment and (ii) post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website. The steps contemplated in Article 1 of Annex D shall then be followed.

(f) If the EC (Empowered Community) Administration timely delivers an EC (Empowered Community) Approval Notice (as defined in Section 1.4(b) of Annex D), the Fundamental Bylaw Amendment or Articles Amendment, as applicable, set forth in the Board Notice shall be deemed approved by the EC (Empowered Community), and, as applicable, (i) such Fundamental Bylaw Amendment shall be in full force and effect as part of these Bylaws as of the date immediately following the Secretary's receipt of the EC (Empowered Community) Approval Notice; or (ii) the Secretary shall cause such Articles Amendment promptly to be certified by the appropriate officers of ICANN (Internet Corporation for Assigned Names and Numbers) and filed with the California Secretary of State. In the event of such approval, neither the Fundamental Bylaw Amendment nor the Articles Amendment shall be subject to any further review or approval of the EC (Empowered Community). The Secretary shall promptly inform the Board of the receipt of an EC (Empowered Community) Approval Notice.

(g) If an EC (Empowered Community) Approval Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary, the Fundamental Bylaw Amendment or Articles Amendment, as applicable, set forth in the Board Notice shall be deemed not approved by the EC (Empowered Community), shall be null and void, and, notwithstanding its approval by the Board, the Fundamental Bylaw Amendment shall not be part of these Bylaws and the Articles Amendment shall not be filed with the Secretary of State.

(h) If a Fundamental Bylaw Amendment or Articles Amendment, as applicable, is not approved by the EC (Empowered Community), ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the concerns raised by the EC (Empowered Community) in determining whether or not to develop a new Fundamental Bylaws Amendment or Articles Amendment, as applicable, and the substance thereof, which shall be subject to the procedures of this Section 25.2.

### Section 25.3. AMENDMENTS RESULTING FROM A POLICY DEVELOPMENT PROCESS

The Board shall not combine an amendment of these Bylaws that was the result of a policy development process of a Supporting Organization (Supporting Organization) (a "**PDP (Policy Development Process) Amendment**") with any other amendment. The Board shall indicate in the applicable Board Notice whether such amendment is a PDP (Policy Development Process) Amendment.

### Section 25.4. OTHER AMENDMENTS

For the avoidance of doubt, these Bylaws can only be amended as set forth in this Article 25. Neither the EC (Empowered Community), the Decisional Participants, the Supporting Organizations (Supporting Organizations), the Advisory Committees (Advisory Committees) nor any other entity or person shall have the power to directly propose amendments to these Bylaws.

## ARTICLE 26 SALE OR OTHER DISPOSITION OF ALL OR SUBSTANTIALLY ALL OF ICANN (Internet Corporation for Assigned Names and Numbers)'S ASSETS

(a) ICANN (Internet Corporation for Assigned Names and Numbers) may consummate a transaction or series of transactions that would result in the sale or disposition of all or substantially all of ICANN (Internet Corporation for Assigned Names and Numbers)'s assets (an "**Asset Sale**") only upon approval by a three-fourths vote of all Directors and the approval of the EC (Empowered Community) as set forth in this Article 26.

(b) Prior to approval of an Asset Sale by the Board, a draft of the definitive Asset Sale agreement (an "**Asset Sale Agreement**"), shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(c) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Asset Sale Agreement, as applicable, and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) Within seven days after the Board's approval of an Asset Sale the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the Asset Sale Agreement and (ii) post the Board Notice on the Website. The steps contemplated in Article 1 of Annex D shall then be followed.

(e) If the EC (Empowered Community) Administration timely delivers an EC (Empowered Community) Approval Notice for the Asset Sale pursuant to and in compliance with the procedures and requirements of Section 1.4(b) of Annex D, the Asset Sale set forth in the Board Notice shall be deemed approved by the EC (Empowered Community), and the Asset Sale may be consummated by ICANN (Internet Corporation for Assigned Names and Numbers), but only under the terms set forth in the Asset Sale Agreement. In the event of such approval, the

Asset Sale shall not be subject to any further review or approval of the EC (Empowered Community). The Secretary shall promptly inform the Board of the receipt of an EC (Empowered Community) Approval Notice.

(f) If an EC (Empowered Community) Approval Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary, the Asset Sale set forth in the Board Notice shall be deemed not approved by the EC (Empowered Community), shall be null and void, and, notwithstanding its approval by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) shall not consummate the Asset Sale.

(g) If an Asset Sale is not approved by the EC (Empowered Community), ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the concerns raised by the EC (Empowered Community) in determining whether or not to consider a new Asset Sale, and the substance thereof, which shall be subject to the procedures of this Article 26.

## ARTICLE 27 TRANSITION ARTICLE

### Section 27.1. WORK STREAM 2

(a) The Cross-Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability ("CCWG-Accountability") was established pursuant to a charter dated 3 November 2014 ("**CCWG-Accountability Charter**"). The CCWG-Accountability Charter was subsequently adopted by the GNSO (Generic Names Supporting Organization), ALAC (At-Large Advisory Committee), ccNSO (Country Code Names Supporting Organization), GAC (Governmental Advisory Committee), ASO (Address Supporting Organization) and SSAC (Security and Stability Advisory Committee) ("**CCWG Chartering Organizations**"). The CCWG-Accountability Charter as in effect on 3 November 2014 shall remain in effect throughout Work Stream 2 (as defined therein).

(b) The CCWG-Accountability recommended in its Supplemental Final Proposal on Work Stream 1 Recommendations to the Board, dated 23 February 2016 ("**CCWG-Accountability Final Report**") that the below matters be reviewed and developed following the adoption date of these Bylaws ("**Work Stream 2 Matters**"), in each case, to the extent set forth in the CCWG-Accountability Final Report:

(i) Improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s standards for diversity at all levels;

- (ii) ICANN (Internet Corporation for Assigned Names and Numbers) staff accountability;
- (iii) Supporting Organization (Supporting Organization) and Advisory Committee (Advisory Committee) accountability, including but not limited to improved processes for accountability, transparency, and participation that are helpful to prevent capture;
- (iv) Improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency, focusing on enhancements to ICANN (Internet Corporation for Assigned Names and Numbers)'s existing DIDP, transparency of ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with governments, improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s whistleblower policy and transparency of Board deliberations;
- (v) Developing and clarifying the FOI-HR (as defined in Section 27.2);
- (vi) Addressing jurisdiction-related questions, including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability;
- (vii) Considering enhancements to the Ombudsman's role and function;
- (viii) Guidelines for standards of conduct presumed to be in good faith associated with exercising removal of individual Directors; and
- (ix) Reviewing the CEP (as set forth in Section 4.3).

(c) As provided in the CCWG-Accountability Charter and the Board's 2014.10.16.16 resolution, the Board shall consider consensus-based recommendations from the CCWG-Accountability on Work Stream 2 Matters ("**Work Stream 2 Recommendations**") with the same process and criteria it committed to using to consider the CCWG-Accountability recommendations in the CCWG-Accountability Final Report ("**Work Stream 1 Recommendations**"). For the avoidance of doubt, that process and criteria includes:

- (i) All Work Stream 2 Recommendations must further the following principles:
  - (A) Support and enhance the multistakeholder model;

(B) Maintain the security, stability and resiliency of the DNS (Domain Name System);

(C) Meet the needs and expectations of the global customers and partners of the IANA (Internet Assigned Numbers Authority) services;

(D) Maintain the openness of the Internet; and

(E) Not result in ICANN (Internet Corporation for Assigned Names and Numbers) becoming a government-led or an inter-governmental organization.

(ii) If the Board determines, by a vote of a two-thirds majority of the Board, that it is not in the global public interest to implement a Work Stream 2 Recommendation, it must initiate a dialogue with the CCWG-Accountability.

(iii) The Board shall provide detailed rationale to accompany the initiation of dialogue. The Board and the CCWG-Accountability shall mutually agree upon the method (e.g., by teleconference, email or otherwise) by which the dialogue will occur. Discussions shall be held in good faith and in a timely and efficient manner in an effort to find a mutually acceptable solution.

(iv) The CCWG-Accountability shall have an opportunity to address the Board's concerns and report back to the Board on further deliberations regarding the Board's concerns. The CCWG-Accountability shall discuss the Board's concerns within 30 days of the Board's initiation of the dialogue.

If a Work Stream 2 Recommendation is modified by the CCWG-Accountability, the CCWG-Accountability shall submit the modified Work Stream 2 Recommendation to the Board for further consideration along with detailed rationale on how the modification addresses the concerns raised by the Board.

(v) If, after the CCWG-Accountability modifies a Work Stream 2 Recommendation, the Board still believes it is not in the global public interest to implement the Work Stream 2 Recommendation, the Board may, by a vote of a two-thirds majority of the Board, send the matter back to the CCWG-Accountability for further consideration. The Board shall provide detailed rationale to accompany its action. If the Board determines not to accept a modified version of a Work Stream 2 Recommendation, unless required by its fiduciary obligations, the Board shall not establish an alternative solution on the issue addressed by the Work Stream 2

Recommendation until such time as the CCWG-Accountability and the Board reach agreement.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall provide adequate support for work on Work Stream 2 Matters, within budgeting processes and limitations reasonably acceptable to the CCWG-Accountability.

(e) The Work Stream 2 Matters specifically referenced in Section 27.1(b) shall be the only matters subject to this Section 27.1 and any other accountability enhancements should be developed through ICANN (Internet Corporation for Assigned Names and Numbers)'s other procedures.

(f) The outcomes of each Work Stream 2 Matter are not limited and could include a variety of recommendations or no recommendation; provided, however, that any resulting recommendations must directly relate to the matters discussed in Section 27.1(b).

## Section 27.2. HUMAN RIGHTS

(a) The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights ("**FOI-HR**") is (i) approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2, with the CCWG Chartering Organizations having the role described in the CCWG-Accountability Charter, and (ii) approved by the Board, in each case, using the same process and criteria as for Work Stream 1 Recommendations.>

(b) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2, or the independent review process provided in Section 4.3, based solely on the inclusion of the Core Value set forth in Section 1.2(b)(viii) (i) until after the FOI-HR contemplated by Section 27.2(a) is in place or (ii) for actions of ICANN (Internet Corporation for Assigned Names and Numbers) or the Board that occurred prior to the effectiveness of the FOI-HR.

## Section 27.3. EXISTING GROUPS AND TASK FORCES

Notwithstanding the adoption or effectiveness of these Bylaws, task forces and other groups in existence prior to the date of these Bylaws shall continue unchanged in membership, scope, and operation unless and until changes are made by ICANN (Internet Corporation for Assigned Names and Numbers) in compliance with the Bylaws.

## Section 27.4. CONTRACTS WITH ICANN (Internet Corporation for Assigned Names and Numbers)

Notwithstanding the adoption or effectiveness of these Bylaws, all agreements, including employment and consulting agreements, entered into by ICANN (Internet Corporation for Assigned Names and Numbers) shall continue in effect according to their terms.

## **Annex A: GNSO (Generic Names Supporting Organization) Policy Development Process**

The following process shall govern the GNSO (Generic Names Supporting Organization) policy development process ("PDP (Policy Development Process)") until such time as modifications are recommended to and approved by the Board. The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are not intended to result in a Consensus (Consensus) Policy, the Council may act through other processes.

### Section 1. **Required Elements of a Policy Development Process**

The following elements are required at a minimum to form Consensus (Consensus) Policies as defined within ICANN (Internet Corporation for Assigned Names and Numbers) contracts, and any other policies for which the GNSO (Generic Names Supporting Organization) Council requests application of this Annex A:

- a. Final Issue Report requested by the Board, the GNSO (Generic Names Supporting Organization) Council ("Council") or Advisory Committee (Advisory Committee), which should include at a minimum a) the proposed issue raised for consideration, b) the identity of the party submitting the issue, and c) how that party is affected by the issue;
- b. Formal initiation of the Policy Development Process by the Council;
- c. Formation of a Working Group or other designated work method;
- d. Initial Report produced by a Working Group or other designated work method;
- e. Final Report produced by a Working Group, or other designated work method, and forwarded to the Council for deliberation;

- f. Council approval of PDP (Policy Development Process) Recommendations contained in the Final Report, by the required thresholds;
- g. PDP (Policy Development Process) Recommendations and Final Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and
- h. Board approval of PDP (Policy Development Process) Recommendations.

## Section 2. **Policy Development Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a Policy Development Process Manual ("**PDP (Policy Development Process) Manual**") within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The PDP (Policy Development Process) Manual shall contain specific additional guidance on completion of all elements of a PDP (Policy Development Process), including those elements that are not otherwise defined in these Bylaws. The PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d).

## Section 3. **Requesting an Issue Report**

*Board Request.* The Board may request an Issue Report by instructing the GNSO (Generic Names Supporting Organization) Council ("Council") to begin the process outlined the PDP (Policy Development Process) Manual. In the event the Board makes a request for an Issue Report, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for an Issue Report.

*Council Request.* The GNSO (Generic Names Supporting Organization) Council may request an Issue Report by a vote of at least one-fourth (1/4) of the members of the Council of each House or a majority of one House.

*Advisory Committee (Advisory Committee) Request.* An Advisory Committee (Advisory Committee) may raise an issue for policy development by action of such committee to request an Issue Report, and transmission of that request to the Staff Manager and GNSO (Generic Names Supporting Organization) Council.

## Section 4. **Creation of an Issue Report**

Within forty-five (45) calendar days after receipt of either (i) an instruction from the Board; (ii) a properly supported motion from the GNSO (Generic Names Supporting Organization) Council; or (iii) a properly supported motion from an Advisory Committee (Advisory Committee), the Staff Manager will create a report (a "**Preliminary Issue Report**"). In the event the Staff Manager determines that more time is necessary to create the Preliminary Issue Report, the Staff Manager may request an extension of time for completion of the Preliminary Issue Report.

The following elements should be considered in the Issue Report:

- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the request for the Issue Report;
- c. How that party is affected by the issue, if known;
- d. Support for the issue to initiate the PDP (Policy Development Process), if known;
- e. The opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue proposed for consideration within the Policy Development Process is properly within the scope of the Mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization) as set forth in the Bylaws.
- f. The opinion of ICANN (Internet Corporation for Assigned Names and Numbers) Staff as to whether the Council should initiate the PDP (Policy Development Process) on the issue.

Upon completion of the Preliminary Issue Report, the Preliminary Issue Report shall be posted on the Website for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

The Staff Manager is responsible for drafting a summary and analysis of the public comments received on the Preliminary Issue Report and producing a Final Issue Report based upon the comments received. The Staff Manager should forward the Final Issue Report, along with any summary and analysis of the public comments received, to the Chair of the GNSO (Generic Names Supporting Organization) Council for consideration for initiation of a PDP (Policy Development Process).

## Section 5. **Initiation of the PDP (Policy Development Process)**

The Council may initiate the PDP (Policy Development Process) as follows:

*Board Request:* If the Board requested an Issue Report, the Council, within the timeframe set forth in the PDP (Policy Development Process) Manual, shall initiate a PDP (Policy Development Process). No vote is required for such action.

*GNSO (Generic Names Supporting Organization) Council or Advisory Committee (Advisory Committee) Requests:* The Council may only initiate the PDP (Policy Development Process) by a vote of the Council. Initiation of a PDP (Policy Development Process) requires a vote as set forth in Section 11.3(i)(ii) and Section 11.3(i)(iii) in favor of initiating the PDP (Policy Development Process).

## **Section 6. Reports**

An Initial Report should be delivered to the GNSO (Generic Names Supporting Organization) Council and posted for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), which time may be extended in accordance with the PDP (Policy Development Process) Manual. Following the review of the comments received and, if required, additional deliberations, a Final Report shall be produced for transmission to the Council.

## **Section 7. Council Deliberation**

Upon receipt of a Final Report, whether as the result of a working group or otherwise, the Council chair will (i) distribute the Final Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

The Council approval process is set forth in Section 11.3(i)(iv) through Section 11.3(vii), as supplemented by the PDP (Policy Development Process) Manual.

## **Section 8. Preparation of the Board Report**

If the PDP (Policy Development Process) recommendations contained in the Final Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

## **Section 9. Board Approval Processes**

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Council recommendation as soon as feasible, but preferably not

later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the PDP (Policy Development Process) Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any PDP (Policy Development Process) Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the policy recommended by a GNSO (Generic Names Supporting Organization) Supermajority Vote or less than a GNSO (Generic Names Supporting Organization) Supermajority vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "**Board Statement**"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.
- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "**Supplemental Recommendation**") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such policy is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers)

community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the policy in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

## Section 10. **Implementation of Approved Policies**

Upon a final decision of the Board adopting the policy, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create an implementation plan based upon the implementation recommendations identified in the Final Report, and to implement the policy. The GNSO (Generic Names Supporting Organization) Council may, but is not required to, direct the creation of an implementation review team to assist in implementation of the policy.

## Section 11. **Maintenance of Records**

Throughout the PDP (Policy Development Process), from policy suggestion to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each PDP (Policy Development Process) issue. Such status page will outline the completed and upcoming steps in the PDP (Policy Development Process) process, and contain links to key resources (e.g. Reports, Comments Fora, WG (Working Group) Discussions, etc.).

## Section 12. **Additional Definitions**

**"Comment Site", "Comment Forum", "Comments For a" and "Website"** refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the PDP (Policy Development Process) will be posted.

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

**"Staff Manager"** means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the PDP (Policy Development Process).

**"GNSO (Generic Names Supporting Organization) Supermajority Vote"** shall have the meaning set forth in the Bylaws.

### Section 13. **Applicability**

The procedures of this Annex A shall be applicable to all requests for Issue Reports and PDPs initiated after 8 December 2011. For all ongoing PDPs initiated prior to 8 December 2011, the Council shall determine the feasibility of transitioning to the procedures set forth in this Annex A for all remaining steps within the PDP (Policy Development Process). If the Council determines that any ongoing PDP (Policy Development Process) cannot be feasibly transitioned to these updated procedures, the PDP (Policy Development Process) shall be concluded according to the procedures set forth in Annex A in force on 7 December 2011.

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## **Annex A-1: GNSO (Generic Names Supporting Organization) Expedited Policy Development Process**

The following process shall govern the specific instances where the GNSO (Generic Names Supporting Organization) Council invokes the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process ("EPDP"). The GNSO (Generic Names Supporting Organization) Council may invoke the EPDP in the following limited circumstances: (1) to address a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the Board or the implementation of such an adopted recommendation; or (2) to create new or additional recommendations for a specific policy issue that had been substantially scoped previously such that extensive, pertinent background information already exists, e.g. (a) in an Issue Report for a possible PDP (Policy Development Process) that was not initiated; (b) as part of a previous PDP (Policy Development Process) that was not completed; or (c) through other projects such as a GGP. The following process shall be in place until such time as modifications are recommended to and approved by the Board. Where a conflict arises in relation to an EPDP between the PDP (Policy Development Process) Manual (see Annex 2 of the GNSO (Generic Names Supporting Organization) Operating Procedures) and the procedures described in this Annex A-1, the provisions of this Annex A-1 shall prevail.

The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. Provided the Council believes and documents via Council vote that the above-listed criteria are met, an EPDP may be initiated to recommend an amendment to an existing Consensus (Consensus) Policy;

however, in all cases where the GNSO (Generic Names Supporting Organization) is conducting policy-making activities that do not meet the above criteria as documented in a Council vote, the Council should act through a Policy Development Process (see Annex A).

### **Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process**

The following elements are required at a minimum to develop expedited GNSO (Generic Names Supporting Organization) policy recommendations, including recommendations that could result in amendments to an existing Consensus (Consensus) Policy, as part of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process:

- a. Formal initiation of the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process by the GNSO (Generic Names Supporting Organization) Council, including an EPDP scoping document;
- b. Formation of an EPDP Team or other designated work method;
- c. Initial Report produced by an EPDP Team or other designated work method;
- d. Final EPDP Policy Recommendation(s) Report produced by an EPDP Team, or other designated work method, and forwarded to the Council for deliberation;
- e. GNSO (Generic Names Supporting Organization) Council approval of EPDP Policy Recommendations contained in the Final EPDP Policy Recommendation(s) Report, by the required thresholds;
- f. EPDP Recommendations and Final EPDP Recommendation(s) Report forwarded to the Board through a Recommendations Report approved by the Council; and
- g. Board approval of EPDP Recommendation(s).

### **Section 2. Expedited Policy Development Process Manual**

The GNSO (Generic Names Supporting Organization) shall include a specific section(s) on the EPDP process as part of its maintenance of the GNSO (Generic Names Supporting Organization) Policy Development Process Manual (PDP (Policy Development Process) Manual), described in Annex 5 of the GNSO (Generic Names Supporting Organization) Operating Procedures. The EPDP Manual shall contain specific additional guidance on completion of all elements of

an EPDP, including those elements that are not otherwise defined in these Bylaws. The E PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d) .

### Section 3. **Initiation of the EPDP**

The Council may initiate an EPDP as follows:

The Council may only initiate the EPDP by a vote of the Council. Initiation of an EPDP requires an affirmative Supermajority vote of the Council (as defined in Section 11.3(i)(xii) of these Bylaws) in favor of initiating the EPDP.

The request to initiate an EPDP must be accompanied by an EPDP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG (Stakeholder Group) / C;
2. Origin of issue (e.g. previously completed PDP (Policy Development Process));
3. Scope of the effort (detailed description of the issue or question that the EPDP is expected to address);
4. Description of how this issue meets the criteria for an EPDP, i.e. how the EPDP will address either: (1) a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the Board or the implementation of such an adopted recommendation, or (2) new or additional policy recommendations on a specific GNSO (Generic Names Supporting Organization) policy issue that had been scoped previously as part of a PDP (Policy Development Process) that was not completed or other similar effort, including relevant supporting information in either case;
5. If not provided as part of item 4, the opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel as to whether the issue proposed for consideration is properly within the scope of the Mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization);
6. Proposed EPDP mechanism (e.g. WG (Working Group), DT (Drafting Team), individual volunteers);
7. Method of operation, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;

8. Decision-making methodology for EPDP mechanism, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;
9. Target completion date.

#### Section 4. **Council Deliberation**

Upon receipt of an EPDP Final Recommendation(s) Report, whether as the result of an EPDP Team or otherwise, the Council chair will (i) distribute the Final EPDP Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

Approval of EPDP Recommendation(s) requires an affirmative vote of the Council meeting the thresholds set forth in Section 11.3(i)(xiv) and (xv), as supplemented by the PDP (Policy Development Process) Manual.

#### Section 5. **Preparation of the Board Report**

If the EPDP Recommendation(s) contained in the Final EPDP Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendation(s) Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

#### Section 6. **Board Approval Processes**

The Board will meet to discuss the EPDP recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Recommendations Report from the Staff Manager. Board deliberation on the EPDP Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any EPDP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of

the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed EPDP Recommendations are not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the guidance in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

## **Section 7. Implementation of Approved Policies**

Upon a final decision of the Board adopting the EPDP recommendations, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the EPDP Recommendations. If deemed necessary, the Board shall direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, based upon the guidance recommendations identified in the Final EPDP Recommendation(s) Report.

## Section 8. **Maintenance of Records**

Throughout the EPDP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each EPDP issue. Such status page will outline the completed and upcoming steps in the EPDP process, and contain links to key resources (e.g. Reports, Comments Fora, EPDP Discussions, etc.).

## Section 9. **Applicability**

The procedures of this Annex A-1 shall be applicable from 28 September 2015 onwards.

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## **Annex A-2: GNSO (Generic Names Supporting Organization) Guidance Process**

The following process shall govern the GNSO (Generic Names Supporting Organization) guidance process ("GGP") until such time as modifications are recommended to and approved by the Board . The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are intended to result in a Consensus (Consensus) Policy, the Council should act through a Policy Development Process (see Annex A).

### **Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Guidance Process**

The following elements are required at a minimum to develop GNSO (Generic Names Supporting Organization) guidance:

1. Formal initiation of the GNSO (Generic Names Supporting Organization) Guidance Process by the Council, including a GGP scoping document;
2. Identification of the types of expertise needed on the GGP Team;
3. Recruiting and formation of a GGP Team or other designated work method;
4. Proposed GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team or other designated work method;

5. Final GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team, or other designated work method, and forwarded to the Council for deliberation;
6. Council approval of GGP Recommendations contained in the Final Recommendation(s) Report, by the required thresholds;
7. GGP Recommendations and Final Recommendation(s) Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and
8. Board approval of GGP Recommendation(s).

## Section 2. **GNSO (Generic Names Supporting Organization) Guidance Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a GNSO (Generic Names Supporting Organization) Guidance Process (GGP Manual) within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The GGP Manual shall contain specific additional guidance on completion of all elements of a GGP, including those elements that are not otherwise defined in these Bylaws. The GGP Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d).

## Section 3. **Initiation of the GGP**

The Council may initiate a GGP as follows:

The Council may only initiate the GGP by a vote of the Council or at the formal request of the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Initiation of a GGP requires a vote as set forth in Section 11.3(i)(xvi) in favor of initiating the GGP. In the case of a GGP requested by the Board, a GGP will automatically be initiated unless the GNSO (Generic Names Supporting Organization) Council votes against the initiation of a GGP as set forth in Section 11.3(i)(xvii).

The request to initiate a GGP must be accompanied by a GGP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG (Stakeholder Group) / C
2. Origin of issue (e.g., board request)

3. Scope of the effort (detailed description of the issue or question that the GGP is expected to address)
4. Proposed GGP mechanism (e.g. WG (Working Group), DT (Drafting Team), individual volunteers)
5. Method of operation, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines
6. Decision-making methodology for GGP mechanism, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines
7. Desired completion date and rationale

In the event the Board makes a request for a GGP, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for a GGP.

#### **Section 4. Council Deliberation**

Upon receipt of a Final Recommendation(s) Report, whether as the result of a GGP Team or otherwise, the Council chair will (i) distribute the Final Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the GGP Manual.

The Council approval process is set forth in Section 11.3(xviii) as supplemented by the GGP Manual.

#### **Section 5. Preparation of the Board Report**

If the GGP recommendations contained in the Final Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

#### **Section 6. Board Approval Processes**

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Guidance recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the GGP Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any GGP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such guidance is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed GNSO (Generic Names Supporting Organization) Guidance recommendation(s) adopted by a GNSO (Generic Names Supporting Organization) Supermajority Vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.
- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

## **Section 7. Implementation of Approved GNSO (Generic Names Supporting Organization) Guidance**

Upon a final decision of the Board adopting the guidance, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the GNSO (Generic Names Supporting Organization) Guidance. If deemed necessary, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) Staff to work

with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, if deemed necessary, based upon the guidance recommendations identified in the Final Recommendation(s) Report.

## Section 8. **Maintenance of Records**

Throughout the GGP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each GGP issue. Such status page will outline the completed and upcoming steps in the GGP process, and contain links to key resources (e.g. Reports, Comments Fora, GGP Discussions, etc.).

## Section 9. **Additional Definitions**

**"Comment Site", "Comment Forum", "Comments Fora" and "Website"** refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the GGP will be posted.

**"GGP Staff Manager"** means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the GGP.

## **Annex B: ccNSO (Country Code Names Supporting Organization) Policy-Development Process (ccPDP)**

The following process shall govern the ccNSO (Country Code Names Supporting Organization) policy-development process ("PDP (Policy Development Process)").

### **1. Request for an Issue Report**

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

- a. *Council.* The ccNSO (Country Code Names Supporting Organization) Council (in this Annex B, the **"Council"**) may call for the creation of an Issue Report by an affirmative vote of at least seven of the members of the Council present at any meeting or voting by e-mail.
- b. *Board.* The Board may call for the creation of an Issue Report by requesting the Council to begin the policy-development process.
- c. *Regional Organization.* One or more of the Regional Organizations representing ccTLDs in the ICANN (Internet Corporation for Assigned

Names and Numbers) recognized Regions may call for creation of an Issue Report by requesting the Council to begin the policy-development process.

- d. ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee). An ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or an ICANN (Internet Corporation for Assigned Names and Numbers) Advisory Committee (Advisory Committee) may call for creation of an Issue Report by requesting the Council to begin the policy-development process.
- e. Members of the ccNSO (Country Code Names Supporting Organization). The members of the ccNSO (Country Code Names Supporting Organization) may call for the creation of an Issue Report by an affirmative vote of at least ten members of the ccNSO (Country Code Names Supporting Organization) present at any meeting or voting by e-mail.

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

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

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

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

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

- c. How that party is affected by the issue;
- d. Support for the issue to initiate the PDP (Policy Development Process);
- e. A recommendation from the Issue Manager as to whether the Council should move to initiate the PDP (Policy Development Process) for this issue (the "**Manager Recommendation**"). Each Manager Recommendation shall include, and be supported by, an opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers) policy process and within the scope of the ccNSO (Country Code Names Supporting Organization). In coming to his or her opinion, the General Counsel shall examine whether:
  - 1) The issue is within the scope of the Mission;
  - 2) Analysis of the relevant factors according to Section 10.6(b) and Annex C affirmatively demonstrates that the issue is within the scope of the ccNSO (Country Code Names Supporting Organization);

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

- 3) Implicates or affects an existing ICANN (Internet Corporation for Assigned Names and Numbers) policy;
- 4) Is likely to have lasting value or applicability, albeit with the need for occasional updates, and to establish a guide or framework for future decision-making.

In all events, consideration of revisions to the ccPDP (this Annex B) or to the scope of the ccNSO (Country Code Names Supporting Organization) (Annex C) shall be within the scope of ICANN (Internet Corporation for Assigned Names and Numbers) and the ccNSO (Country Code Names Supporting Organization).

In the event that General Counsel is of the opinion the issue is not properly within the scope of the ccNSO (Country Code Names Supporting Organization) Scope, the Issue Manager shall inform the Council of this opinion. If after an analysis of the relevant factors according to Section 10.6 and Annex C a majority of 10 or more Council members is of the opinion the issue is within scope the Chair of the ccNSO (Country Code Names Supporting Organization) shall inform the Issue Manager

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

- f. In the event that the Manager Recommendation is in favor of initiating the PDP (Policy Development Process), a proposed time line for conducting each of the stages of PDP (Policy Development Process) outlined herein ("**PDP (Policy Development Process) Time Line**").
- g. If possible, the issue report shall indicate whether the resulting output is likely to result in a policy to be approved by the Board. In some circumstances, it will not be possible to do this until substantive discussions on the issue have taken place. In these cases, the issue report should indicate this uncertainty. Upon completion of the Issue Report, the Issue Manager shall distribute it to the full Council for a vote on whether to initiate the PDP (Policy Development Process).

### **3. Initiation of PDP (Policy Development Process)**

The Council shall decide whether to initiate the PDP (Policy Development Process) as follows:

- a. Within 21 days after receipt of an Issue Report from the Issue Manager, the Council shall vote on whether to initiate the PDP (Policy Development Process). Such vote should be taken at a meeting held in any manner deemed appropriate by the Council, including in person or by conference call, but if a meeting is not feasible the vote may occur by e-mail.
- b. A vote of ten or more Council members in favor of initiating the PDP (Policy Development Process) shall be required to initiate the PDP (Policy Development Process) provided that the Issue Report states that the issue is properly within the scope of the Mission and the ccNSO (Country Code Names Supporting Organization) Scope.

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

At the meeting of the Council where the PDP (Policy Development Process) has been initiated (or, where the Council employs a vote by e-mail, in that vote) pursuant to Item 3 above, the Council shall decide, by a majority vote of members present at the meeting (or voting by e-mail), whether or not to appoint a task force to address the issue. If the Council votes:

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

The Council shall also, by a majority vote of members present at the meeting or voting by e-mail, approve or amend and approve the PDP (Policy Development Process) Time Line set out in the Issue Report.

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

- a. Upon voting to appoint a task force, the Council shall invite each of the Regional Organizations (see Section 10.5) to appoint two individuals to participate in the task force (the "**Representatives**"). Additionally, the Council may appoint up to three advisors (the "**Advisors**") from outside the ccNSO (Country Code Names Supporting Organization) and, following formal request for GAC (Governmental Advisory Committee) participation in the Task Force, accept up to two Representatives from the Governmental Advisory Committee (Advisory Committee) to sit on the task force. The Council may increase the number of Representatives that may sit on a task force in its discretion in circumstances that it deems necessary or appropriate.
- b. Any Regional Organization wishing to appoint Representatives to the task force must provide the names of the Representatives to the Issue Manager within ten (10) calendar days after such request so that they are included on the task force. Such Representatives need not be members of the Council, but each must be an individual who has an interest, and ideally knowledge and expertise, in the subject matter, coupled with the ability to devote a substantial amount of time to the task force's activities.
- c. The Council may also pursue other actions that it deems appropriate to assist in the PDP (Policy Development Process), including appointing a particular individual or organization to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager in accordance with the PDP (Policy Development Process) Time Line.

## **6. Public Notification of Initiation of the PDP (Policy Development Process) and Comment Period**

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

## **7. Task Forces**

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

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

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

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

3. Any specific instructions from the Council for the task force, including whether or not the task force should solicit the advice of outside advisors on the issue.

The task force shall prepare its report and otherwise conduct its activities in accordance with the Charter. Any request to deviate from the Charter must be formally presented to the Council and may only be undertaken by the task force upon a vote of a majority of the Council members present at a meeting or voting by e-mail. The quorum requirements of Section 10.3(n) shall apply to Council actions under this Item 7(b).

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

*d. Collection of Information.*

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

- (i) If a Supermajority Vote (as defined by the Regional Organization) was reached, a clear statement of the Regional Organization's position on the issue;
- (ii) If a Supermajority Vote was not reached, a clear statement of all positions espoused by the members of the Regional Organization;
- (iii) A clear statement of how the Regional Organization arrived at its position(s). Specifically, the statement should detail specific meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

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

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

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

2. *Outside Advisors.* The task force may, in its discretion, solicit the opinions of outside advisors, experts, or other members of the public. Such opinions should be set forth in a report prepared by such outside advisors, and (i) clearly labeled as coming from outside advisors; (ii) accompanied by a detailed statement of the advisors' (a) qualifications and relevant experience and (b) potential conflicts of interest. These reports should be submitted in a formal statement to the task force chair within the time designated in the PDP (Policy Development Process) Time Line.

e. *Task Force Report.* The chair of the task force, working with the Issue Manager, shall compile the Regional Statements, the Comment Report, and other information or reports, as applicable, into a single document ("**Preliminary Task Force Report**") and distribute the Preliminary Task Force Report to the full task force within the time designated in the PDP (Policy Development Process) Time Line. The task force shall have a final task force meeting to consider the issues and try and reach a Supermajority Vote. After the final task force meeting, the chair of the task force and the Issue Manager shall create the final task force report (the "**Task Force Report**") and post it on the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). Each Task Force Report must include:

1. A clear statement of any Supermajority Vote (being 66% of the task force) position of the task force on the issue;
2. If a Supermajority Vote was not reached, a clear statement of all positions espoused by task force members submitted within the time line for submission of constituency reports. Each statement should clearly indicate (i) the reasons underlying the position and (ii) the Regional Organizations that held the position;
3. An analysis of how the issue would affect each Region, including any financial impact on the Region;

4. An analysis of the period of time that would likely be necessary to implement the policy; and
5. The advice of any outside advisors appointed to the task force by the Council, accompanied by a detailed statement of the advisors' (i) qualifications and relevant experience and (ii) potential conflicts of interest.

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

- a. If the Council decides not to convene a task force, each Regional Organization shall, within the time designated in the PDP (Policy Development Process) Time Line, appoint a representative to solicit the Region's views on the issue. Each such representative shall be asked to submit a Regional Statement to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.
- b. The Council may, in its discretion, take other steps to assist in the PDP (Policy Development Process), including, for example, appointing a particular individual or organization, to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.
- c. The Council shall formally request the Chair of the GAC (Governmental Advisory Committee) to offer opinion or advice.
- d. The Issue Manager shall take all Regional Statements, the Comment Report, and other information and compile (and post on the Website) an Initial Report within the time designated in the PDP (Policy Development Process) Time Line. Thereafter, the Issue Manager shall, in accordance with Item 9 below, create a Final Report.

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

- a. A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be opened for comments on the Task Force Report or Initial Report. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. All comments shall include the author's name, relevant experience, and interest in the issue.
- b. At the end of the comment period, the Issue Manager shall review the comments received and may, in the Issue Manager's reasonable

discretion, add appropriate comments to the Task Force Report or Initial Report, to prepare the "**Final Report**". The Issue Manager shall not be obligated to include all comments made during the comment period, nor shall the Issue Manager be obligated to include all comments submitted by any one individual or organization.

- c. The Issue Manager shall prepare the Final Report and submit it to the Council chair within the time designated in the PDP (Policy Development Process) Time Line.

## **10. Council Deliberation**

- a. Upon receipt of a Final Report, whether as the result of a task force or otherwise, the Council chair shall (i) distribute the Final Report to all Council members; (ii) call for a Council meeting within the time designated in the PDP (Policy Development Process) Time Line wherein the Council shall work towards achieving a recommendation to present to the Board; and (iii) formally send to the GAC (Governmental Advisory Committee) Chair an invitation to the GAC (Governmental Advisory Committee) to offer opinion or advice. Such meeting may be held in any manner deemed appropriate by the Council, including in person or by conference call. The Issue Manager shall be present at the meeting.
- b. The Council may commence its deliberation on the issue prior to the formal meeting, including via in-person meetings, conference calls, e-mail discussions, or any other means the Council may choose.
- c. The Council may, if it so chooses, solicit the opinions of outside advisors at its final meeting. The opinions of these advisors, if relied upon by the Council, shall be (i) embodied in the Council's report to the Board, (ii) specifically identified as coming from an outside advisor; and (iii) accompanied by a detailed statement of the advisor's (a) qualifications and relevant experience and (b) potential conflicts of interest.

## **11. Recommendation of the Council**

In considering whether to make a recommendation on the issue (a "**Council Recommendation**"), the Council shall seek to act by consensus. If a minority opposes a consensus position, that minority shall prepare and circulate to the Council a statement explaining its reasons for opposition. If the Council's discussion of the statement does not result in consensus, then a recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council, and shall be conveyed to the Members as the Council's Recommendation. Notwithstanding the foregoing, as outlined below, all

viewpoints expressed by Council members during the PDP (Policy Development Process) must be included in the Members Report.

## **12. Council Report to the Members**

In the event that a Council Recommendation is adopted pursuant to Item 11 then the Issue Manager shall, within seven days after the Council meeting, incorporate the Council's Recommendation together with any other viewpoints of the Council members into a Members Report to be approved by the Council and then to be submitted to the Members (the "**Members Report**"). The Members Report must contain at least the following:

- a. A clear statement of the Council's recommendation;
- b. The Final Report submitted to the Council; and
- c. A copy of the minutes of the Council's deliberation on the policy issue (see Item 10), including all the opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

## **13. Members Vote**

Following the submission of the Members Report and within the time designated by the PDP (Policy Development Process) Time Line, the ccNSO (Country Code Names Supporting Organization) members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and members' votes shall be lodged over such a period of time as designated in the PDP (Policy Development Process) Time Line (at least 21 days long).

In the event that at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes within the voting period, the resulting vote will be employed without further process. In the event that fewer than 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes in the first round of voting, the first round will not be employed and the results of a final, second round of voting, conducted after at least thirty days notice to the ccNSO (Country Code Names Supporting Organization) members, will be employed if at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes. In the event that more than 66% of the votes received at the end of the voting period shall be in favor of the Council Recommendation, then the recommendation shall be conveyed to the Board in accordance with Item 14 below as the ccNSO (Country Code Names Supporting Organization) Recommendation.

## **14. Board Report**

The Issue Manager shall within seven days after a ccNSO (Country Code Names Supporting Organization) Recommendation being made in accordance with Item 13 incorporate the ccNSO (Country Code Names Supporting Organization) Recommendation into a report to be approved by the Council and then to be submitted to the Board (the "**Board Report**"). The Board Report must contain at least the following:

- a. A clear statement of the ccNSO (Country Code Names Supporting Organization) recommendation;
- b. The Final Report submitted to the Council; and
- c. the Members' Report.

#### **15. Board Vote**

- a. The Board shall meet to discuss the ccNSO (Country Code Names Supporting Organization) Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.
- b. The Board shall adopt the ccNSO (Country Code Names Supporting Organization) Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or of ICANN (Internet Corporation for Assigned Names and Numbers).
  1. In the event that the Board determines not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation in a report to the Council (the "**Board Statement**"); and (ii) submit the Board Statement to the Council.
  2. The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
  3. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to

reflect the view of the Council (the Council's "**Supplemental Recommendation**"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13 . In the event that more than 66% of the votes cast by ccNSO (Country Code Names Supporting Organization) Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that acceptance of such policy would constitute a breach of the fiduciary duties of the Board to the Company.

4. In the event that the Board does not accept the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, it shall state its reasons for doing so in its final decision ("**Supplemental Board Statement**").
5. In the event the Board determines not to accept a ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, then the Board shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved until such time as the ccNSO (Country Code Names Supporting Organization) shall, under the ccPDP, make a recommendation on the issue that is deemed acceptable by the Board.

## **16. Implementation of the Policy**

Upon adoption by the Board of a ccNSO (Country Code Names Supporting Organization) Recommendation or ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, the Board shall, as appropriate, direct or authorize ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the policy.

## **17. Maintenance of Records**

With respect to each ccPDP for which an Issue Report is requested (see Item 1), ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain on the Website a status web page detailing the progress of each ccPDP, which shall provide a list of relevant dates for the ccPDP and shall also link to the following documents, to the extent they have been prepared pursuant to the ccPDP:

- a. Issue Report;
- b. PDP (Policy Development Process) Time Line;
- c. Comment Report;
- d. Regional Statement(s);
- e. Preliminary Task Force Report;
- f. Task Force Report;
- g. Initial Report;
- h. Final Report;
- i. Members' Report;
- j. Board Report;
- k. Board Statement;
- l. Supplemental Members' Report; and
- m. Supplemental Board Statement.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) shall post on the Website comments received in electronic written form specifically suggesting that a ccPDP be initiated.

### **Annex C: The Scope of the ccNSO (Country Code Names Supporting Organization)**

This annex describes the scope and the principles and method of analysis to be used in any further development of the scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role. As provided in Section 10.6(b) of the Bylaws, that scope shall be defined according to the procedures of the ccPDP.

The scope of the ccNSO (Country Code Names Supporting Organization)'s authority and responsibilities must recognize the complex relation between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers/registries with regard to policy issues. This annex shall assist the ccNSO (Country Code Names Supporting Organization), the ccNSO (Country Code Names Supporting Organization) Council, and the Board and staff in delineating relevant global policy issues.

## *Policy areas*

The ccNSO (Country Code Names Supporting Organization)'s policy role should be based on an analysis of the following functional model of the DNS (Domain Name System):

1. Data is registered/maintained to generate a zone file,
2. A zone file is in turn used in TLD (Top Level Domain) name servers.

Within a **TLD (Top Level Domain)** two functions have to be performed (these are addressed in greater detail below):

1. Entering data into a database ("**Data Entry Function**") and
2. Maintaining and ensuring upkeep of name-servers for the TLD (Top Level Domain) ("**Name Server Function**").

These two core functions must be performed at the ccTLD (Country Code Top Level Domain) registry level as well as at a higher level (IANA (Internet Assigned Numbers Authority) function and root servers) and at lower levels of the DNS (Domain Name System) hierarchy. This mechanism, as RFC (Request for Comments) 1591 points out, is recursive:

There are no requirements on sub domains of top-level domains beyond the requirements on higher-level domains themselves. That is, the requirements in this memo are applied recursively. In particular, all sub domains shall be allowed to operate their own domain name servers, providing in them whatever information the sub domain manager sees fit (as long as it is true and correct).

## *The Core Functions*

### 1. Data Entry Function (DEF):

Looking at a more detailed level, the first function (entering and maintaining data in a database) should be fully defined by a naming policy. This naming policy must specify the rules and conditions:

- a. under which data will be collected and entered into a database or data changed (at the TLD (Top Level Domain) level among others, data to reflect a transfer from registrant to registrant or changing registrar) in the database.
- b. for making certain data generally and publicly available (be it, for example, through Whois or nameservers).

## 2. The Name-Server Function (NSF (National Science Foundation (USA)))

The name-server function involves essential interoperability and stability issues at the heart of the domain name system. The importance of this function extends to nameservers at the ccTLD (Country Code Top Level Domain) level, but also to the root servers (and root-server system) and nameservers at lower levels.

On its own merit and because of interoperability and stability considerations, properly functioning nameservers are of utmost importance to the individual, as well as to the local and the global Internet communities.

With regard to the nameserver function, therefore, policies need to be defined and established. Most parties involved, including the majority of ccTLD (Country Code Top Level Domain) registries, have accepted the need for common policies in this area by adhering to the relevant RFCs, among others RFC (Request for Comments) 1591.

### *Respective Roles with Regard to Policy, Responsibilities, and Accountabilities*

It is in the interest of ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers to ensure the stable and proper functioning of the domain name system. ICANN (Internet Corporation for Assigned Names and Numbers) and the ccTLD (Country Code Top Level Domain) registries each have a distinctive role to play in this regard that can be defined by the relevant policies. The scope of the ccNSO (Country Code Names Supporting Organization) cannot be established without reaching a common understanding of the allocation of authority between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) registries.

Three roles can be distinguished as to which responsibility must be assigned on any given issue:

- Policy role: i.e. the ability and power to define a policy;
- Executive role: i.e. the ability and power to act upon and implement the policy; and
- Accountability role: i.e. the ability and power to hold the responsible entity accountable for exercising its power.

Firstly, responsibility presupposes a policy and this delineates the policy role. Depending on the issue that needs to be addressed those who are involved in defining and setting the policy need to be determined and defined. Secondly, this

presupposes an executive role defining the power to implement and act within the boundaries of a policy. Finally, as a counter-balance to the executive role, the accountability role needs to be defined and determined.

The information below offers an aid to:

1. delineate and identify specific policy areas;
2. define and determine roles with regard to these specific policy areas.

This annex defines the scope of the ccNSO (Country Code Names Supporting Organization) with regard to developing policies. The scope is limited to the policy role of the ccNSO (Country Code Names Supporting Organization) policy-development process for functions and levels explicitly stated below. It is anticipated that the accuracy of the assignments of policy, executive, and accountability roles shown below will be considered during a scope-definition ccPDP process.

#### *Name Server Function (as to ccTLDs)*

##### Level 1: Root Name Servers

Policy role: IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: Root Server System Operators

Accountability role: RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))

##### Level 2: ccTLD (Country Code Top Level Domain) Registry Name Servers in respect to interoperability

Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers)), for best practices a ccNSO (Country Code Names Supporting Organization) process can be organized

Executive role: ccTLD (Country Code Top Level Domain) Manager

Accountability role: part ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority)), part Local Internet Community, including local government

##### Level 3: User's Name Servers

Policy role: ccTLD (Country Code Top Level Domain) Manager, IETF (Internet Engineering Task Force) (RFC (Request for Comments))

Executive role: Registrant (Registrant)

Accountability role: ccTLD (Country Code Top Level Domain) Manager

## *Data Entry Function (as to ccTLDs)*

### Level 1: Root Level Registry

Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority))

Accountability role: ICANN (Internet Corporation for Assigned Names and Numbers) community, ccTLD (Country Code Top Level Domain) Managers, (national authorities in some cases)

### Level 2: ccTLD (Country Code Top Level Domain) Registry

Policy role: Local Internet Community, including local government, and/or ccTLD (Country Code Top Level Domain) Manager according to local structure

Executive role: ccTLD (Country Code Top Level Domain) Manager

Accountability role: Local Internet Community, including national authorities in some cases

### Level 3: Second and Lower Levels

Policy role: Registrant (Registrant)

Executive role: Registrant (Registrant)

Accountability role: Registrant (Registrant), users of lower-level domain names

## **ANNEX D: EC (Empowered Community) MECHANISM**

### **ARTICLE 1 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO APPROVE APPROVAL ACTIONS**

#### **Section 1.1. APPROVAL ACTIONS**

The processes set forth in this Article 1 shall govern the escalation procedures for the EC (Empowered Community)'s exercise of its right to approve the following (each, an "**Approval Action**") under the Bylaws:

- a. Fundamental Bylaw Amendments, as contemplated by Section 25.2 of the Bylaws;
- b. Articles Amendments, as contemplated by Section 25.2 of the Bylaws; and
- c. Asset Sales, as contemplated by Article 26 of the Bylaws.

#### **Section 1.2. APPROVAL PROCESS**

Following the delivery of a Board Notice for an Approval Action ("**Approval Action Board Notice**") by the Secretary to the EC (Empowered Community) Administration and the Decisional Participants (which delivery date shall be referred to herein as the "**Approval Action Board Notification Date**"), the Decisional Participants shall thereafter promptly inform their constituents of the delivery of the Approval Action Board Notice. Any Approval Action Board Notice relating to a Fundamental Bylaw Amendment or Articles Amendment shall include a statement, if applicable, that the Fundamental Bylaw Amendment or Articles Amendment, as applicable, is based solely on the outcome of a PDP (Policy Development Process), citing the specific PDP (Policy Development Process) and the provision in the Fundamental Bylaw Amendment or Articles Amendment subject to the Approval Action Board Notice that implements such PDP (Policy Development Process) (as applicable, a "**PDP (Policy Development Process) Fundamental Bylaw Statement**" or "**PDP (Policy Development Process) Articles Statement**") and the name of the Supporting Organization (Supporting Organization) that is a Decisional Participant that undertook the PDP (Policy Development Process) relating to the Fundamental Bylaw Amendment or Articles Amendment, as applicable (as applicable, the "**Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant**" or "**Articles Amendment PDP (Policy Development Process) Decisional Participant**"). The process set forth in this Section 1.2 of this Annex D as it relates to a particular Approval Action is referred to herein as the "**Approval Process.**"

### **Section 1.3. APPROVAL ACTION COMMUNITY FORUM**

- a. ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Approval Action (an "**Approval Action Community Forum**").
- b. If the EC (Empowered Community) Administration requests a publicly-available conference call by providing a notice to the Secretary, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Approval Action Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- c. The Approval Action Community Forum shall be convened and concluded during the period beginning upon the Approval Action Board Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s

principal office) on the 30<sup>th</sup> day after the Approval Action Board Notification Date ("**Approval Action Community Forum Period**"). If the EC (Empowered Community) Administration requests that the Approval Action Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the Approval Action Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the EC (Empowered Community) Administration. If the Approval Action Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30<sup>th</sup> day after the Approval Action Board Notification Date, the Approval Action Community Forum Period for the Approval Action shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

- d. The Approval Action Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Approval Action Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Approval Action Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Approval Action Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- e. The EC (Empowered Community) Administration shall manage and moderate the Approval Action Community Forum in a fair and neutral manner.
- f. ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and

questions on the Approval Action prior to the convening of and during the Approval Action Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

- g. ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Approval Action Community Forum in order to address any questions or concerns regarding the Approval Action.
- h. For the avoidance of doubt, the Approval Action Community Forum is not a decisional body.
- i. During the Approval Action Community Forum Period, an additional one or two Community Forums may be held at the discretion of the Board or the EC (Empowered Community) Administration. If the Board decides to hold an additional one or two Approval Action Community Forums, it shall provide a rationale for such decision, which rationale ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- j. ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Approval Action Community Forum and shall promptly post on the Website a public record of the Approval Action Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Approval Action Community Forum.

#### **Section 1.4. DECISION WHETHER TO APPROVE AN APPROVAL ACTION**

(a) Following the expiration of the Approval Action Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21<sup>st</sup> day after the expiration of the Approval Action Community Forum Period (such period, the "**Approval Action Decision Period**"), with respect to each Approval Action, each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Approval Action, (ii) objects to such Approval Action or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Approval Action), and each Decisional Participant

shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Approval Action Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Approval Action Decision Period).

(b) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver a written notice ("**EC (Empowered Community) Approval Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Article 1 of this Annex D, the EC (Empowered Community) has approved the Approval Action if:

(i) The Approval Action does not relate to a Fundamental Bylaw Amendment or Articles Amendment and is (A) supported by three or more Decisional Participants and (B) not objected to by more than one Decisional Participant;

(ii) The Approval Action relates to a Fundamental Bylaw Amendment and is (A) supported by three or more Decisional Participants (including the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant if the Board Notice included a PDP (Policy Development Process) Fundamental Bylaw Statement) and (B) not objected to by more than one Decisional Participant; or

(iii) The Approval Action relates to an Articles Amendment and is (A) supported by three or more Decisional Participants (including the Articles Amendment PDP (Policy Development Process) Decisional Participant if the Board Notice included a PDP (Policy Development Process) Articles Statement) and (B) not objected to by more than one Decisional Participant.

(c) If the Approval Action does not obtain the support required by Section 1.4(b)(i), (ii) or (iii) of this Annex D, as applicable, the Approval Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver to the Secretary a notice certifying that the Approval Process has been terminated with respect to the Approval Action ("**Approval Process Termination Notice**").

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Approval Action Board Notice, (ii) EC (Empowered Community) Approval Notice, (iii) Approval Process Termination Notice, (iv) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (v) other notices the Secretary receives under this Article 1.

## ARTICLE 2 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO REJECT SPECIFIED ACTIONS

### Section 2.1. Rejection Actions

The processes set forth in this Article 2 shall govern the escalation procedures for the EC (Empowered Community)'s exercise of its right to reject the following (each, a "**Rejection Action**") under the Bylaws:

- a. PTI Governance Actions, as contemplated by Section 16.2(d) of the Bylaws;
- b. IFR Recommendation Decisions, as contemplated by Section 18.6(d) of the Bylaws;
- c. Special IFR Recommendation Decisions, as contemplated by Section 18.12(e) of the Bylaws;
- d. SCWG Creation Decisions, as contemplated by Section 19.1(d) of the Bylaws;
- e. SCWG Recommendation Decisions, as contemplated by Section 19.4(d) of the Bylaws;
- f. ICANN (Internet Corporation for Assigned Names and Numbers) Budgets, as contemplated by Section 22.4(a)(v) of the Bylaws;
- g. IANA (Internet Assigned Numbers Authority) Budgets, as contemplated by Section 22.4(b)(v) of the Bylaws;
- h. Operating Plans, as contemplated by Section 22.5(a)(v) of the Bylaws;
- i. Strategic Plans, as contemplated by Section 22.5(b)(v) of the Bylaws; and
- j. Standard Bylaw Amendments, as contemplated by Section 25.1(e) of the Bylaws.

### Section 2.2. PETITION PROCESS FOR SPECIFIED ACTIONS

(a) Following the delivery of a Board Notice for a Rejection Action ("**Rejection Action Board Notice**") by the Secretary to the EC (Empowered Community) Administration and Decisional Participants (which delivery date shall be referred to herein as the "**Rejection Action Board Notification Date**"), the Decisional Participants shall thereafter promptly inform their constituents of the delivery of the Rejection Action Board Notice. The process set forth in this Section 2.2 of this Annex D as it relates to a particular Rejection Action is referred to herein as the "**Rejection Process**."

(b) During the period beginning on the Rejection Action Board Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21<sup>st</sup> day after the Rejection Action Board Notification Date (as it relates to a particular Rejection Action, the "**Rejection Action Petition Period**"), subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant, seeking to reject the Rejection Action and initiate the Rejection Process (a "**Rejection Action Petition**").

(c) A Decisional Participant that has received a Rejection Action Petition shall either accept or reject such Rejection Action Petition; provided that a Decisional Participant may only accept such Rejection Action Petition if it was received by such Decisional Participant during the Rejection Action Petition Period.

(i) If, in accordance with the requirements of Section 2.2(c) of this Annex D, a Decisional Participant accepts a Rejection Action Petition during the Rejection Action Petition Period, the Decisional Participant shall promptly provide to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary written notice ("**Rejection Action Petition Notice**") of such acceptance (such Decisional Participant, the "**Rejection Action Petitioning Decisional Participant**"), and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Action Petition Notice on the Website. The Rejection Action Petition Notice shall also include:

(A) the rationale upon which rejection of the Rejection Action is sought. Where the Rejection Action Petition Notice relates to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, an IANA (Internet Assigned Numbers Authority) Budget, an Operating Plan or a Strategic Plan, the Rejection Action Petition Notice shall not be valid and shall not be accepted by the EC (Empowered Community) Administration unless the rationale set forth in the Rejection Action Petition Notice is based on one or more significant issues that were specifically raised in the applicable public

comment period(s) relating to perceived inconsistencies with the Mission, purpose and role set forth in ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws, the global public interest, the needs of ICANN (Internet Corporation for Assigned Names and Numbers)'s stakeholders, financial stability, or other matter of concern to the community; and

(B) where the Rejection Action Petition Notice relates to a Standard Bylaw Amendment, a statement, if applicable, that the Standard Bylaw Amendment is based solely on the outcome of a PDP (Policy Development Process), citing the specific PDP (Policy Development Process) and the provision in the Standard Bylaw Amendment subject to the Board Notice that implements such PDP (Policy Development Process) ("**PDP (Policy Development Process) Standard Bylaw Statement**") and the name of the Supporting Organization (Supporting Organization) that is a Decisional Participant that undertook the PDP (Policy Development Process) relating to the Standard Bylaw Amendment ("**Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant**").

The Rejection Process shall thereafter continue pursuant to Section 2.2(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Rejection Action Petition Notice pursuant to Section 2.2(c)(i) of this Annex D during the Rejection Action Petition Period, the Rejection Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Rejection Action Petition Period, deliver to the Secretary a notice certifying that the Rejection Process has been terminated with respect to the Rejection Action contained in the Approval Notice ("**Rejection Process Termination Notice**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Process Termination Notice on the Website.

(d) Following the delivery of a Rejection Action Petition Notice to the EC (Empowered Community) Administration pursuant to Section 2.2(c)(i) of this Annex D, the Rejection Action Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Rejection Action Petition. The Rejection Action Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Rejection Action Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Rejection Action Supporting Decisional Participant**") during the period beginning upon the expiration of the Rejection Action Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7<sup>th</sup> day after the expiration of the Rejection Action Petition Period (the "**Rejection Action Petition Support Period**"), the Rejection Action Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Rejection Action Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Rejection Action Supporting Decisional Participant, and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Action Supported Petition on the Website. Each Rejection Action Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Rejection Action Petition, and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post each such notice on the Website. Such Rejection Action Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Rejection Action Petitioning Decisional Participant who shall act as a liaison with respect to the Rejection Action Supported Petition;

(C) a statement as to whether or not the Rejection Action Petitioning Decisional Participant and/or the Rejection Action Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Rejection Action Community Forum (as defined in Section 2.3 of this Annex D) for the community to discuss the Rejection Action Supported Petition;

(D) a statement as to whether the Rejection Action Petitioning Decisional Participant and the Rejection Action Supporting Decisional Participant have determined to hold the Rejection Action Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, taking into account the limitation on holding such a Rejection Action Community Forum when the Rejection Action Supported Petition relates to an ICANN (Internet Corporation for Assigned Names and

Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget as described in Section 2.3(c) of this Annex D; and

(E) a PDP (Policy Development Process) Standard Bylaw Statement, if applicable.

The Rejection Process shall thereafter continue for such Rejection Action Supported Petition pursuant to Section 2.3 of this Annex D. The foregoing process may result in more than one Rejection Action Supported Petition relating to the same Rejection Action.

(ii) The Rejection Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Rejection Action Petition Support Period, deliver to the Secretary a Rejection Process Termination Notice, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website, if:

(A) no Rejection Action Petitioning Decisional Participant is able to obtain the support of at least one other Decisional Participant for its Rejection Action Petition during the Rejection Action Petition Support Period; or

(B) where the Rejection Action Supported Petition includes a PDP (Policy Development Process) Standard Bylaw Statement, the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Rejection Action Petitioning Decisional Participant or (y) one of the Rejection Action Supporting Decisional Participants.

### **Section 2.3. REJECTION ACTION COMMUNITY FORUM**

- a. If the EC (Empowered Community) Administration receives a Rejection Action Supported Petition under Section 2.2(d) of this Annex D during the Rejection Action Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Rejection Action Supported Petition ("**Rejection Action Community Forum**"). If the EC (Empowered Community) Administration receives more than one Rejection Action Supported Petition relating to the same Rejection Action, all such Rejection Action Supported Petitions shall be discussed at the same Rejection Action Community Forum.

- b. If a publicly-available conference call has been requested in a Rejection Action Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Rejection Action Community Forum relating to that Rejection Action Supported Petition, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. If a conference call has been requested in relation to more than one Rejection Action Supported Petition relating to the same Rejection Action, all such Rejection Action Supported Petitions shall be discussed during the same conference call.
- c. The Rejection Action Community Forum shall be convened and concluded during the period beginning upon the expiration of the Rejection Action Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Petition Support Period ("**Rejection Action Community Forum Period**") unless all Rejection Action Supported Petitions relating to the same Rejection Action requested that the Rejection Action Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Rejection Action Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting (except as otherwise provided below with respect to a Rejection Action Supported Petition relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget) on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Rejection Action Petitioning Decisional Participant(s) and the Rejection Action Supporting Decisional Participant(s). If the Rejection Action Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Petition Support Period, the Rejection Action Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting. Notwithstanding the

foregoing and notwithstanding any statement in the Rejection Action Supported Petition, a Rejection Action Community Forum to discuss a Rejection Action Supported Petition relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget may only be held at a scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting if such Rejection Action Community Forum occurs during the Rejection Action Community Forum Period, without any extension of such Rejection Action Community Forum Period.

- d. The Rejection Action Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Rejection Action Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Rejection Action Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Rejection Action Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- e. The EC (Empowered Community) Administration shall manage and moderate the Rejection Action Community Forum in a fair and neutral manner.
- f. ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Rejection Action Supported Petition prior to the convening of and during the Rejection Action Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).
- g. ICANN (Internet Corporation for Assigned Names and Numbers) staff (including the CFO when the Rejection Action Supported Petition relates to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, IANA (Internet Assigned Numbers Authority) Budget or Operating Plan) and Directors representing the Board are expected to attend the

Rejection Action Community Forum in order to address the concerns raised in the Rejection Action Supported Petition.

- h. If the Rejection Action Petitioning Decisional Participant and each of the Rejection Action Supporting Decisional Participants for an applicable Rejection Action Supported Petition agree before, during or after the Rejection Action Community Forum that the issue raised in such Rejection Action Supported Petition has been resolved, such Rejection Action Supported Petition shall be deemed withdrawn and the Rejection Process with respect to such Rejection Action Supported Petition will be terminated. If all Rejection Action Supported Petitions relating to a Rejection Action are withdrawn, the Rejection Process will automatically be terminated. If a Rejection Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Rejection Action Supported Petition, deliver to the Secretary a Rejection Process Termination Notice. For the avoidance of doubt, the Rejection Action Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Rejection Action Petitioning Decisional Participant and the Rejection Action Supporting Decisional Participant(s).
- i. During the Rejection Action Community Forum Period, an additional one or two Rejection Action Community Forums may be held at the discretion of a Rejection Action Petitioning Decisional Participant and a related Rejection Action Supporting Decisional Participant, or the EC (Empowered Community) Administration.
- j. ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Rejection Action Community Forum and shall promptly post on the Website a public record of the Rejection Action Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Rejection Action Community Forum.

#### **Section 2.4. DECISION WHETHER TO REJECT A REJECTION ACTION**

- (a) Following the expiration of the Rejection Action Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21<sup>st</sup> day after the expiration of the Rejection Action Community Forum Period (such period, the "**Rejection Action Decision Period**"), with

respect to each Rejection Action Supported Petition, each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Rejection Action Supported Petition and has determined to reject the Rejection Action, (ii) objects to such Rejection Action Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Rejection Action Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to expiration of the Rejection Action Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Rejection Action Decision Period).

(b) The EC (Empowered Community) Administration, within twenty-four (24) hours of the expiration of the Rejection Action Decision Period, shall promptly deliver a written notice ("**EC (Empowered Community) Rejection Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Article 2 of Annex D, the EC (Empowered Community) has resolved to reject the Rejection Action if (after accounting for any adjustments to the below as required by the GAC (Governmental Advisory Committee) Carve-out pursuant to Section 3.6(e) of the Bylaws if the Rejection Action Supported Petition included a GAC (Governmental Advisory Committee) Consensus (Consensus) Statement):

(i) A Rejection Action Supported Petition relating to a Rejection Action other than a Standard Bylaw Amendment is (A) supported by four or more Decisional Participants and (B) not objected to by more than one Decisional Participant; or

(ii) A Rejection Action Supported Petition relating to a Standard Bylaw Amendment that is (A) supported by three or more Decisional Participants (including the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant if the Rejection Action Supported Petition included a PDP (Policy Development Process) Standard Bylaw Statement) and (B) not objected to by more than one Decisional Participant.

(c) If no Rejection Action Supported Petition obtains the support required by Section 2.4(b)(i) or (ii) of this Annex D, as applicable, the Rejection Process will automatically be terminated and the EC (Empowered Community) Administration

shall, within twenty-four (24) hours of the expiration of the Rejection Action Decision Period, deliver to the Secretary a Rejection Process Termination Notice.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Rejection Action Board Notice, (ii) Rejection Action Petition, (iii) Rejection Action Petition Notice, (iv) Rejection Action Supported Petition, (v) EC (Empowered Community) Rejection Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Rejection Action, (vi) Rejection Process Termination Notice, and (vii) other notices the Secretary receives under this Article 2.

## ARTICLE 3 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO REMOVE DIRECTORS AND RECALL THE BOARD

### Section 3.1. **NOMINATING COMMITTEE DIRECTOR REMOVAL PROCESS**

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove a Director holding Seats 1 through 8 and initiate the Nominating Committee Director Removal Process ("**Nominating Committee Director Removal Petition**"). Each Nominating Committee Director Removal Petition shall set forth the rationale upon which such individual seeks to remove such Director. The process set forth in this Section 3.1 of Annex D is referred to herein as the "**Nominating Committee Director Removal Process**."

(b) During the period beginning on the date that the Decisional Participant received the Nominating Committee Director Removal Petition (such date of receipt, the "**Nominating Committee Director Removal Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21<sup>st</sup> day after the Nominating Committee Director Removal Petition Date (as it relates to a particular Director, the "**Nominating Committee Director Removal Petition Period**"), the Decisional Participant that has received a Nominating Committee Director Removal Petition ("**Nominating Committee Director Removal Petitioned Decisional Participant**") shall either accept or reject such Nominating Committee Director Removal Petition; provided that a Nominating Committee Director Removal Petitioned Decisional Participant shall not accept a Nominating Committee Director Removal Petition if, during the same term, the Director who is the subject of such Nominating Committee Director Removal Petition had previously been subject to a Nominating Committee

Director Removal Petition that led to a Nominating Committee Director Removal Community Forum (as discussed in Section 3.1(e) of this Annex D).

(c) During the Nominating Committee Director Removal Petition Period, the Nominating Committee Director Removal Petitioned Decisional Participant shall invite the Director subject to the Nominating Committee Director Removal Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) to a dialogue with the individual(s) bringing the Nominating Committee Director Removal Petition and the Nominating Committee Director Removal Petitioned Decisional Participant's representative on the EC (Empowered Community) Administration. The Nominating Committee Director Removal Petition may not be accepted unless this invitation has been extended upon reasonable notice and accommodation to the affected Director's availability. If the invitation is accepted by either the Director who is the subject of the Nominating Committee Director Removal Petition or the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director), the Nominating Committee Director Removal Petitioned Decisional Participant shall not accept the Nominating Committee Director Removal Petition until the dialogue has occurred or there have been reasonable efforts to have the dialogue.

(i) If, in accordance with Section 3.1(b) of this Annex D, a Nominating Committee Director Removal Petitioned Decisional Participant accepts a Nominating Committee Director Removal Petition during the Nominating Committee Director Removal Petition Period (such Decisional Participant, the "**Nominating Committee Director Removal Petitioning Decisional Participant**"), the Nominating Committee Director Removal Petitioning Decisional Participant shall, within twenty-four (24) hours of its acceptance of the Nominating Committee Director Removal Petition, provide written notice ("**Nominating Committee Director Removal Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary. The Nominating Committee Director Removal Petition Notice shall include the rationale upon which removal of the affected Director is sought. The Nominating Committee Director Removal Process shall thereafter continue pursuant to Section 3.1(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Nominating Committee Director Removal Petition Notice pursuant to Section 3.1(c)(i) of this Annex D during the Nominating Committee Director Removal Petition Period, the Nominating Committee Director Removal Process shall automatically be terminated with respect to the applicable Nominating Committee Director Removal Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the

expiration of the Nominating Committee Director Removal Petition Period, deliver to the Secretary a notice certifying that the Nominating Committee Director Removal Process has been terminated with respect to the applicable Nominating Committee Director Removal Petition ("**Nominating Committee Director Removal Process Termination Notice**").

(d) Following the delivery of a Nominating Committee Director Removal Petition Notice to the EC (Empowered Community) Administration by a Nominating Committee Director Removal Petitioning Decisional Participant pursuant to Section 3.1(c)(i) of this Annex D, the Nominating Committee Director Removal Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Nominating Committee Director Removal Petition. The Nominating Committee Director Removal Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Nominating Committee Director Removal Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Nominating Committee Director Removal Supporting Decisional Participant**") during the period beginning upon the expiration of the Nominating Committee Director Removal Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7<sup>th</sup> day after the expiration of the Nominating Committee Director Removal Petition Period (the "**Nominating Committee Director Removal Petition Support Period**"), the Nominating Committee Director Removal Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Nominating Committee Director Removal Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Nominating Committee Director Removal Supporting Decisional Participant. Each Nominating Committee Director Removal Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Nominating Committee Director Removal Petition. Such Nominating Committee Director Removal Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Nominating Committee Director Removal Petitioning Decisional Participant who shall act as a liaison with respect to the Nominating Committee Director Removal Supported Petition;

(C) a statement as to whether or not the Nominating Committee Director Removal Petitioning Decisional Participant and/or the Nominating Committee Director Removal Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Nominating Committee Director Removal Community Forum (as defined in Section 3.1(e) of this Annex D) for the community to discuss the Nominating Committee Director Removal Supported Petition; and

(D) a statement as to whether the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant have determined to hold the Nominating Committee Director Removal Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Nominating Committee Director Removal Process shall thereafter continue for such Nominating Committee Director Removal Petition pursuant to Section 3.1(e) of this Annex D.

(ii) The Nominating Committee Director Removal Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Petition Support Period, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice if the Nominating Committee Director Removal Petitioning Decisional Participant is unable to obtain the support of at least one other Decisional Participant for its Nominating Committee Director Removal Petition during the Nominating Committee Director Removal Petition Support Period.

(e) If the EC (Empowered Community) Administration receives a Nominating Committee Director Removal Supported Petition under Section 3.1(d) of this Annex D during the Nominating Committee Director Removal Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the

Nominating Committee Director Removal Supported Petition ("**Nominating Committee Director Removal Community Forum**").

(i) If a publicly-available conference call has been requested in a Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Nominating Committee Director Removal Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Director who is the subject of the Nominating Committee Director Removal Supported Petition regarding his or her availability.

(ii) The Nominating Committee Director Removal Community Forum shall be convened and concluded during the period beginning upon the expiration of the Nominating Committee Director Removal Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Petition Support Period ( "**Nominating Committee Director Removal Community Forum Period**") unless the Nominating Committee Director Removal Supported Petition requested that the Nominating Committee Director Removal Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Nominating Committee Director Removal Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant(s); provided, that, the date and time of any Nominating Committee Director Removal Community Forum shall be determined after consultation with the Director who is the subject of the Nominating Committee Director Removal Supported Petition regarding his or her availability. If the Nominating Committee Director Removal Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as

calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Petition Support Period, the Nominating Committee Director Removal Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Nominating Committee Director Removal Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Nominating Committee Director Removal Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Nominating Committee Director Removal Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of the Nominating Committee Director Removal Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Nominating Committee Director Removal Community Forum in a fair and neutral manner; provided that no individual from the Nominating Committee Director Removal Petitioning Decisional Participant or the Nominating Committee Director Removal Supporting Decisional Participant, nor the individual who initiated the Nominating Committee Director Removal Petition, shall be permitted to participate in the management or moderation of the Nominating Committee Director Removal Community Forum.

(v) The Director subject to the Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Nominating Committee Director Removal Supported Petition prior to the convening of and during the Nominating Committee Director Removal Community Forum. Any written materials delivered to the EC (Empowered Community)

Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) The Director who is the subject of the Nominating Committee Director Removal Supported Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) are expected to attend the Nominating Committee Director Removal Community Forum in order to address the issues raised in the Nominating Committee Director Removal Supported Petition.

(vii) If the Nominating Committee Director Removal Petitioning Decisional Participant and each of the Nominating Committee Director Removal Supporting Decisional Participants for an applicable Nominating Committee Director Removal Supported Petition agree before, during or after the Nominating Committee Director Removal Community Forum that the issue raised in such Nominating Committee Director Removal Supported Petition has been resolved, such Nominating Committee Director Removal Supported Petition shall be deemed withdrawn and the Nominating Committee Director Removal Process with respect to such Nominating Committee Director Removal Supported Petition will be terminated. If a Nominating Committee Director Removal Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Nominating Committee Director Removal Supported Petition, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice. For the avoidance of doubt, the Nominating Committee Director Removal Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant(s).

(viii) During the Nominating Committee Director Removal Community Forum Period, an additional one or two Nominating Committee Director Removal Community Forums may be held at the discretion of a Nominating Committee Director Removal Petitioning Decisional Participant and a related Nominating Committee Director Removal Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Nominating Committee Director Removal Community Forum and shall promptly post on the Website a public record

of the Nominating Committee Director Removal Community Forum as well as all written submissions of the Director who is the subject of the Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Nominating Committee Director Removal Community Forum.

(f) Following the expiration of the Nominating Committee Director Removal Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21<sup>st</sup> day after the expiration of the Nominating Committee Director Removal Community Forum Period (such period, the "**Nominating Committee Director Removal Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Nominating Committee Director Removal Supported Petition, (ii) objects to such Nominating Committee Director Removal Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Nominating Committee Director Removal Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Nominating Committee Director Removal Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Nominating Committee Director Removal Decision Period).

(g) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Decision Period, deliver a written notice ("**Nominating Committee Director Removal Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of Section 3.1 of this Annex D, the EC (Empowered Community) has approved of the removal of the Director who is subject to the Nominating Committee Director Removal Process if the Nominating Committee Director Removal Supported Petition is (i) supported by three or more Decisional Participants and (ii) not objected to by more than one Decisional Participant.

(h) Upon the Secretary's receipt of a Nominating Committee Director Removal Notice, the Director subject to such Nominating Committee Director Removal Notice shall be effectively removed from office and shall no longer be a Director

and such Director's vacancy shall be filled in accordance with Section 7.12 of the Bylaws.

(i) If the Nominating Committee Director Removal Supported Petition does not obtain the support required by Section 3.1(g) of this Annex D, the Nominating Committee Director Removal Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Decision Period, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice. The Director who was subject to the Nominating Committee Director Removal Process shall remain on the Board and not be subject to the Nominating Committee Director Removal Process for the remainder of the Director's current term.

(j) If neither a Nominating Committee Director Removal Notice nor a Nominating Committee Director Removal Process Termination Notice are received by the Secretary prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21<sup>st</sup> day after the expiration of the Nominating Committee Director Removal Community Forum Period, the Nominating Committee Director Removal Process shall automatically terminate and the Director who was subject to the Nominating Committee Director Removal Process shall remain on the Board and shall not be subject to the Nominating Committee Director Removal Process for the remainder of the Director's current term.

(k) Notwithstanding anything in this Section 3.1 to the contrary, if, for any reason, including due to resignation, death or disability, a Director who is the subject of a Nominating Committee Director Removal Process ceases to be a Director, the Nominating Committee Director Removal Process for such Director shall automatically terminate without any further action of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community) Administration.

(l) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Nominating Committee Director Removal Petition, (ii) Nominating Committee Director Removal Petition Notice, (iii) Nominating Committee Director Removal Supported Petition, (iv) Nominating Committee Director Removal Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to remove the relevant Director, (v) Nominating Committee Director Removal Process Termination Notice, and (vi) other notices the Secretary receives under this Section 3.1.

### **Section 3.2. SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) DIRECTOR REMOVAL PROCESS**

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to the ASO (Address Supporting Organization), ccNSO (Country Code Names Supporting Organization), GNSO (Generic Names Supporting Organization) or At-Large Community (as applicable, the "**Applicable Decisional Participant**") seeking to remove a Director who was nominated by that Supporting Organization (Supporting Organization) or the At-Large Community in accordance with Section 7.2(a) of the Bylaws, and initiate the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition**"). The process set forth in this Section 3.2 of this Annex D is referred to herein as the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process.**"

(b) During the period beginning on the date that the Applicable Decisional Participant received the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition (such date of receipt, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21<sup>st</sup> day after the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Date (as it relates to a particular Director, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period**"), the Applicable Decisional Participant shall either accept or reject such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition pursuant to the internal procedures of the Applicable Decisional Participant for the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition; provided that the Applicable Decisional Participant shall not accept an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition if, during the same term, the Director who is the subject of such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition had previously been subject

to an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition that led to an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum (as defined in Section 3.2(d) of this Annex D).

(c) During the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the Applicable Decisional Participant shall invite the Director subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) to a dialogue with the individual(s) bringing the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition and the Applicable Decisional Participant's representative on the EC (Empowered Community) Administration. The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition may not be accepted unless this invitation has been extended upon reasonable notice and accommodation to the affected Director's availability. If the invitation is accepted by either the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition or the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director), the Applicable Decisional Participant shall not accept the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition until the dialogue has occurred or there have been reasonable efforts to have the dialogue.

(i) If, in accordance with Section 3.2(b), the Applicable Decisional Participant accepts an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the Applicable Decisional Participant shall, within twenty-four (24) hours of the Applicable Decisional Participant's acceptance of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition, provide written notice ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional

Participants and the Secretary. Such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Applicable Decisional Participant who shall act as a liaison with respect to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice;

(C) a statement as to whether or not the Applicable Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum (as defined in Section 3.2(d) of this Annex D) for the community to discuss the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition; and

(D) a statement as to whether the Applicable Decisional Participant has determined to hold the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall thereafter continue for such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition pursuant to Section 3.2(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice pursuant to Section 3.2(c)(i) during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall automatically be terminated with respect to the applicable SO (Supporting Organization)/AC (Advisory Committee; or

Administrative Contact (of a domain registration)) Director Removal Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, deliver to the Secretary a notice certifying that the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process has been terminated with respect to the applicable SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice**").

(d) If the EC (Empowered Community) Administration receives an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice under Section 3.2(c) of this Annex D during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum**").

(i) If a publicly-available conference call has been requested in an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice regarding his or her availability.

(ii) The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be convened and concluded during the period beginning upon the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period ( "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period**") unless the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice requested that the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Applicable Decisional Participant; provided, that the date and time of any SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be determined after consultation with the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice regarding his or her availability. If the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period shall expire at 11:59 p.m., local time of

the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum in a fair and neutral manner; provided that no individual from the Applicable Decisional Participant, nor the individual who initiated the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition, shall be permitted to participate in the management or moderation of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum.

(v) The Director subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the SO (Supporting

Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice prior to the convening of and during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) The Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) are expected to attend the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum in order to address the issues raised in the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice.

(vii) If the Applicable Decisional Participant agrees before, during or after the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum that the issue raised in such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice has been resolved, such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice shall be deemed withdrawn and the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process with respect to such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice will be terminated. If an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, deliver to the Secretary an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice. For the avoidance of doubt, the SO (Supporting Organization)/AC (Advisory Committee; or

Administrative Contact (of a domain registration)) Director Removal Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Applicable Decisional Participant.

(viii) During the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period, an additional one or two SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forums may be held at the discretion of the Applicable Decisional Participant or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum and shall promptly post on the Website a public record of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum as well as all written submissions of the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum.

(e) Following the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the request of the EC (Empowered Community) Administration, issue a request for comments and recommendations from the community, which shall be delivered to the Secretary for prompt posting on the Website along with a means for comments and recommendations to be submitted to ICANN (Internet Corporation for Assigned Names and Numbers) on behalf of the EC (Empowered Community) Administration. This comment period shall remain open until 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7<sup>th</sup> day after the request for comments and recommendations was posted on the Website (the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal**").

**Comment Period"). ICANN (Internet Corporation for Assigned Names and Numbers)** shall promptly post on the Website all comments and recommendations received by **ICANN (Internet Corporation for Assigned Names and Numbers)** during the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period**.

(f) Following the expiration of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period**, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of **ICANN (Internet Corporation for Assigned Names and Numbers)**'s principal office) on the 21<sup>st</sup> day after the expiration of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period** (such period, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Decision Period**"), the Applicable Decisional Participant shall inform the **EC (Empowered Community) Administration** in writing as to whether the Applicable Decisional Participant has support for the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice** within the Applicable Decisional Participant of a three-quarters majority as determined pursuant to the internal procedures of the Applicable Decisional Participant ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice**"). The Applicable Decisional Participant shall, within twenty-four (24) hours of obtaining such support, deliver the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** to the **EC (Empowered Community) Administration**, the other Decisional Participants and Secretary, and **ICANN (Internet Corporation for Assigned Names and Numbers)** shall, at the direction of the Applicable Decisional Participant, concurrently post on the Website an explanation provided by the Applicable Decisional Participant as to why the Applicable Decisional Participant has chosen to remove the affected Director. Upon the Secretary's receipt of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** from the **EC (Empowered Community) Administration**, the Director subject to such **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** shall be effectively removed from office and shall no longer be a Director and such Director's vacancy shall be filled in accordance with Section 7.12 of the Bylaws.

(g) If the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition**

Notice does not obtain the support required by Section 3.2(f) of this Annex D, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the failure to obtain such support, deliver to the Secretary an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice. The Director who was subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall remain on the Board and shall not be subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for the remainder of the Director's current term.

(h) If neither an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice nor an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice are received by the Secretary prior to the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Decision Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall automatically terminate and the Director who was subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall remain on the Board and shall not be subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for the remainder of the Director's current term.

(i) Notwithstanding anything in this Section 3.2 to the contrary, if, for any reason, including due to resignation, death or disability, a Director who is the subject of an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process ceases to be a Director, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for such Director shall automatically terminate without any further action of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community) Administration.

(j) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director

Removal Petition, (ii) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, (iii) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to remove the relevant Director, (iv) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice, and (v) other notices the Secretary receives under this Section 3.2.

### **Section 3.3. BOARD RECALL PROCESS**

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove all Directors (other than the President) at the same time and initiate the Board Recall Process ("**Board Recall Petition**"), provided that a Board Recall Petition cannot be submitted solely on the basis of a matter decided by a Community IRP if (i) such Community IRP was initiated in connection with the Board's implementation of GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and (ii) the EC (Empowered Community) did not prevail in such Community IRP. Each Board Recall Petition shall include a rationale setting forth the reasons why such individual seeks to recall the Board. The process set forth in this Section 3.3 of this Annex D is referred to herein as the "**Board Recall Process**."

(b) A Decisional Participant that has received a Board Recall Petition shall either accept or reject such Board Recall Petition during the period beginning on the date the Decisional Participant received the Board Recall Petition ("**Board Recall Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21<sup>st</sup> day after the Board Recall Petition Date (the "**Board Recall Petition Period**").

(i) If, in accordance with Section 3.3(b) of this Annex D, a Decisional Participant accepts a Board Recall Petition during the Board Recall Petition Period (such Decisional Participant, the "**Board Recall Petitioning Decisional Participant**"), the Board Recall Petitioning Decisional Participant shall, within twenty-four (24) hours of the expiration of its acceptance of the Board Recall Petition, provide written notice ("**Board Recall Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary. The Board Recall Petition Notice shall include the rationale upon

which removal of the Board is sought. The Board Recall Process shall thereafter continue pursuant to Section 3.3(c) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Board Recall Petition Notice pursuant to Section 3.3(b)(i) of this Annex D during the Board Recall Petition Period, the Board Recall Process shall automatically be terminated with respect to the Board Recall Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Petition Period, deliver to the Secretary a notice certifying that the Board Recall Process has been terminated with respect to the Board Recall Petition ("**Board Recall Process Termination Notice**").

(c) Following the delivery of a Board Recall Petition Notice to the EC (Empowered Community) Administration by a Board Recall Petitioning Decisional Participant pursuant to Section 3.3(b)(i) of this Annex D, the Board Recall Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Board Recall Petition. The Board Recall Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Board Recall Petitioning Decisional Participant obtains the support of at least two other Decisional Participants (each, a "**Board Recall Supporting Decisional Participant**") during the period beginning upon the expiration of the Board Recall Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7<sup>th</sup> day after the expiration of the Board Recall Petition Period (the "**Board Recall Petition Support Period**"), the Board Recall Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Board Recall Supported Petition**") within twenty-four hours of receiving the support of at least two Board Recall Supporting Decisional Participants. Each Board Recall Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Board Recall Petition. Such Board Recall Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Board Recall Petitioning Decisional Participant who shall act as a liaison with respect to the Board Recall Supported Petition;

(C) a statement as to whether or not the Board Recall Petitioning Decisional Participant and/or the Board Recall Supporting Decisional Participants requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Board Recall Community Forum (as defined in Section 3.3(d) of this Annex D) for the community to discuss the Board Recall Supported Petition; and

(D) a statement as to whether the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants have determined to hold the Board Recall Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Board Recall Process shall thereafter continue for such Board Recall Supported Petition pursuant to Section 3.3(d) of this Annex D.

(ii) The Board Recall Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Petition Support Period, deliver to the Secretary a Board Recall Process Termination Notice if the Board Recall Petitioning Decisional Participant is unable to obtain the support of at least two other Decisional Participants for its Board Recall Petition during the Board Recall Petition Support Period.

(d) If the EC (Empowered Community) Administration receives a Board Recall Supported Petition under Section 3.3(c) of this Annex D during the Board Recall Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Board Recall Supported Petition ("**Board Recall Community Forum**").

(i) If a publicly-available conference call has been requested in a Board Recall Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Board Recall Community Forum, and inform the Decisional Participants of the date, time

and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Board regarding the availability of the Directors.

(ii) The Board Recall Community Forum shall be convened and concluded during the period beginning upon the expiration of the Board Recall Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Petition Support Period ( "**Board Recall Community Forum Period**") unless the Board Recall Supported Petition requested that the Board Recall Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Board Recall Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants; provided, that, the date and time of any Board Recall Community Forum shall be determined after consultation with the Board regarding the availability of the Directors. If the Board Recall Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Petition Support Period, the Board Recall Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Board Recall Community Forum shall have at least one face-to-face meeting and may also be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects. If the Board Recall Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of

the date, time and participation methods of the Board Recall Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Board Recall Community Forum in a fair and neutral manner; provided that no individual from the Board Recall Petitioning Decisional Participant or a Board Recall Supporting Decisional Participant, nor the individual who initiated the Board Recall Petition, shall be permitted to participate in the management or moderation of the Board Recall Community Forum.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Board Recall Supported Petition prior to the convening of and during the Board Recall Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and the full Board are expected to attend the Board Recall Community Forum in order to address the issues raised in the Board Recall Supported Petition.

(vii) If the Board Recall Petitioning Decisional Participant and each of the Board Recall Supporting Decisional Participants for the Board Recall Supported Petition agree before, during or after the Board Recall Community Forum that the issue raised in such Board Recall Supported Petition has been resolved, such Board Recall Supported Petition shall be deemed withdrawn and the Board Recall Process with respect to such Board Recall Supported Petition will be terminated. If a Board Recall Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Board Recall Supported Petition, deliver to the Secretary a Board Recall Process Termination Notice. For the avoidance of doubt, the Board Recall Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants.

(viii) During the Board Recall Community Forum Period, an additional one or two Board Recall Community Forums may be held at the discretion of the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Board Recall Community Forum and shall promptly post on the Website a public record of the Board Recall Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Board Recall Community Forum.

(e) Following the expiration of the Board Recall Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21<sup>st</sup> day after the expiration of the Board Recall Community Forum Period (such period, the "**Board Recall Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Board Recall Supported Petition, (ii) objects to such Board Recall Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Board Recall Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to expiration of the Board Recall Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Board Recall Decision Period).

(f) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Decision Period, deliver a written notice ("**EC (Empowered Community) Board Recall Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 3.3 of this Annex D, the EC (Empowered Community) has resolved to remove all Directors (other than the President) if (after accounting for any adjustments to the below as required by the GAC (Governmental Advisory Committee) Carve-out pursuant to Section 3.6(e) of the Bylaws if an IRP Panel found that, in implementing GAC (Governmental Advisory

Committee Consensus (Consensus) Advice, the Board acted inconsistently with the Articles or Bylaws) a Board Recall Supported Petition (i) is supported by four or more Decisional Participants, and (ii) is not objected to by more than one Decisional Participant.

(g) Upon the Secretary's receipt of an EC (Empowered Community) Board Recall Notice, all Directors (other than the President) shall be effectively removed from office and shall no longer be Directors and such vacancies shall be filled in accordance with Section 7.12 of the Bylaws.

(h) If the Board Recall Supported Petition does not obtain the support required by Section 3.3(f) of this Annex D, the Board Recall Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Decision Period, deliver to the Secretary a Board Recall Process Termination Notice. All Directors shall remain on the Board.

(i) If neither an EC (Empowered Community) Board Recall Notice nor a Board Recall Process Termination Notice are received by the Secretary prior to the expiration of the Board Recall Decision Period, the Board Recall Process shall automatically terminate and all Directors shall remain on the Board.

(j) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Board Recall Petition, (ii) Board Recall Petition Notice, (iii) Board Recall Supported Petition, (iv) EC (Empowered Community) Board Recall Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to recall the Board, (v) Board Recall Process Termination Notice, and (vi) other notices the Secretary receives under this Section 3.3.

## Article 4 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO INITIATE MEDIATION, A COMMUNITY IRP OR RECONSIDERATION REQUEST

### **Section 4.1. MEDIATION INITIATION**

(a) If the Board refuses or fails to comply with a decision by the EC (Empowered Community) delivered to the Secretary pursuant to an EC (Empowered Community) Approval Notice, EC (Empowered Community) Rejection Notice, Nominating Committee Director Removal Notice, SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice or EC (Empowered Community) Board Recall Notice pursuant to and in compliance with Article 1, Article 2 or Article 3 of

this Annex D, or rejects or otherwise does not take action that is consistent with a final IFR Recommendation, Special IFR Recommendation, SCWG Creation Recommendation or SCWG Recommendation, as applicable (each, an "**EC (Empowered Community) Decision**"), the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate mediation with the Board in relation to that EC (Empowered Community) Decision as contemplated by Section 4.7 of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration, the Decisional Participants and the Secretary requesting the initiation of a mediation ("**Mediation Initiation Notice**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any Mediation Initiation Notice.

(b) As soon as practicable after receiving a Mediation Initiation Notice, the EC (Empowered Community) Administration and the Secretary shall initiate mediation, which shall proceed in accordance with Section 4.7 of the Bylaws.

#### **Section 4.2. COMMUNITY IRP**

(a) After completion of a mediation under Section 4.7 of the Bylaws, the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate a Community IRP (a "**Community IRP Petitioning Decisional Participant**"), as contemplated by Section 4.3 of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration and the Decisional Participants requesting the initiation of a Community IRP ("**Community IRP Petition**"). The Community IRP Petitioning Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. The process set forth in this Section 4.2 of this Annex D as it relates to a particular Community IRP Petition is referred to herein as the "**Community IRP Initiation Process.**"

(b) Following the delivery of a Community IRP Petition to the EC (Empowered Community) Administration by a Community IRP Petitioning Decisional Participant pursuant to Section 4.2(a) of this Annex D (which delivery date shall be referred to herein as the "**Community IRP Notification Date**"), the Community IRP Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Community IRP

Petition. The Community IRP Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Community IRP Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Community IRP Supporting Decisional Participant**") during the period beginning on the Community IRP Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21<sup>st</sup> day after the Community IRP Notification Date (the "**Community IRP Petition Support Period**"), the Community IRP Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Community IRP Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Community IRP Supporting Decisional Participant. Each Community IRP Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Community IRP Petition. Such Community IRP Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Community IRP Petitioning Decisional Participant who shall act as a liaison with respect to the Community IRP Supported Petition;

(C) a statement as to whether or not the Community IRP Petitioning Decisional Participant and/or the Community IRP Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Community IRP Community Forum (as defined in Section 4.2(c) of this Annex D) for the community to discuss the Community IRP Supported Petition;

(D) a statement as to whether the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant have determined to hold the Community IRP Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting;

(E) where the Community IRP Supported Petition relates to a Fundamental Bylaw Amendment, a PDP (Policy Development Process) Fundamental Bylaw Statement if applicable and, if so, the name of the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant;

(F) where the Community IRP Supported Petition relates to an Articles Amendment, a PDP (Policy Development Process) Articles Statement if applicable and, if so, the name of the Articles Amendment PDP (Policy Development Process) Decisional Participant;

(G) where the Community IRP Supported Petition relates to a Standard Bylaw Amendment, a PDP (Policy Development Process) Standard Bylaw Statement if applicable and, if so, the name of the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant; and

(H) where the Community IRP Supported Petition relates to a policy recommendation of a cross community working group chartered by more than one Supporting Organization (Supporting Organization) ("**CCWG Policy Recommendation**"), a statement citing the specific CCWG Policy Recommendation and related provision in the Community IRP Supported Petition ("**CCWG Policy Recommendation Statement**"), and, if so, the name of any Supporting Organization (Supporting Organization) that is a Decisional Participant that approved the CCWG Policy Recommendation ("**CCWG Policy Recommendation Decisional Participant**").

The Community IRP Initiation Process shall thereafter continue for such Community IRP Supported Petition pursuant to Section 4.2(c) of this Annex D.

(ii) The Community IRP Initiation Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community IRP Petition Support Period, deliver to the Secretary a notice certifying that the Community IRP Initiation Process has been terminated with respect to the Community IRP included in the Community IRP Petition ("**Community IRP Termination Notice**") if:

(A) no Community IRP Petitioning Decisional Participant is able to obtain the support of at least one other Decisional Participant for its Community IRP Petition during the Community IRP Petition Support Period;

(B) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Fundamental Bylaw Statement, the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants;

(C) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Articles Statement, the Articles Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants;

(D) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Standard Bylaw Statement, the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants; or

(E) where the Community IRP Supported Petition includes a CCWG Policy Recommendation Statement, the CCWG Policy Recommendation Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants.

(c) If the EC (Empowered Community) Administration receives a Community IRP Supported Petition under Section 4.2(b) of this Annex D during the Community IRP Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested third parties may discuss the Community IRP Supported Petition ("**Community IRP Community Forum**").

(i) If a publicly-available conference call has been requested in a Community IRP Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Community IRP Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(ii) The Community IRP Community Forum shall be convened and concluded during the period beginning on the expiration of the Community IRP Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30<sup>th</sup> day after the expiration of the Community IRP Petition Support Period ("**Community IRP Community Forum Period**") unless the Community IRP Supported Petition requested that the Community IRP Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Community IRP Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant(s). If the Community IRP Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30<sup>th</sup> day after the expiration of the Community IRP Petition Support Period, the Community IRP Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Community IRP Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects and/or, only if the Community IRP Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Community IRP Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Community IRP Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Community IRP Community Forum in a fair and neutral

manner.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Community IRP Supported Petition prior to the convening of and during the Community IRP Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Community IRP Community Forum in order to discuss the Community IRP Supported Petition.

(vii) If the Community IRP Petitioning Decisional Participant and each of the Community IRP Supporting Decisional Participants for the Community IRP Supported Petition agree before, during or after a Community IRP Community Forum that the issue raised in such Community IRP Supported Petition has been resolved, such Community IRP Supported Petition shall be deemed withdrawn and the Community IRP Initiation Process with respect to such Community IRP Supported Petition will be terminated. If a Community IRP Initiation Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Community IRP Supported Petition, deliver to the Secretary a Community IRP Termination Notice. For the avoidance of doubt, the Community IRP Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant(s).

(viii) During the Community IRP Community Forum Period, an additional one or two Community IRP Community Forums may be held at the discretion of a Community IRP Petitioning Decisional Participant and a related Community IRP Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Community IRP Community Forum and

shall promptly post on the Website a public record of the Community IRP Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Community IRP Community Forum.

(d) Following the expiration of the Community IRP Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21<sup>st</sup> day after the expiration of the Community IRP Community Forum Period (such period, the "**Community IRP Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Community IRP Supported Petition, (ii) objects to such Community IRP Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Community IRP Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Community IRP Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Community IRP Decision Period).

(e) The EC (Empowered Community) Administration, within twenty-four (24) hours of the expiration of the Community IRP Decision Period, shall promptly deliver a written notice ("**EC (Empowered Community) Community IRP Initiation Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 4.2 of this Annex D, the EC (Empowered Community) has resolved to accept the Community IRP Supported Petition if:

(i) A Community IRP Supported Petition that does not include a PDP (Policy Development Process) Fundamental Bylaw Statement, a PDP (Policy Development Process) Articles Statement, a PDP (Policy Development Process) Standard Bylaw Statement or a CCWG Policy Recommendation Statement (A) is supported by three or more Decisional Participants, and (B) is not objected to by more than one Decisional Participant;

(ii) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Fundamental Bylaw Statement, (B) is supported by three or more Decisional Participants (including the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant;

(iii) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Articles Statement, (B) is supported by three or more Decisional Participants (including the Articles Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant;

(iv) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Standard Bylaw Statement, (B) is supported by three or more Decisional Participants (including the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant; or

(v) A Community IRP Supported Petition that (A) includes a CCWG Policy Recommendation Statement, (B) is supported by three or more Decisional Participants (including the CCWG Policy Recommendation Decisional Participant), and (C) is not objected to by more than one Decisional Participant.

(f) If the Community IRP Supported Petition does not obtain the support required by Section 4.2(e) of this Annex D, the Community IRP Initiation Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community IRP Decision Period, deliver to the Secretary a Community IRP Termination Notice.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Community IRP Petition, (ii) Community IRP Supported Petition, (iii) EC (Empowered Community) Community IRP Initiation Notice, (iv) Community IRP Termination Notice, (v) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (vi) other notices the Secretary receives under this Section 4.2.

### **Section 4.3. COMMUNITY RECONSIDERATION REQUEST**

(a) Any Decisional Participant may request that the EC (Empowered Community) initiate a Reconsideration Request (a "**Community Reconsideration Petitioning Decisional Participant**"), as contemplated by Section 4.2(b) of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration and the

other Decisional Participants, with a copy to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website, requesting the review or reconsideration of an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or staff ("**Community Reconsideration Petition**"). A Community Reconsideration Petition must be delivered within 30 days after the occurrence of any of the conditions set forth in Section 4.2(g)(i)(A), (B) or (C) of the Bylaws. In that instance, the Community Reconsideration Petition must be delivered within 30 days from the initial posting of the rationale. The process set forth in this Section 4.3 of this Annex D as it relates to a particular Community Reconsideration Petition is referred to herein as the "**Community Reconsideration Initiation Process.**"

(b) Following the delivery of a Community Reconsideration Petition to the EC (Empowered Community) Administration by a Community Reconsideration Petitioning Decisional Participant pursuant to Section 4.3(a) of this Annex D (which delivery date shall be referred to herein as the "**Community Reconsideration Notification Date**"), the Community Reconsideration Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Community Reconsideration Petition. The Community Reconsideration Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Community Reconsideration Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Community Reconsideration Supporting Decisional Participant**") during the period beginning on the Community Reconsideration Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21<sup>st</sup> day after the Community Reconsideration Notification Date (the "**Community Reconsideration Petition Support Period**"), the Community Reconsideration Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Community Reconsideration Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Community Reconsideration Supporting Decisional Participant. Each Community Reconsideration Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the

Community Reconsideration Petition. Such Community Reconsideration Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Community Reconsideration Petitioning Decisional Participant who shall act as a liaison with respect to the Community Reconsideration Supported Petition;

(C) a statement as to whether or not the Community Reconsideration Petitioning Decisional Participant and/or the Community Reconsideration Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Community Reconsideration Community Forum (as defined in Section 4.3(c) of this Annex D) for the community to discuss the Community Reconsideration Supported Petition; and

(D) a statement as to whether the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant have determined to hold the Community Reconsideration Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Community Reconsideration Initiation Process shall thereafter continue for such Community Reconsideration Supported Petition pursuant to Section 4.3(c) of this Annex D.

(ii) The Community Reconsideration Initiation Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Petition Support Period, deliver to the Secretary a notice certifying that the Community Reconsideration Initiation Process has been terminated with respect to the Reconsideration Request included in the Community Reconsideration Petition ("**Community Reconsideration Termination Notice**") if the Community Reconsideration Petitioning Decisional Participant is unable to obtain the support of at least one other Decisional Participant for its Community Reconsideration Petition during the Community Reconsideration Petition Support Period.

(c) If the EC (Empowered Community) Administration receives a Community Reconsideration Supported Petition under Section 4.3(b) of this Annex D during

the Community Reconsideration Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested third parties may discuss the Community Reconsideration Supported Petition ("**Community Reconsideration Community Forum**").

(i) If a publicly-available conference call has been requested in a Community Reconsideration Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Community Reconsideration Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(ii) The Community Reconsideration Community Forum shall be convened and concluded during the period beginning on the expiration of the Community Reconsideration Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30<sup>th</sup> day after the expiration of the Community Reconsideration Petition Support Period ("**Community Reconsideration Forum Period**") unless the Community Reconsideration Supported Petition requested that the Community Reconsideration Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Community Reconsideration Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant(s). If the Community Reconsideration Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30<sup>th</sup> day after the expiration of the Community Reconsideration Petition Support Period, the Community Reconsideration Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of

such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Community Reconsideration Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects and/or, only if the Community Reconsideration Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Community Reconsideration Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Community Reconsideration Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Community Reconsideration Community Forum in a fair and neutral manner.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Community Reconsideration Supported Petition prior to the convening of and during the Community Reconsideration Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Community Reconsideration Community Forum in order to discuss the Community Reconsideration Supported Petition.

(vii) If the Community Reconsideration Petitioning Decisional Participant and each of the Community Reconsideration Supporting Decisional Participants for a Community Reconsideration Supported Petition agree before, during or after the Community Reconsideration Community Forum

that the issue raised in such Community Reconsideration Supported Petition has been resolved, such Community Reconsideration Supported Petition shall be deemed withdrawn and the Community Reconsideration Initiation Process with respect to such Community Reconsideration Supported Petition will be terminated. If a Community Reconsideration Initiation Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Community Reconsideration Supported Petition, deliver to the Secretary a Community Reconsideration Termination Notice. For the avoidance of doubt, the Community Reconsideration Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant(s).

(viii) During the Community Reconsideration Community Forum Period, an additional one or two Community Reconsideration Community Forums may be held at the discretion of a Community Reconsideration Petitioning Decisional Participant and a related Community Reconsideration Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Community Reconsideration Community Forum and shall promptly post on the Website a public record of the Community Reconsideration Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Community Reconsideration Community Forum.

(d) Following the expiration of the Community Reconsideration Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21<sup>st</sup> day after the expiration of the Community Reconsideration Community Forum Period (such period, the "**Community Reconsideration Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Community Reconsideration Supported Petition, (ii) objects to such Community Reconsideration Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Community Reconsideration Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN

(Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Community Reconsideration Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Community Reconsideration Decision Period).

(e) If (i) three or more Decisional Participants support the Community Reconsideration Supported Petition and (ii) no more than one Decisional Participant objects to the Community Reconsideration Supported Petition, then the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Decision Period, deliver a notice to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 4.3 of this Annex D, the EC (Empowered Community) has resolved to accept the Community Reconsideration Supported Petition ("**EC (Empowered Community) Reconsideration Initiation Notice**"). The Reconsideration Request shall then proceed in accordance with Section 4.2 of the Bylaws.

(f) If the Community Reconsideration Supported Petition does not obtain the support required by Section 4.3(e) of this Annex D, the Community Reconsideration Initiation Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Decision Period, deliver to the Secretary a Community Reconsideration Termination Notice.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Community Reconsideration Petition, (ii) Community Reconsideration Supported Petition, (iii) EC (Empowered Community) Reconsideration Initiation Notice, (iv) Community Reconsideration Termination Notice, (v) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (vi) other notices the Secretary receives under this Section 4.3.

## **Annex E: Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles**

### 1. Principles

The caretaker ICANN (Internet Corporation for Assigned Names and Numbers) budget (the "**Caretaker ICANN (Internet Corporation for Assigned Names and**

**Numbers) Budget")** is defined as an annual operating plan and budget that is established by the CFO in accordance with the following principles (the "**Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles**"):

- a. It is based on then-current ICANN (Internet Corporation for Assigned Names and Numbers) operations;
- b. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to "take good care" and not expose itself to additional enterprise risk(s) as a result of the rejection of an ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the EC (Empowered Community) pursuant to the Bylaws;
- c. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to react to emergency situations in a fashion that preserves the continuation of its operations;
- d. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to abide by its existing obligations (including Articles of Incorporation, Bylaws, and contracts, as well as those imposed under law);
- e. It enables ICANN (Internet Corporation for Assigned Names and Numbers) to avoid waste of its resources during the rejection period (i.e., the period between when an ICANN (Internet Corporation for Assigned Names and Numbers) Budget is rejected by the EC (Empowered Community) pursuant to the Bylaws and when an ICANN (Internet Corporation for Assigned Names and Numbers) Budget becomes effective in accordance with the Bylaws) or immediately thereafter, by being able to continue activities during the rejection period that would otherwise need to be restarted at a materially incremental cost; and
- f. Notwithstanding any other principle listed above, it prevents ICANN (Internet Corporation for Assigned Names and Numbers) from initiating activities that remains subject to community consideration (or for which that community consideration has not concluded) with respect to the applicable ICANN (Internet Corporation for Assigned Names and Numbers) Budget, including without limitation, preventing implementation of any expenditure or undertaking any action that was the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that was rejected by the EC (Empowered

Community) that triggered the need for the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

## 1. Examples

Below is a non-exhaustive list of examples, to assist with the interpretation of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles, of what a Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget would logically include:

- i. the functioning of the EC (Empowered Community), the Decisional Participants, and any Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) that are not Decisional Participants;
- ii. the functioning of all redress mechanisms, including without limitation the office of the Ombudsman, the IRP, and mediation;
- iii. employment of staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) across all locations, including all related compensation, benefits, social security, pension, and other employment costs;
- iv. hiring staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) in the normal course of business;
- v. necessary or time-sensitive travel costs for staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) or vendors as needed in the normal course of business;
- vi. operating all existing ICANN (Internet Corporation for Assigned Names and Numbers) offices, and continuing to assume obligations relative to rent, utilities, maintenance, and similar matters;
- vii. contracting with vendors as needed in the normal course of business;
- viii. conducting ICANN (Internet Corporation for Assigned Names and Numbers) meetings and ICANN (Internet Corporation for Assigned Names and Numbers) intercessional meetings previously contemplated; and

ix. participating in engagement activities in furtherance of the approved Strategic Plan.

b. Below is a non-limitative list of examples, to assist with the interpretation of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles, of what a Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget would logically exclude:

i. hiring staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) or entering into new agreements in relation to activities that are the subject of the rejection of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the EC (Empowered Community) pursuant to the Bylaws, unless excluding these actions would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

ii. in the normal course of business, travel not deemed indispensable during the rejection period, unless the lack of travel would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

iii. entering into new agreements in relation to opening or operating new ICANN (Internet Corporation for Assigned Names and Numbers) locations/offices, unless the lack of commitment would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

iv. entering into new agreements with governments (or their affiliates), unless the lack of commitment would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles; and

v. the proposed expenditure that was the basis for the rejection by the EC (Empowered Community) that triggered the need for the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

## **Annex F: Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles**

### 1. Principles

The caretaker IANA (Internet Assigned Numbers Authority) Budget (the "**Caretaker IANA (Internet Assigned Numbers Authority) Budget**") is defined as an annual operating plan and budget that is established by the CFO in

accordance with the following principles (the "**Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles**"):

- a. It is based on then-current operations of the IANA (Internet Assigned Numbers Authority) functions;
- b. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to "take good care" and not expose itself to additional enterprise risk(s) as a result of the rejection of an IANA (Internet Assigned Numbers Authority) Budget by the EC (Empowered Community) pursuant to the Bylaws;
- c. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to react to emergency situations in a fashion that preserves the continuation of its operations;
- d. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to abide by its existing obligations (including Articles of Incorporation, Bylaws, and contracts, as well as those imposed under law);
- e. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to avoid waste of its resources during the rejection period (i.e., the period between when an IANA (Internet Assigned Numbers Authority) Budget is rejected by the EC (Empowered Community) pursuant to the Bylaws and when an IANA (Internet Assigned Numbers Authority) Budget becomes effective in accordance with the Bylaws) or immediately thereafter, by being able to continue activities during the rejection period that would have otherwise need to be restarted at an incremental cost; and
- f. Notwithstanding any other principle listed above, it prevents ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, from initiating activities that remain subject to community consideration (or for which that community consultation has not concluded) with respect to the applicable IANA (Internet Assigned Numbers Authority) Budget, including without limitation, preventing implementation of any expenditure or

undertaking any action that was the subject of the IANA (Internet Assigned Numbers Authority) Budget that was rejected by the EC (Empowered Community) that triggered the need for the Caretaker IANA (Internet Assigned Numbers Authority) Budget.

## 1. Examples

a. Below is a non-exhaustive list of examples, to assist with the interpretation of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles, of what a Caretaker IANA (Internet Assigned Numbers Authority) Budget would logically include:

i. employment of staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) across all locations, including all related compensation, benefits, social security, pension, and other employment costs;

ii. hiring staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) in the normal course of business;

iii. necessary or time-sensitive travel costs for staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) or vendors as needed in the normal course of business;

iv. operating all existing offices used in the performance of the IANA (Internet Assigned Numbers Authority) functions, and continuing to assume obligations relative to rent, utilities, maintenance, and similar matters;

v. contracting with vendors as needed in the normal course of business;

vi. participating in meetings and conferences previously contemplated;

vii. participating in engagement activities with ICANN (Internet Corporation for Assigned Names and Numbers)'s Customer Standing Committee or the customers of the IANA (Internet Assigned Numbers Authority) functions;

viii. fulfilling obligations (including financial obligations under agreements and memoranda of understanding to which ICANN (Internet Corporation for Assigned

Names and Numbers) or its affiliates is a party that relate to the IANA (Internet Assigned Numbers Authority) functions; and

ix. participating in engagement activities in furtherance of the approved Strategic Plan.

b. Below is a non-limitative list of examples, to assist with the interpretation of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles, of what a Caretaker IANA (Internet Assigned Numbers Authority) Budget would logically exclude:

i. hiring staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) or entering into new agreements in relation to activities that are the subject of the rejection of the IANA (Internet Assigned Numbers Authority) Budget by the EC (Empowered Community) pursuant to the Bylaws, unless excluding these actions would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

ii. in the normal course of business, travel not deemed indispensable during the rejection period, unless the lack of travel would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

iii. entering into new agreements in relation to opening or operating new locations/offices where the IANA (Internet Assigned Numbers Authority) functions shall be performed, unless the lack of commitment would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

iv. entering into new agreements with governments (or their affiliates), unless the lack of commitment would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles; and

v. the proposed expenditure that was the basis for the rejection by the EC (Empowered Community) that triggered the need for the Caretaker IANA (Internet Assigned Numbers Authority) Budget.

## **ANNEX G-1**

The topics, issues, policies, procedures and principles referenced in Section 1.1(a)(i) with respect to gTLD (generic Top Level Domain) registrars are:

- issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet, registrar

services, registry services, or the DNS (Domain Name System);

- functional and performance specifications for the provision of registrar services;
- registrar policies reasonably necessary to implement Consensus (Consensus) Policies relating to a gTLD (generic Top Level Domain) registry;
- resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names, but including where such policies take into account use of the domain names); or
- restrictions on cross-ownership of registry operators and registrars or resellers and regulations and restrictions with respect to registrar and registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or reseller are affiliated.

Examples of the above include, without limitation:

- principles for allocation of registered names in a TLD (Top Level Domain) (e.g., first-come/first-served, timely renewal, holding period after expiration);
- prohibitions on warehousing of or speculation in domain names by registries or registrars;
- reservation of registered names in a TLD (Top Level Domain) that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS (Domain Name System) or the Internet (e.g., establishment of reservations of names from registration);
- maintenance of and access to accurate and up-to-date information concerning registered names and name servers;
- procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility among continuing registrars of the registered names sponsored in a TLD (Top Level Domain) by a registrar losing accreditation; and
- the transfer of registration data upon a change in registrar sponsoring one or more registered names.

The topics, issues, policies, procedures and principles referenced in Section 1.1(a)(i) with respect to gTLD (generic Top Level Domain) registries are:

- issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or DNS (Domain Name System);
- functional and performance specifications for the provision of registry services;
- security and stability of the registry database for a TLD (Top Level Domain);
- registry policies reasonably necessary to implement Consensus (Consensus) Policies relating to registry operations or registrars;
- resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or
- restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.

Examples of the above include, without limitation:

- principles for allocation of registered names in a TLD (Top Level Domain) (e.g., first-come/first-served, timely renewal, holding period after expiration);
- prohibitions on warehousing of or speculation in domain names by registries or registrars;
- reservation of registered names in the TLD (Top Level Domain) that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS (Domain Name System) or the Internet (e.g., establishment of reservations of names from registration);
- maintenance of and access to accurate and up-to-date information concerning domain name registrations; and
- procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD (Top Level Domain) affected by such a suspension or termination.

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[1] When "1 October 2016" is used, that signals that the date that will be used is the effective date of the Bylaws.



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<a href="#">Learning</a> (/en/about/learning)	<a href="#">Global Support</a> (/resources/pages/customer-support-2015-06-22-en)	<a href="#">Mechanisms</a> (/en/news/in-focus/accountability/mechanisms)	<a href="#">Agreements</a> (/en/about/agreements)	<a href="#">Domain Name Dispute Resolution</a> (/en/help/dndr)
<a href="#">Participate</a> (/en/about/participate)	<a href="#">Security Team</a> (/about/staff/security)	<a href="#">Independent Review Process</a> (/resources/pages/irp-2012-02-25-en)	<a href="#">Specific Reviews</a> (/resources/reviews/aoc)	<a href="#">Name Collision</a> (/en/help/name-collision)
<a href="#">Groups</a> (https://www.icann.org/resources/pages/groups/2012-02-06-en)	<a href="#">PGP Keys</a> (/en/contact/pgp-keys)	<a href="#">Request for Reconsideration</a> (/groups/board/governance/reconsideration)	<a href="#">Annual Report</a> (/about/annual-report)	<a href="#">Registrar Problems</a> (/en/news/announcements/announcements-mar07-en.htm)
<a href="#">Board of Directors</a> (/resources/pages/board-of-directors-2014-03-19-en)	<a href="#">Certificate Authority</a> (/contact/certificate-authority)	<a href="#">Ombudsman</a> (/help/ombudsman)	<a href="#">Financials</a> (/en/about/transparency/financials)	<a href="#">WHOIS</a> (http://whois.icann.org/)
<a href="#">President's Corner</a> (/presidents-corner)	<a href="#">Registry Liaison</a> (/resources/pages/contact-f2-2012-02-25-en)	<a href="#">Empowered Community</a> (/ec)	<a href="#">Document Disclosure</a> (/en/about/transparency/document-disclosure)	
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# **Exhibit 12**

# **GENERAL PRINCIPLES OF LAW, INTERNATIONAL DUE PROCESS, AND THE MODERN ROLE OF PRIVATE INTERNATIONAL LAW**

CHARLES T. KOTUBY JR.\*

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Commentators have observed that the field of private international law is mired in the past. To update and adapt to an increasingly interconnected world, it should consider how other fields of international dispute resolution have changed to the evolving face of globalization in the past decade.

Private international law has been traditionally limited to developing rules to decide the proper forum and applicable law for transnational disputes, and to facilitate the recognition and enforcement of foreign judgments in municipal courts. The result is a field of mechanical rules that point parties to the right court and the proper law, with little regard to what that court does or what that law says. It has served the role of an international prothonotary – a mere guidepost for transnational actors seeking justice on the international plane.

This may have been sufficient in centuries past, where “international” discourse was largely limited to regional interactions among legal systems of similar traditions and competencies. But, in the last few decades, that

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discourse has become truly global. In U.S. federal courts, there were only 15 published opinions addressing proof of foreign law between 1966 and 1971, covering the laws of 12 different foreign countries. In the past five years, there have been more than 125 published decisions, covering the laws of approximately 50 foreign countries. The increased number of cases is mirrored by the increased range and complexity of the foreign laws at issue—from Afghanistan to Zimbabwe, Nicaragua and Iraq.

Of course, all of these foreign states unilaterally proclaim themselves to be *un Estado de derecho*, but these are often mere words. All too often, “[t]he more dictatorial the regime, the more surrealistically gorgeous” its laws.<sup>1</sup> The reality is that adherence to basic notions of justice is still a startling anomaly in today’s world.<sup>2</sup> With this in mind, the field of private international law must stop worrying about mechanical methods and grammatical texts, and begin operating in realistic *contexts*. Too often this discipline is over-concerned with the applicability of laws, but not the validity of laws; with proper methodology, but not judicious results. This article proposes that, in order to play a meaningful role in the resolution of modern transnational disputes, the field of private international law must play a meaningful role in explicating the *substance* of those municipal laws applied to the transnational scenario.

The means by which this explication may occur is nothing new within the field of international law *writ large*. For over a century international judges have observed that there are certain minimum, corrective principles inherent in every legal system. These “general principles of law recognized by civilized nations” derive from the consensus of municipal legal systems *in foro* domestic, and while they are grounded in the positive law of nation states, they rest alongside custom and treaties as a primary source of international law. They seek to define the fundamentals of substantive justice and procedural fairness, and have been applied by the International Court of Justice, international investment tribunals, and commercial arbitration panels time and again to reach judicious results when the applicable law otherwise would not. Taken together, these general principles form an emerging notion of international due process by which local legal processes are judged beyond their own sovereign borders. Just as they do on the international plane, these general principles can play a material role when a transnational case comes to a municipal court.

Applying these principles to inform the proper choice of law; to assist

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1. Jan Paulsson, *Enclaves of Justice* 1, (University of Miami Law Legal Studies Research Paper No. 2010-29), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1707504](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707504).

2. See *id.* (referring to the “Fraudulent Consensus on the Rule of Law”).

in the interpretation and application of that law; or to assess the adequacy of a foreign judicial decision under a truly international standard; falls squarely within the bailiwick of private international law. Scholars, advocates, and judges operating in this field should take heed of these universal principles of law in cases that incorporate a foreign element; they should explicate them and apply them to achieve a result that is not only fair to the parties, but one that also advances minimum international standard of justice more generally. This trend may have already started, but it should be encouraged to continue, in order to move private international law alongside other disciplines of international dispute resolution.

### I. THE RECURRING HYPOTHETICAL AND THE INFLUENCE OF PROFESSOR BIN CHENG

The annals of legal history are full of recurring tales. On the international plane, perhaps the most common is the nationalization decree used to expropriate foreign investment. We can crib the facts from any number of recent cases, or take them from the tomes of centuries past, but perhaps the best hypothetical was written by Jan Paulsson in a 2009 article.<sup>3</sup> It goes something like this:

Rex has recently installed himself as the benevolent dictator of a resource-rich country. He took power from a government he accuses of having distributed national wealth in a grossly unfair manner, and he enjoys passionate popularity among the vast disadvantaged segments of the population. He accuses foreign business interests of having colluded with formerly powerful national elites. In pursuit of his policies, Rex decides to abrogate international treaties and rewrite national laws. With that, he also decides to nullify contracts made with foreign investors and expropriate foreign assets in the name of redistributive justice. His political majority will support him, as will the legislators and judges he has hand-picked for office. Rex insists that he respects the rule of law, but by “law” he means the rules he has put into place to further his policies.<sup>4</sup> A legal action by an aggrieved foreign investor under that law may be futile.<sup>5</sup> This is not only because Rex’s courts are often packed with his cronies, but also because *any* court that applies Rex’s laws as they are drafted and enacted will be obliged to reach the same conclusion. And the discipline of private

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3. Jan Paulsson, *Unlawful Laws and the Authority of International Tribunals*, 23 ICSID Rev.—FOREIGN INVESTMENT L.J. 215, 221-22 (2008).

4. For a further discussion of “the law” as opposed to mere “laws,” see *infra* note 146.

5. See Paulsson, *supra* note 4, at 221-22.

international law, as it is traditionally conceived, reflexively points to Rex's laws as the rule of decision in transnational cases. Rex thus has free reign to abrogate his international contracts, even contracts to arbitrate,<sup>6</sup> by the stroke of a pen.

International law has had to develop the mechanisms to deal with the "Rex's" of the world. For a time, these types of disputes were left to the discretion of negotiating sovereigns, who would espouse an investor's international claims against other states. Modern bilateral investment treaties (BITs) changed all that. Private companies no longer depend on the discretion of their home states in the context of diplomatic protection as to whether a claim should be raised against another state.<sup>7</sup> They can bring an international claim against their host sovereign themselves.<sup>8</sup> But, in some respects, all sovereigns are similar to Rex. They all find it intolerable, or at least inconvenient, that an external authority could be allowed to determine what is lawful or unlawful in their own territory.<sup>9</sup> So, as a choice of law limitation, most BITs point to applying the respondent state's law when an investment tribunal is asked to adjudicate its breach of contract with a covered investor. The investor is thus protected against the

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6. See, e.g., *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 461, 463, 466 (S.D.N.Y. 2007) (holding that "extensive formalities" for state-contracting and an Ecuadorian Constitutional provision prohibiting state-owned entities from submitting to a "foreign jurisdiction" precluded any reasonable reliance on a contract—and its arbitration clause—that had been followed by the contracting parties for over two decades); cf. *Bitúmenes Orinoco S.A. v. New Brunswick Power Holding Corp.*, No. 05 Civ. 9485(LAP), 2007 WL 485617, at \*18-19 (S.D.N.Y. Jan. 31, 2007) (refusing, for lack of proof, a state-owned entity's attempt to free itself from a contract to arbitrate by pointing to a Venezuelan law that stripped its board of directors from any authority to enter into the contract).

7. See Karl-Heinz Bockstiegel, *Arbitration of Foreign Investment Disputes – An Introduction*, in *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 125, 125-31 (Albert Jan van den Berg ed., 2005); JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* 1-15 (1999); M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 61-84 (2000).

8. There are presently over 2,000 bilateral and regional investment treaties that provide for the compulsory arbitration of investment disputes between investors and their host state. During the 1990s, roughly 1,500 BITs were concluded, and the inclusion of states' consents to investment arbitration became the norm. This wave of new treaties were not confined to the conventional relationship between capital-exporting and capital-importing states; developing states, too, began to sign investment treaties among themselves. United Nations Conference on Trade and Development, *Trends in International Investment Agreements: An Overview* 33-34, U.N. Doc. UNTAD/ITE/IIT/13 (1999). Cases and controversies soon followed; from 1995 to 2004, ICSID registered four times as many claims as in the previous 30 years, and the growth trend appears to be sustaining. This is only a snapshot of the explosion of investment arbitration because ICSID is only one forum for these disputes. Other forums, such as the ICC's International Court of Arbitration or ad hoc tribunals established under the UNCITRAL Rules, are also available for investor-state disputes, and these fora normally keep cases confidential unless both disputing parties agree otherwise.

9. See Paulsson, *supra* note 4, at 222.

inherent bias of Rex's legal process, but not from the bias of Rex's "laws" themselves.

So international law has taken the next logical step and developed a safety valve for dealing with Rex's "laws." An international tribunal's authority to determine and apply national law is plenary, so it is proper for it to refuse to apply "unlawful laws."<sup>10</sup> The mechanism by which it does this varies, but one common approach is to apply "general principles of law recognized by civilized nations" as a corrective norm. There is a real convergence of certain long-standing and baseline principles of contract, procedure, causation, and liability in the municipal laws of the world, regardless of the one-off decrees that are passed for political expediency. The principles become "general" principles, and thus a primary source of international law, when they are deemed "universally recognized" by most civilized legal systems.<sup>11</sup> Once divined, these principles will "prevail over domestic rules that might be incompatible with them," such that "the law of the host state can be applied" where there is no conflict, but "[s]o too can [universal principles] be applied" to correct or supplant those national laws that are in disharmony with minimum international standards.<sup>12</sup> So where, for instance, an international investment tribunal accepts that Egyptian law is the proper law of the contract, it may likewise conclude that "Egyptian law must be construed so as to include such principles [and the] national laws of Egypt can be relied upon *only in as much as they do not contravene said principles*."<sup>13</sup> The goal is to produce decisions that are grounded in positive law, but still detached from the constraints of domestic dogmatism

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10. *Id.* at 224.

11. See BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 1* (Cambridge Univ. Press 2006) (1953); Vladimir-Djuro Degan, *General Principles of Law (A Source of General International Law)*, 3 FINNISH Y.B. INT'L L. 1, 46 (1992); Wolfgang Friedmann, *The Uses Of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 280-81 (1963); Michael D. Nolan and Frédéric G. Sourgens, *Issues of Proof of General Principles of Law in International Arbitration*, 3 WORLD ARB. & MEDIATION REV. 505, 505 (2009).

12. *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, ¶¶ 40-44 (Feb. 5, 2002), 41 I.L.M. 933 (2002); *accord Amco v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, ¶ 40 (Nov. 20, 1984), 1 ICSID Rep. 413 (1993) ("applicable host-state laws . . . must be checked against international laws, which will prevail in case of conflict").

13. *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, ¶ 84 (May 20, 1992), 8 ICSID REV.-FOREIGN INVESTMENT L.J. 328, 352 (1993) ("When . . . international law is violated by the exclusive application of municipal law, the Tribunal is bound . . . to apply directly the relevant principles and rules of international law. . . . [S]uch a process 'will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law' (quoting A. Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 342 (1972)).

and the idiosyncrasies of local law; for tribunals to display the same sort of “pragmatic functionality” that brings disputing parties to international arbitration in the first place.<sup>14</sup>

One good example is the case of *World Duty Free Company Ltd. v. The Republic of Kenya*.<sup>15</sup> In 1989, a UK company had concluded an agreement with the government for the construction, maintenance, and operation of duty-free complexes at the Nairobi and Mombassa airports. Later, as alleged by Claimant, the government sought to cover-up a massive internal fraud by expropriating and liquidating Claimant’s local assets, including its rights under the 1989 Agreement. Claimant sought, *inter alia*, restitution for breach of the contract, which awkwardly referenced both Kenyan and English law as the governing law.

Kenya defended on the basis that the 1989 Agreement was “tainted with illegality” and thus unenforceable because it was procured upon the payment of a USD 2 million bribe from the Claimant to the former President of Kenya. Claimant did little to rebut the factual basis for that defense, but instead argued that “it was routine practice to make such donations in advance of doing business in Kenya” and that “said practice had cultural roots” in Kenya and was “regarded as a matter of protocol by the Kenyan people.”<sup>16</sup> “[S]ufficient regard to the domestic public policy,” Claimant argued, required the Tribunal to uphold the contract notwithstanding the bribe.<sup>17</sup>

The Tribunal first divined, and then applied, “an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.”<sup>18</sup> After surveying arbitral jurisprudence, a number of international conventions, decisions of domestic courts, and various domestic laws, the Tribunal concluded that “bribery or influence peddling . . . are sanctioned by criminal law in most, if not all, countries.”<sup>19</sup> As a result, this consensus could be considered a general principle of English and Kenyan law, so “it is thus unnecessary for this Tribunal to consider the effect of a local custom which might render legal locally what

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14. See Klaus Peter Berger, *General Principles of Law in International Commercial Arbitration: How to Find Them—How to Apply Them*, 5 *WORLD ARB. & MEDIATION REV.* 97, 105-06 (2011); see also Yves Derains, *The Application of Transnational Rules in ICC Arbitral Awards*, 5 *WORLD ARB. & MEDIATION REV.* 173, 193 (2011) (noting a “trend among international arbitrators which seeks to challenge the adequacy of applying national laws when resolving transnational disputes”).

15. ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

16. *Id.* ¶¶ 110, 120, 134.

17. *Id.* ¶ 120.

18. *Id.* ¶ 139.

19. *Id.* ¶ 142.

would otherwise violate transnational public policy.”<sup>20</sup> Even “[i]f it had been necessary,” the Tribunal noted, it would have been “minded to decline . . . to recognise any local custom in Kenya purporting to validate bribery committed by the Claimant in violation of international public policy.”<sup>21</sup> The Tribunal cited a similar approach taken by the UK House of Lords in *Kuwait v Iraqi Airways*, which is discussed below. Thus, “Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur action*,” the general principle of law that “[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.”<sup>22</sup>

Similar facts were presented in *Inceysa Vallisoletana v. El Salvador*, and the tribunal also decided the case in a similar fashion.<sup>23</sup> In *Inceysa*, a Spanish company signed a contract to provide industrial services to the Republic of El Salvador. It alleged before an ICSID Tribunal that the Republic breached that contract and expropriated its rights under it. For its part, El Salvador alleged that the Claimant only procured the contract through fraud, and therefore cannot claim any protections under the relevant BIT. But the Claimant had two separate decisions of the Supreme Court of El Salvador that sustained the legality of the bidding process for the contract; it alleged that those decisions were *res judicata* on the issue of Claimant’s alleged fraud.

The Tribunal agreed that the legality of the contract depended upon the “laws and governing legal principles in El Salvador.”<sup>24</sup> Primary among those laws was the relevant BIT, which was incorporated into domestic law by the Constitution, and provides for the application of “international law” to disputes regarding foreign investments.<sup>25</sup> Because “the general principles of law are an autonomous or direct source of international law,” the Tribunal held that they may be applied as “general rules on which there is international consensus” and “rules of law on which the legal systems of [all] States are based.”<sup>26</sup>

While *res judicata* is one of those general principles, and decisions of the El Salvadorian Supreme Court should usually be binding when the applicable law is that of El Salvador, the Tribunal decided the issue of its

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20. *Id.* ¶ 172.

21. *Id.*

22. *Id.* ¶¶ 179, 181.

23. *Inceysa Vallisoletana v. El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), available at [http://www.italaw.com/sites/default/files/case-documents/ita0424\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf).

24. *Id.* ¶ 218.

25. *Id.* ¶¶ 219-24.

26. *Id.* ¶ 227.

own competence without limitation from the national judgments. Reviewing the legality of the investment contract *de novo*, the Tribunal concluded that Claimant violated at least three general principles of law in its procurement. *First*, it violated the “supreme principle” of good faith, which, in the context of contractual relations, requires the “absence of deceit and artifice in the negotiation and execution of [legal] instruments.”<sup>27</sup> *Second*, it violated the principle of *nemo auditor propiam turpitudinem allegans*, which means that it cannot “seek to benefit from an investment effectuated by means of [an] illegal act.”<sup>28</sup> And *third*, “the acts committed by [claimant] during the bidding process [we]re in violation of the legal principle that prohibits unlawful enrichment.”<sup>29</sup> This principle, the Tribunal found, was codified in the “written legal systems of the nations governed by the Civil Law system,” and provides that “when the cause of the increase in the assets of a certain person is illegal, such enrichment must be sanctioned by preventing its consummation.”<sup>30</sup> Accordingly, “the *systematic* interpretation” of El Salvadorian law, underpinned by “the general principles of law,” must deny Claimant the right to access the jurisdiction of the Tribunal – irrespective of what the El Salvadorian Supreme Court may have already said on the matter.<sup>31</sup>

In 1953, Professor Bin Cheng wrote the seminal book on the type of “general principles” invoked in these investor-state arbitrations. Cheng set forth five general categories of substantive concepts that are commonly recognized by civilized nations. Basic notions like *pacta sunt servanda* and *res judicata* are among the most commonly recognized principles, expressed as Latin maxims to demonstrate their permanence and universality. Testifying to the importance of these principles of universal law, Professor Bin Cheng’s 60 year-old book remains one of the most cited treatises by international tribunals.

But is this a unique phenomenon of investment law? As a source of law listed in the ICJ Statute, is it limited to public international law? To be sure, lawyers not dedicated to non-state mechanisms like international arbitration tend to cling to what they know; they tend to fight with the national law with which they are familiar, and only begrudgingly accept foreign law as a rule of decision. In the U.S. at least, “the tendency of the federal courts is to duck and run when presented with issues of foreign

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27. *Id.* ¶ 231.

28. *Id.* ¶ 242.

29. *Id.* ¶ 253.

30. *Id.* ¶ 254.

31. *Id.* ¶¶ 218, 263.

law,”<sup>32</sup> and they may run faster when that foreign law is an amalgam of ancient principles divined from a comparative exercise. But the perception may not approximate historical reality: national courts may be looking – or perhaps should be looking – in the direction of these fundamental transnational rules.

The notion of “general principles” as a formal source of law before the International Court of Justice came about when European national courts were still reeling with post-WWII trauma. The Continental European tradition of mechanically applying written laws with extreme formalism was blamed for the grave injustices perpetuated by the courts of Nazi Germany and Vichy France.<sup>33</sup> When the war ended, the general principles – or *principes généraux* – obtained favor in France as a reaction against the Vichy period, in which French wartime courts blithely applied Vichy enactments, offering an alternative source to effectuate justice where the written law fails.<sup>34</sup>

If the general principles obtained some acceptance in Europe – despite the generalized distaste in civil law for anything outside the Code – they obtained even greater acceptance in the common law systems.<sup>35</sup> In 1960, the Government of the Republic of Cuba established Banco Para el Comercio Exterior de Cuba (“Bancec”) to serve as an official autonomous credit institution for foreign trade. That same year, all of Citibank’s assets in Cuba were seized and nationalized by the Cuban Government. Separately, but soon thereafter, Bancec acquired a letter of credit issued by Citibank arising from a sugar transaction with a Canadian company. But when Bancec brought suit on the letter of credit in the United States, Citibank counter-claimed, asserting a right to set off the value of its seized Cuban assets. Citibank could only do so, though, if Bancec was deemed the alter ego of the Government of Cuba, and thus responsible for the expropriation. Cuban law was the natural choice of law, and Cuban law

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32. Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 432 AM. J. COMP. L. 581, 581 (1995).

33. Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law*, 35 CORNELL INT’L L. J. 101, 103, 142-48 (2001-2002) (citing, *inter alia*, JACQUES GHESTIN & GILLES GOUBEAUX, *TRAITE DE DROIT CIVIL: INTRODUCTION GENERALE* (1977)).

34. *Id.* at 142, 147.

35. This, of course, happens most often where the statute directs the court to “international law” as the rule of decision—as in the case of the Alien Tort Statute. *See, e.g.*, *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 54 (D.C. Cir. 2011) (Kavanaugh, dissenting) (arguing for the application of a “principle which is found to be generally accepted by civilized legal systems”); *see generally* David W. Rivkin, *A Survey of Transnational Legal Principles in U.S. Courts*, 5 WORLD ARB. & MEDIATION REV. 231, 234-37 (2011).

maintained strict separation between the company and the State, thus immunizing Bancec.

The case wound its way through the federal courts; the district court sided with Citibank on finding Bancec sufficiently aligned with the Government of Cuba, but the Second Circuit – applying Cuban law – reversed. The case ultimately came to be heard before the U.S. Supreme Court, which, in an opinion written by Justice Sandra Day O’Connor, disclaimed blind adherence to Cuban law, or even U.S. law, and instead applied “principles of equity common to international law and federal common law.”<sup>36</sup> These “controlling principles,” it said, were divined in large part by U.S. federal common law, supplemented by principles adopted by “governments throughout the world.” These principles formed the rule of decision on whether Bancec should be accorded separate legal status from the Government of Cuba.

Citing studies of English law,<sup>37</sup> Soviet law,<sup>38</sup> and comparative studies by both scholars and NGOs<sup>39</sup> — while discarding some principles applied by foreign courts as “not . . . universally acceptable,”<sup>40</sup> — the Court held that “[s]eparate legal personality” and “[l]imited liability is the rule, not the exception.”<sup>41</sup> However, after referring to various authorities on European civil law<sup>42</sup> and international decisions collecting “the wealth of practice already accumulated on the subject in municipal law[s]” around the world,<sup>43</sup> the Court held that Bancec’s independent corporate status could be disregarded in this instance, and that it could be held to answer in a U.S. court for Citibank’s expropriation in Cuba. Ultimately, this result was “the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.”

## II. GENERAL PRINCIPLES OF LAW IN THE REGULATION OF TRANSNATIONAL PRIVATE RELATIONSHIPS

What Justice O’Connor did in *Bancec* is not completely novel,

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36. First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 613 (1983).

37. *Id.* at 624 n.13; *see also id.* at 625 n.16, 626 n.18.

38. *Id.* at 624 n.13

39. *Id.*

40. *Id.* at 626 n.18.

41. *Id.* at 626.

42. *Id.* at 628 n.20.

43. *Id.*

whether in the United States or abroad. In that case, the foreign instrumentality's primary argument was that the law of the place of its incorporation – there, Cuba – should govern the substantive questions relating to its structure and internal affairs.<sup>44</sup> To be sure, “[a]s a general matter,” the incorporating state’s law typically governs to achieve “certainty and predictability” for “parties with interests in the corporation.”<sup>45</sup> But that rule is not absolute. According to the Court, “[t]o give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit th[at] state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result.” *Nemo iudex in causa sua*.<sup>46</sup> In the place of Cuban law, the Court applied “principles . . . common to both international law and federal common law,” as explicated by “governments throughout the world.”<sup>47</sup> In other words, the Court applied those aspects of U.S. common law consonant with “general principles recognized by civilized nations.”

That phrase was inserted into article 38 of the Statute of the International Court of Justice as one of the five sources of international law. It encompasses the positive, private laws of all national judicial systems, distilled to their base norms by a deductive and then comparative analysis.<sup>48</sup> Among the examples of the general principles cited in the *travaux préparatoires* of the ICJ Statute are *res judicata*, good faith, certain points of procedure (like burden of proof), proscription of abuse of rights, and *lex specialis generalibus derogat*.<sup>49</sup> These principles are, in a way, state practice *in foro domestic*, and states are bound to them in the same way they are bound to customary international law that stems from the concordance of their practice on the international plane.<sup>50</sup> As stated by one U.S. judge, “[p]rivate [domestic] law, being in general more developed

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44. *Id.* at 621.

45. *Id.*

46. See Cheng, *supra* note 12, at 279 (“No one can be judge in his own cause.”).

47. *First Nat’l City Bank*, 462 U.S. at 623-24.

48. See generally Michael D. Nolan & Frederic G. Sourgens, *Issues of Proof of General Principles of Law*, 3 WORLD ARB. & MEDIATION REV. 505 (2009).

49. Cheng, *supra* note 12, at 25-26.

50. See Olufemi Elias & Chin Lin, *General Principles of Law, Soft Law and the Identification of International Law*, 28 NETH. Y.B. INT’L L. 3, 25-26 (1997). Indeed, the division between custom and general principles of law is often not very clear. In its broadest sense, customary international law may include all that is unwritten in international law, but in Article 38(a)(1), custom is strictly confined to what is a general practice among States and accepted by them as law. For the general principles, there is the element of recognition on the part of civilized peoples but the requirement of a general practice among States is absent. What is important for Article 38(a)(3) is general practices *within* States.

than international law, has always constituted a sort of reserve store of principles upon which the latter has been in the habit of drawing . . . for the good reason that a principle which is found to be generally accepted by civilized legal systems may fairly be assumed to be so reasonable as to be necessary to the maintenance of justice under any system.”<sup>51</sup> So international tribunals, or national courts faced with a transnational case, have this reserve store of principles that form an international minimum standard of due process and fairness – based not on their own parochial views, but on the universal views of all legal systems.

There are also examples of this practice outside the United States. During the 1990 Iraqi invasion of Kuwait, ten commercial airplanes belonging to Kuwait Airlines were seized by Iraq. After the First Gulf War, Kuwait Airways subsequently brought an action in the UK against Iraq Airways for the aircrafts’ return. In transnational cases like this, English courts typically apply the “double actionability rule,” which requires that the act be tortious in England *and* civilly actionable in Iraq before an action will lie.<sup>52</sup> But, under a special provision of Iraqi law, those seized aircraft were legally transferred to Iraqi Airways after the war. The Plaintiff conceded this legal point, but argued that the English Court should “altogether disregard” that Iraqi law.

The “normal position,” according to the court, was to follow its precedent on choice of law and apply “the laws of another country even though those laws are different from the law of the forum court.”<sup>53</sup> And, while the confiscatory Iraqi law was likely a violation of public international law, “breach of international law by a state is not, and should not be, a ground for refusing to recognise a foreign decree.”<sup>54</sup> While this latter principle “is not discretionary,”<sup>55</sup> the ultimate choice of law is, and “blind adherence to foreign law can never be required of an English court.” In exceptional cases, “a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice . . . [That is,] when it would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”<sup>56</sup> In that situation, “the court will decline

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51. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 54 (D.C. Cir. 2011) (Kavanaugh, dissenting) (quoting J.L. BRIERLY, *THE LAW OF NATIONS* 62-63 (6th ed. 1963)).

52. Kuwait Airways Corp. v. Iraqi Airways Co., [2002] UKHL 19, ¶ 12, *available at* <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020516/kuwait-1.htm>.

53. *Id.* ¶¶ 15-16.

54. *Id.* ¶ 24.

55. *Id.*

56. *Id.* ¶¶ 16-17.

to enforce or recognise *the foreign decree* to whatever extent is required in the circumstances<sup>57</sup>— even though it will continue to apply that foreign law *as a whole*.

That was the result in the case of *Kuwait Airways Corp. v. Iraqi Airways*. The Iraqi decree transferring legal title of foreign seized property no doubt violated international law: “Having forcibly invaded Kuwait, seized its assets, and taken KAC’s aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait’s existence as a separate state.”<sup>58</sup> The decree was then plead by Iraqi Airways as an impediment to Plaintiff’s claim under the “double actionability rule.” But according to the English Court, “[an] expropriatory decree made in these circumstances and for this purpose is simply not acceptable today, . . . [and constitutes] a gross violation of established rules of international law of fundamental importance.”<sup>59</sup> Implicit in the decision is the principle of *nullus commodum capere de sua injuria propria* (no one can be allowed to take advantage of his own wrong). The foreign decree that would have otherwise governed the case was excised from Iraqi law and entirely ignored. Because the torts of conversion and usurpation were recognized in England and Iraq, respectively, and amply proven by Plaintiffs, under *both* English and Iraqi law the Plaintiff’s claim was sustained.<sup>60</sup>

General principles of law often form an essential and functioning part of the civil law as well. To fill lacunae, many Civil Codes requires judges

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57. *Id.* ¶ 17.

58. *Id.* ¶ 28.

59. *Id.* ¶ 29.

60. This is not to suggest that the general principles should abrogate the longstanding adherence to the “act of state” doctrine. In the United States, for instance, the act of state doctrine requires courts to presume valid acts of a foreign sovereign taken *within its territory*, and to refuse to adjudicate cases that require the court to assess their validity *within that territory*. See, e.g., *W.S. Kirkpatrick & Co. v. Evt’l Tectonics Corp.* 493 U.S. 400, 407 (1990) (“a seizure by a state cannot be complained of elsewhere in the sense of being sought to be declared ineffective elsewhere.”). The *Kuwait Airways* case, however, is different because the English court was not purporting to declare the seizure ineffective *inside* Iraq; it just refused to apply the expropriatory law as the rule of decision in its courts (that is, *outside* of Iraq). This is something that U.S. courts also can—and must—do. See, e.g., *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972) (“our courts will not give ‘extraterritorial effect’ to a confiscatory decree of a foreign state, even where directed against its own nationals.”). Whether the foreign law will be ignored in this instance is typically a function of *local* “public policy.” See *id.* at 78 (“We hold that it is our duty to assess, as a matter of federal law, the compatibility with the laws and policy of *this country* of depriving the original owners of [their] property without compensating them for it.” (emphasis added)). This article posits in § IV, *infra*, that perhaps the amalgam of fundamental legal principles adopted by civilized countries is a more just benchmark than the “unruly horse” of local public policy. *Richardson v. Mellish* (1824), 2 Bing 229, 252 (Burrough, J.) (“Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you”).

to reference “the general principles of universal law”;<sup>61</sup> and many Codes of Civil Procedure instruct courts to decide legal issues “with clarity, based on the law and the merits of the process and, in the absence of law, [on] the principles of universal justice.”<sup>62</sup> But while provisions like these are not exceptional in the civil law, their use is. With a tradition steeped in positivism and formalism, there is a concern that judges will employ general principles to impose their own unpredictable legal norms, rather than following the norms imposed by the legislature – what the French might condemn as a “*gouvernement de juges*.”<sup>63</sup> But some civil law scholars, heeding the lessons from the pre-WWII era, are beginning to eschew this cramped viewpoint of the civil law for something much more flexible.<sup>64</sup> Indeed, at least some national civil codes expressly direct judges to decide cases according to the spirit of their nation’s laws – a spirit conveyed by the entirety of the Code.<sup>65</sup>

### III. INTERNATIONAL DUE PROCESS AS A MINIMUM CORRECTIVE STANDARD

The “general principles of law” are not a tool of oppression; they are not just a way to correct idiosyncratic and exotic laws. Their procedural element, in fact, works just the opposite effect.

Arriving at one definition of substantive justice in a transnational case is a difficult thing. Every state has vastly different procedures to determine what is “justice,” and those procedures produce vastly different final judgments. But when recognition of those judgments is sought abroad, the enforcement state must ascertain whether they meet minimum standards of justice before giving them its *imprimatur*. Like the discretionary application of foreign law, “[n]ations are not inexorably bound to enforce judgments obtained in each other’s courts.” In the United States, as in many national courts, “[i]t has long been the law . . . that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the *basics* of due process.”<sup>66</sup> Similarly, if an individual

61. Civil Code, art. 18 (Ecuador); *see also* Code of Civil Procedure, art. 8 (Venez.); Code of Criminal Procedure, art. 134 (Arg.); Code of Civil Procedure, art. 274 (Ecuador); Constitución Política de la República de Chile [C.P.], art. 54; Constitution, arts. 3, 9, 11 (Arm.); Constitution, art. 24 (Bulg.); Code of Civil Procedure, art. 145 (Bol.); Code of Civil Procedure, art. 2 (Kaz.).

62. Code of Civil Procedure, art. 278 (Ecuador).

63. *See* Curran, *supra* note 34, at 148.

64. *See id.* at 144 (citing, *inter alia*, Jean Boulanger, *Principes généraux du droit et droit positif*, in 1 LE DROIT FRANCAIS AU MILEAU DU XXE SIÈCLE: ÉTUDES OFFERTES À GEORGES RIPERT 68 (1951)).

65. *See* Civil Code, art. 1 (Switz.); Civil Code, art. 12 (It.). This sort of judicial methodology has a long history in Germany, too. *See* Curran, *supra* note 34, at 151-66.

66. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410, 1412 (9th Cir. 1995) (emphasis added). By

aggrieved by a foreign judgment or government decision wants redress for his gripe on the international level, he can bring an arbitral claim against the offending state under a relevant BIT (if one indeed exists). That state will be liable for a denial of justice if the decision was tainted by a “flagrant abuse of judicial procedure”<sup>67</sup> or “fundamental breaches of due process.”<sup>68</sup> In both scenarios, while “[a]n alien usually must take [a foreign] legal system as he finds it, with all its deficiencies and imperfections,”<sup>69</sup> “[t]he sovereign right of a state to do justice cannot be perverted into a weapon for circumventing its obligations toward aliens who must seek the aid of its courts.”<sup>70</sup> In both scenarios, there is an international minimum standard of justice that must be done. And, as we will see below, the national and international inquiries largely overlap. This is because, for nearly as long as individuals were engaging each other across national borders, there has existed a rudimentary code of “international due process” consisting of “certain minimum standards in the administration of justice of such elementary fairness and general application in the legal systems of the world that they have become

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design and necessity, the “basics” are not parochial; the standard is not “intended to bar the enforcement of all judgments of any foreign legal system that does not conform its procedural doctrines to the latest twist and turn of our courts.” *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000). Indeed, the statute requires only that the foreign procedure be “compatible with the requirements of due process of law,” not ‘equivalent’ to the requirements of American due process, and “[i]t is a fair guess that no foreign nation has decided to incorporate [U.S. notions of] due process doctrines into its own procedural law.” *Id.* So, while a foreign legal system need not share every jot and tittle of U.S. jurisprudence, it “must abide by fundamental standards of procedural fairness,” *Cunard Steamship Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985), and “afford the defendant the basic tenets of due process,” *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997)—that is, “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers”—if it wants its judgments enforced here, *Ashenden*, 233 F.3d at 477. According to Judge Posner of the United States Court of Appeals of the Seventh Circuit, “[w]e’ll call this the ‘international concept of due process’ to distinguish it from the complex concept that has emerged from [domestic] case law.” *Id.*

67. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 155-56 (Feb. 5) (Tanaka, J., concurring).

68. JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 205 (2005).

69. *Salem (U.S.) v. Egypt*, 2 R.I.A.A. 1161, 1202 (1932). For instance, in *The Affaire du Capitaine Thomas Melville White*, the British Government complained to an arbitral tribunal that the arrest of one of its citizens in Peru was illegal. The tribunal, however, had “little doubt” that “the rules of procedure to be observed by the courts in [Peru] are to be judged solely and alone according to the legislation in force there.” See *Décision de la commission, chargée, par le Sénat de la Ville libre hanséatique de Hambourg, de prononcer dans la cause du capitaine Thomas Melville White, datée de Hambourg du 13 avril 1864*, in Henri La Fontaine, *PASICRISIE INTERNATIONALE, 1794-1900: HISTOIRE DOCUMENTAIRE DES ARBITRAGES INTERNATIONAUX*, 48 (Kluwer 1997) (1902).

70. J. Irizarry y Puente, *The Concept of Denial of Justice in Latin America*, 43 MICH. L. REV. 383 (1944).

international legal standards.”<sup>71</sup>

One might think that the mutual interests of international commerce and the rule of law would espouse an incredibly high standard of “due process” in both scenarios. It doesn’t. The cross-border movement of legal rights and judgments depends largely upon a “spirit of co-operation” among states, which in the end is guided by “many values” beyond substantive justice, “among them predictability, . . . ease of commercial interactions, and stability through satisfaction of mutual expectations.”<sup>72</sup> To satisfy these needs, international challenges to judgments and judicial recognition of the same do not turn on American, common law, or even Western notions of “due process.” Rather, as we will see below, they turn on “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations.”<sup>73</sup> Stated otherwise, in both the national and international scenario, the applicable standard of due process requires only “justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.”<sup>74</sup>

This notion of international due process is drawn from the general principles of law. But rather than supplanting and correcting-*upward* a deficient foreign law before it is applied in a local court, international due process corrects-*downward* the parochial notions of local due process to grant greater leeway to foreign judgments. Drawing on our prior discussion of “Rex,” this deferential standard aims to *help* his minimally-adequate decisions and judgments gain international approval (provided, of course, that they are minimally adequate); not supplant them with a different set of processes, priorities and rules. In this way, the general principles coalesce around this one minimum standard of treatment to which all states can, and must, strive to attain.

For well over a century, U.S. jurisprudence has itself compiled a laundry list of elements that undergird the ‘international concept of due process.’ There must be, for instance, an “opportunity for [a] full and fair trial abroad before a court of competent jurisdiction”; “regular proceedings” and not *ad hoc* procedures; “due [notice] or voluntary

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71. Friedmann, *supra* note 12, at 290.

72. *Societe Nationale Industrielle Aerospatiale v. United States Dist.*, 482 U.S. 522, 543 n.27 (1987).

73. *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

74. Elihu Root, President, Am. Soc’y of Int’l Law, *The Basis of Protection to Citizens Residing Abroad*, Address Before the American Society of International Law Annual Meeting (Apr. 28-30, 1910), in 4 PROC. AM. SOC. INT’L L. 16, 21 (1910), *quoted in* Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 38 MICH. L. REV. 445, 458 (1940).

appearance of the defendant”; “a system of . . . impartial administration of justice between the citizens of its own country and those of other countries”; and assurances against “fraud in procuring the judgment.”<sup>75</sup> Other elements include the assurance that “the judiciary was [not] dominated by the political branches of government or by an opposing litigant”; that the defendant was able to “obtain counsel, to secure documents or attendance of witnesses”; and that the parties “have access to appeal or review.”<sup>76</sup> These “are not mere niceties of American jurisprudence” but are instead “the ingredients of ‘civilized jurisprudence’” and “basic due process.”<sup>77</sup>

These core concepts of international due process can be directly traced to the general principles of law. As a theoretical matter, both are based in the positive laws that apply in domestic legal systems. Just as national principles become general principles when they are universally accepted by the majority of civilized legal systems, rules of process form the baseline notion of international due process when they are “simple and basic enough to describe the judicial processes of civilized nations, our peers.”<sup>78</sup>

We see this common thread between principles and process as a matter of practice, too. The U.S. Supreme Court has long held that judgments rendered without service of process or notice are contrary to “immutable principle[s] of natural justice,”<sup>79</sup> “*coram non judge*,”<sup>80</sup> and void.<sup>81</sup> This is not only a general principle of American law, but is also a “fundamental condition[]” that is “universally prescribed in all systems of law established by civilized countries.”<sup>82</sup> Accordingly, this basic principle forms a core component of both American due process and international due process,<sup>83</sup> such that judicial judgments, if they were rendered in their

75. *Hilton v. Guyot*, 159 U.S. 113, 202 (1895).

76. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. b (1987).

77. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (quoting *Hilton*, 159 U.S. at 205); see also *British Midland Airways Ltd. v. Int’l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (“It has long been the law that unless a foreign country’s judgments are the result of outrageous departures from our own notions of ‘civilized jurisprudence,’ comity should not be refused” (quoting *Hilton*, 159 U.S. at 205)).

78. *Ashenden*, 233 F.3d at 477.

79. *Hollingsworth v. Barbour*, 29 U.S. 466, 475 (1830).

80. *Coram non judge* means “[o]utside the presence of a judge” or “[b]efore a judge or court that is not the proper one or that cannot take legal cognizance of the matter.” BLACK’S LAW DICTIONARY 338 (7th ed. 1999).

81. See, e.g., *Boswell’s Lessee v. Otis*, 50 U.S. 336, 350-51 (1850).

82. *Twining v. New Jersey*, 21 U.S. 78, 111 (1908).

83. See *Hilton*, 159 U.S. at 166 (“Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice.”); *Int’l Transactions, Ltd. v. Embotelladora Agral Regiomontana*,

state of origin without proper notice, will almost universally be denied recognition and enforcement in another state and may even constitute an international delict if property is seized in the rendering state as a result.<sup>84</sup>

Similarly, Professor Bin Cheng devoted a chapter of his book on the General Principles to the notion of *audiatur et altera pars*, which translates in practice to the “fundamental requirement of equality between the parties in judicial proceedings” and their equal right to be heard.<sup>85</sup> Elsewhere, he discussed the maxim *nemo debet esse iudex in propria sua causa*, or the “universally accepted doctrine that no one can be judge in his own cause,”<sup>86</sup> and the principle that requires tribunals to exercise only that jurisdiction authorized by law (*extra compromisum arbiter nihil facere potest*). All three of these general principles have found their way into the core notions of international due process. Nearly contemporaneously with Bin Cheng’s book, the Council of Europe drafted the European Convention on Human Rights, which provided an early attempt to codify an intra-European baseline of due process, and included within it the guarantee that “everyone is entitled to [(1)] a fair and public hearing within a reasonable time [(2)] by an independent and impartial tribunal [(3)] established by law.”<sup>87</sup> Violation of this article can impugn a foreign judgment in both domestic<sup>88</sup> and international<sup>89</sup> courts. The parallels between Bin Cheng’s general principles of law and the ECHR’s baseline notion of due process are hard to ignore.

Modern soft law codifications, like the ALI/UNIDROIT Principles of Transnational Civil Procedure, provide an even clearer example of many of the principles underlying international due process.<sup>90</sup> For instance, the

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SA de CV, 347 F.3d 589, 594 (5th Cir. 2003) (“Notice is an element of our notion of due process and the United States will not enforce a judgment obtained without the bare minimum requirements of notice.”).

84. See, e.g., Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, ¶¶ 146-51 (Apr. 12, 2002), 18 ICSID Rev.—FOREIGN INVESTMENT L.J. 602 (2003).

85. CHENG, *supra* note 12, at 291-98.

86. *Id.* at 279.

87. Convention for the Protection of Human Rights and Fundamental Freedoms, art. VI, para. 1, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (emphasis added).

88. See, e.g., Yukos Capital S.A.R.L. v. OAO Rosneft, Amsterdam Court of Appeal, Case No. 200.005.269/01, Decision, ¶ 3.10 (Apr. 28, 2009), available at <http://www.iiiglobal.org/component/jdownloads/finish/170/4135.html> (unofficial translation).

89. See, e.g., Oao Neftyanaya Kompaniya Yukos v. Russia, ¶ 551 (Sept. 20, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106308>.

90. Instruments like these are, almost by definition, an attempt to deduce general principles from a comparative exercise. They are, according to one scholar, “normative instrument[s] that attempt[] to construct a single unified body of . . . rules from a number of legal systems.” Peter L. Fitzgerald, *The*

three general principles that underlie the notion of a fair hearing by a competent court are listed in the first three articles of that instrument, which address the “independence [and] impartiality” of judges, their “jurisdiction over parties,” and the “procedural equality of the parties.”<sup>91</sup> The general principle that judgments cannot be rendered without due notice follows soon thereafter, at article 5.<sup>92</sup> That article also catalogues a number of general principles that have been applied as such by national and international courts, including the requirement of “effective . . . notice” at the outset of proceedings, and the “right to submit relevant contentions of fact and law and to offer supporting evidence” in support of a defense or a claim.<sup>93</sup>

Other general principles appear throughout the ALI/UNIDROIT Principles, too. A claimant bears the burden of proof, and a defendant must prove all the material facts that are the basis of his defense.<sup>94</sup> These are universal principles that have long been applied as such by domestic and international courts and tribunals.<sup>95</sup> There also is “little, if indeed any question as to *res judicata* being a general principle of law” common to all civilized countries.<sup>96</sup> That a second suit is barred by a former adjudication involving the same subject matter and legal bases is “a principle inherent in all judicial systems.”<sup>97</sup> The Principles, too, are designed to “avoid repetitive litigation” with detailed rules on claim and issue preclusion.<sup>98</sup>

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*International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States*, 27 J. L. & COMM. 1, 33 (2008); see also Berger, *supra* note 15, at 109-13.

91. ALI/UNIDROIT Principles of Transnational Civil Procedure, 2004 UNIFORM L. REV. 758, 760-66.

92. *Id.* at 768.

93. ALI/UNIDROIT Principles, *supra* note 92, art. 5.4; CHENG, *supra* note 12, at 293; see, e.g., *Hilton v. Guyot*, 159 U.S. 113, 159 (1895) (To be recognized, a foreign judgment must be the product of “due allegations and proofs, and opportunity to defend against them.”); *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992) (refusing recognition of arbitral award under the due process defense of the New York Convention, where judge had previously told the claimant that invoices may be submitted in summary form to prove their claims, only to switch course at the hearing on the merits and deny the claims for failure to submit the original invoices; “by so misleading [claimant], however unwittingly, the Tribunal denied [claimant] the opportunity to present its claim in a meaningful manner.”); *Generica Ltd. v. Pharm. Basics*, 125 F.3d 1123, 1130 (7th Cir. 1997) (“When the exclusion of relevant evidence actually deprived a party of a fair hearing, therefore, it is appropriate to vacate an arbitral award.”).

94. ALI/UNIDROIT Principles, *supra* note 92, art. 21.

95. See, e.g., CHENG, *supra* note 12, at 326-335.

96. *Id.* at 336.

97. PETER R. BARNETT, *RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW* ¶ 1.12 (2001).

98. ALI/UNIDROIT Principles, *supra* note 92, art. 28, cmt. P-28A.

And, it has been universally acknowledged that a default judgment cannot lie until the court has satisfied itself of its jurisdiction and that the claim is well-founded in fact and law.<sup>99</sup> The Principles, too, incorporate this rule.<sup>100</sup>

When pulled together into a “Transnational [Code of] Civil Procedure,” as ALI and UNIDROIT have done, these individual principles form a set of minimum “standards for adjudication of transnational commercial disputes.”<sup>101</sup> In other words, they constitute an attempted codification of “international due process.”

The application of the international concept of due process is becoming more common in domestic courts, and we can point to some high-profile examples. Several years ago, thousands of Nicaraguan citizens sued Dole Food Company and The Dow Chemical Company in Nicaraguan courts, alleging that they were exposed to chemicals causing them to be infertile while working on the defendants’ banana plantations. Nicaraguan courts applied Special Law 364, which was enacted in Nicaragua specifically to handle these claims.<sup>102</sup> This law assumed the plaintiffs were indigent and covered their costs, imposed minimum damage amounts, irrefutable presumptions of causation, summary proceedings, abolition of the statute of limitations, and strict curtailment of appellate review.<sup>103</sup> In the end, Nicaraguan courts entered over \$2 billion in judgments for the plaintiffs.

When Plaintiffs sought to enforce one of these judgments in Florida, the defendants objected on numerous grounds, including the lack of due process that the defendants received in Nicaragua. The court, citing *Ashenden*, evaluated the Special Law 364 to determine whether it was “fundamentally fair.”<sup>104</sup> Because it “targets a handful of United States companies for burdensome and unfair treatment to which domestic Nicaraguan defendants are never subjected,” the court held that the foreign judgment should not be recognized or enforced. Specifically:

[T]he legal regime set up by Special Law 364 and applied in this case does not comport with the “basic fairness” that the “international concept of due process” requires. It does not even come close. “*Civilized nations*” do not typically require defendants to pay out millions of dollars without proof that they are responsible for the alleged injuries.

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99. See, e.g., CHENG, *supra* note 12, at 297.

100. ALI/UNIDROIT Principles, *supra* note 92, art. 15.3.

101. *Id.* at 758.

102. *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1316-18 (S.D. Fla. 2009).

103. *Id.* [BB 4.1][subs ok, as noted above, changed pincite][EK]

104. *Id.* at 1327 (citing *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000)).

*Basic fairness requires proof of a connection between a plaintiff's injury and a defendant's conduct (i.e., causation) before awarding millions of dollars in damages. Civilized nations do not target and discriminate against a handful of foreign companies and subject them to minimum damages so dramatically out of proportion with damage awards against resident defendants. In summary, civilized nations simply do not subject foreign defendants to the type of discriminatory laws and procedures mandated by Special Law 364, and the Court cannot enforce the judgment because it was rendered under a legal system that did not provide "procedures compatible with the requirements of due process of law."*<sup>105</sup>

This admonishment from the court in *Osorio* didn't flow from the Fourteenth Amendment of the U.S. Constitution, whose "due process" clause encompasses not only "idiosyncratic jurisprudence"<sup>106</sup> on principles of procedural fairness, but also substantive matters like personal privacy<sup>107</sup> and applicable law.<sup>108</sup> "It is a fair guess that no foreign nation has decided to incorporate our due process doctrines into its own procedural law,"<sup>109</sup> so insisting on all of the rigors of our system would undoubtedly stunt the movement of judgments abroad. The deficient process followed in Nicaragua violated something far less stringent and more fundamental – that is, the basic rules of procedural fairness followed by all "[c]ivilized nations."<sup>110</sup>

International norms developed through "discursive synthesis" like this – that is, the interaction of many different legal traditions and principles – are always "more likely to be implemented [in national legal systems] and less likely to be disobeyed [on the international level]."<sup>111</sup> In some ways, this is Harold Koh's "Transnational Legal Process" on full display – principles are divined from the interaction of legal systems, those principles are internalized into a country's normative system, and a new baseline legal rule is created which will guide transnational interactions between parties in the future.<sup>112</sup> The result, we can hope, is a compliance pull to the rule of law, and the optimistic establishment of "enclaves of justice." In Mexico,

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105. *Id.* at 1345. (citation omitted) (emphasis added).

106. *Ashenden*, 233 F.3d at 477.

107. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (noting the private nature of the petitioners' conduct).

108. *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

109. *Ashenden*, 233 F.3d at 476.

110. *Id.* at 477.

111. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 481 (1995).

112. Harold Koh, *The Transnational Legal Process*, 75 *NEB. L. REV.* 181, 204-05 (1996); Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L. J.* 2599, 2646 (1997).

for instance, it is reported that NAFTA has encouraged government officials and courts to avoid conduct that might fall below the international minimum standard, and thereby be impugned in an international forum.<sup>113</sup> A foreign court applying a baseline notion of international due process to Mexican laws and decisions might exert a similar compliance pull – to the benefit of foreigners and citizens alike.

Of course, commentators may levy the same criticisms against this process that have been made since the inception of “general principles” as a primary source of international law nearly a century ago. Some may bemoan that “unelected” judges may be given free rein to divine principles made by “the world community at the expense of state prerogatives,” where “the interests of the [home] state[] are neither formally nor effectively represented in th[at] lawmaking process.”<sup>114</sup> But, in a transnational case, there is nothing new about judges applying law that was made elsewhere; it happens all the time whenever the courts’ own choice-of-law principles so direct. Nor is there anything undemocratic about judges applying principles that were crystallized outside its territorial jurisdiction (at least in non-Constitutional matters).<sup>115</sup> This is something that American judges have done since the beginning of the Republic, whenever they declared rules of customary international law to be part of “general common law.”<sup>116</sup> The process of “finding”<sup>117</sup> general principles – that is, identifying the underlying legal rationale behind a particular rule and surveying its general acceptance across legal systems – is certainly no more (and probably less) discretionary than divining a customary international law.<sup>118</sup> And if predictable outcomes is the main concern, and

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113. See Paulsson, *supra* note 2.

114. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 868 (1997).

115. I am not suggesting that these general principles can or should be applied to help discern a constitutional question. See generally Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 653 (2009). That lively debate of beyond the scope of this article. I will only note that it is a far lesser intrusion—and far less controversial—to apply these principles to a transnational *civil* case, where the parties have litigated their claims overseas or are actually arguing for the applicability of foreign law.

116. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980); see also *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (U.S. courts variably “apply Federal law, state law, and international law, as the exigencies of the particular case may demand.”); *The Nereide*, 13 U.S. 388, 423 (1815) (stating that “the Court is bound by the law of nations which is a part of the law of the land”).

117. See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-62 (1984) (“In a real sense federal courts find international law rather than make it, . . . as is clearly not the case when federal judges make federal common law pursuant to constitutional or legislative delegation.”).

118. Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1853 (1998).

judges cannot be trusted to ensure that predictability, is not a methodology designed to apply well-accepted and ancient principles better than that hazards of an uncertain choice of law determination, followed by blind adherence to idiosyncratic rules?<sup>119</sup>

#### IV. THE RELEVANCE OF GENERAL PRINCIPLES TO THE MODERN ROLE OF PRIVATE INTERNATIONAL LAW

The discipline of private international law, defined in its simplest terms, is the body of authority that regulates private relationships across national borders, and resolves questions that result from the presence of foreign elements in legal relationships.<sup>120</sup> This doesn't tell us much, so we need to dig a bit deeper.

Contrary to what the label suggests, it is also important to acknowledge that private international law is really not “international law” at all, in that it does not constitute a set of rights and obligations between states. Rather, it is *municipal* law that is applied because of the presence of a foreign element. By ASIL's definition it “has a dualistic character, balancing international consensus with domestic recognition and implementation, as well as balancing sovereign actions with those of the private sector.”<sup>121</sup>

Traditionally, “private international law” does its part to resolve transnational disputes by pointing parties to the proper forum and the proper law, without purporting to resolve the substance of a juridical question. Its rules rarely provide the ultimate solution to a dispute, and it has been said that this discipline of law “resembles the inquiry office at a railway station where a passenger may learn the platform at which his train

119. See Emmanuel Galliard, *General Principles of Law in International Commercial Arbitration—Challenging the Myths*, 5 *WORLD ARB. & MEDIATION REV.* 161, 169 (2011).

120. See, e.g., P.M. North & J.J. Fawcett, *CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW* 3, 7 (13th ed. 1999); *Private International Law*, DEPARTMENT OF INTERNATIONAL LAW, [http://www.oas.org/dil/private\\_international\\_law.htm](http://www.oas.org/dil/private_international_law.htm) (last visited Apr. 1, 2013) (“Private International Law is the legal framework composed of conventions, protocols, model laws, legal guides, uniform documents, case law, practice and custom, as well as other documents and instruments, which regulate relationships between individuals in an international context.”); *Private International Law*, AUSTRALIAN GOVERNMENT, <http://www.ag.gov.au/Internationalrelations/PrivateInternationalLaw/Pages/default.aspx> (last visited Apr. 1, 2013) (“Private international law is an area of law that deals with civil transactions and disputes that contain international elements. Also known as ‘conflicts of laws’, the subject is primarily concerned with developing principles and rules to resolve the following three stages of a legal conflict: Jurisdiction, Choice of law, Recognition and enforcement of judgments.”).

121. Louise Tsang, *Private International Law*, AMERICAN SOCIETY OF INTERNATIONAL LAW (June 21, 2011), <http://www.asil.org/erg/?page=pil>.

starts”—it points parties to the right court and the right law, “[b]ut it says no more.”<sup>122</sup> If this sounds like a simple process, leading to clean and predictable results, it isn’t. One negative consequence of the inherently municipal nature of private international law is uncertainty: with little harmonization of these various rules among states, there is no guarantee that the same dispute involving a foreign element will be decided in the same manner from one jurisdiction to another. And even once a choice of forum and law is made, the chosen law doesn’t always dictate a simple, judicious, and expected result. The chosen local law applied to the transnational case can lead to absurd results, and foreign law applied in local courts can often be even worse.

As the discussion above demonstrates, in order to play a meaningful role in aiding the resolution of modern transnational disputes, the authorities that encompass the rules of private international law must play a role in determining the *substance* of those municipal laws applied to the transnational scenario. Like investment tribunals in the past decade-and-a-half, courts seised with transnational matters and asked to apply foreign law should develop corrective mechanisms grounded in positive law that ensure substantive justice from a universal perspective. If we continue to hew to a mechanical application of the chosen municipal law, and excuse it with “meretricious concessions to cultural relativism,” we may find ourselves “complicit with dictators, fanatics and thugs” who have perpetrated the “fraudulent consensus on the rule of law” worldwide.<sup>123</sup> By the same token, if we continue to rely on the “unruly horse” of local public policy, or insist on parochial norms to stunt the movement of foreign judgments around the world, we threaten the very foundation of international law—that “systemic value of reciprocal tolerance and goodwill” which furthers the “mutual interests of all nations in a smoothly functioning international legal regime.”<sup>124</sup>

To some extent, private international law organizations have already heeded this call. The Hague Conference on Private International Law, for one, has recently acknowledged the “need, in practice, to facilitate access to foreign law” as an “essential component to . . . the rule of law and . . . the proper administration of justice.”<sup>125</sup> Efforts like this will make it easier

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122. See North & Fawcett, *supra* note 121, at 8-9.

123. See Paulsson, *supra* note 2, at 9.

124. *Societe Nationale Industrielle Aerospatiale v. United States for the S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

125. See generally Hague Conference on Private International Law, Feb. 15-17, 2012, *Conclusions and Recommendations on Access to Foreign Law in Civil and Commercial Matters*, available at [http://www.oas.org/dil/private\\_international\\_law.htm](http://www.oas.org/dil/private_international_law.htm).

for the national judge to apply the *whole law* to a particular case – the underlying universal principles as well as its normative code.<sup>126</sup> Moving one step further, for almost a century the International Institute for the Unification of Private Law (UNIDROIT) has been modernizing, harmonizing, and coordinating the rules of private commercial law to formulate uniform law instruments, and numerous treaties have been concluded between states that effectively do the same.<sup>127</sup> And for centuries before that, *lex mercatoria* has provided rules of international trade that have long been used to “clarify, to fill gaps, and to reduce the impact of peculiarities of individual country’s laws.”<sup>128</sup> But insofar as they are derived from scholarly consensus (in the case of uniform law instruments), and mercantile usage (in the case of *lex mercatoria*), these non-state laws have their obvious drawbacks.<sup>129</sup> Municipal courts may not recognize the choice of non-state codifications to a particular dispute before it. In Europe, this traces back to Article 1(1) of the Rome Convention, which stipulates that the Convention governs the “choice between the laws of different countries.”<sup>130</sup> Other provisions, too, especially those dealing with contracts – such as Articles 3 (3) and 7 (1) – refer to the applicable law as “the law of a country.” This is true in the United States too. Section 187 of the Second Restatement of Conflicts, and Sections 1-105 and 1-301 of the UCC, designate the law to which reference is made as the “law of a state.” And because “state” is defined in that Restatement as a “territorial unit with a distinct body of law,” this wording suggests that only the application – and the choice – of state law is contemplated.<sup>131</sup> There is a need, then, for

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126. See *infra* note 146.

127. See, e.g., Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371; Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Sept. 18, 1961, 500 U.N.T.S. 31.

128. Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator’s View*, in *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW* 71 (Thomas E. Carbonneau ed., 1998).

129. See Galliard, *supra* note 120, at 161-62 (noting that “it would be misleading . . . to equate general principles with *lex mercatoria*” because only the former is “rooted in national legal systems” and identified through a comparative law analysis).

130. Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on June 19, 1980.

131. Case law is generally in accord. In *Trans Meridian Trading Inc. v. Empresa Nacional de Comercializacion de Insumos*, 829 F.2d 949, 953-54 (9th Cir. 1987), for example, the Court of Appeals for the Ninth Circuit refused to enjoin payment on an international letter of credit despite the fact that the contract had been expressly made subject to the “Uniform Customs and Practices for Documentary Credit (UCP)” published by the International Chamber of Commerce, which allowed issuance of an

an established source of *positive* law to do what the *lex mercatoria* does – to “clarify, to fill gaps, and to reduce the impact of peculiarities of individual country’s laws.”<sup>132</sup>

This is precisely where the “general principles of law recognized by civilized nations” can, and should, enter the field of private international law. These principles are, by definition, borne from *municipal* law – or in the least the distillation of underlying legal principles that give shape to those positive laws. Again, by definition, they stem from “*international consensus*” – before being characterized as general, the judge must deem them accepted by the majority of legal systems in the world. And they must also possess some modicum of “*domestic recognition*” to be accepted by the forum that seeks to apply them. In the transnational case, involving litigants from varying legal traditions, a solution premised on international rather than municipal principles is always the preferred solution; a solution based on one of the three primary “sources of international law” codified by the Statute of the International Court of Justice may be the best solution of all. One could even argue that this source of international law is the one that is best designed for private international law cases; it is, after all, the *only* source that derives from the world’s many *municipal* codes, which in and of themselves are designed to apply to the conduct of *private relationships*.

To be clear, though, this suggestion is not intended to formulate a new approach to the choice of law, even though on its face it may look like the “better law” approach championed by Professor Leflar a half-century ago,<sup>133</sup> or the “principles of preference” introduced by Professor Cavers decades before that.<sup>134</sup> Both sought to announce criteria of rule-selection; a “choice between laws;”<sup>135</sup> a unified theory by which judges could choose the competing municipal law that would best effect “relevant multistate policies”<sup>136</sup> or some subjective notion of justice.<sup>137</sup> What I am suggesting

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injunction under the given circumstances. The court held that the UCP was not the law “of a foreign jurisdiction, but rather . . . a compendium of commercial practices published by the International Chamber of Commerce.” Therefore, “a provision in a letter of credit that the UCP governs the transaction” did not “prevent application of California’s Commercial Code.”

132. Lowenfeld, *supra* note 129, at 149.

133. R. LEFLAR, AMERICAN CONFLICTS LAW 258 (1968).

134. D. CAVERS, THE CHOICE-OF-LAW PROCESS 64 (1965).

135. LEFLAR, *supra* note 134, at 258.

136. CAVERS, *supra* note 135, at 64.

137. I would note, however, that there is no reason why the general principles of law could not play an important role in the search for the appropriate choice of law. For example, in *Eli Lilly do Brasil, Ltda v. Fed. Express Co.*, 502 F.3d 78, 81-82 (2d Cir. 2007), Eli Lilly had contracted with FedEx to ship pharmaceuticals, which were stolen while being transported by truck in Brazil. Eli Lilly elected to sue in the Southern District of New York instead of Brazil, requiring the court to determine

comes *after* a choice of law is made. From there the court ascertains that law – and, if necessary, invokes certain “general principles of law recognized by civilized nations” to correct any unjust outcomes perpetuated by that law. From there that law is applied in this corrected form, hopefully resulting in “justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.”<sup>138</sup> At the very least, it results in a chosen law that eschews parochial outcomes for a transnational dispute. That is the law that sets sail beyond a state’s borders.

Nor is this an effort to craft a comparative code of conduct applicable to transnational relationships everywhere. It is much more modest than that. These *principles* are distinguishable from *rules*. “A rule . . . is essentially practical and, moreover, binding.”<sup>139</sup> The Eighth Commandment, ‘Thou Shalt Not Steal,’ is a fundamental rule, adopted by every civilized legal system, but its widespread acceptance does not make it a “general principle of law recognized by civilized nations.”<sup>140</sup> Principles simply “express[] a general truth, which guides our action,” and the action of legislatures, and “serves as a theoretical basis” for binding rules of practical application.<sup>141</sup> By way of illustration, while theft may be strictly prohibited as a firm *rule*, the *principle* that laws have only prospective effect<sup>142</sup> (for instance) is far less obligatory.

So when a municipal court is given the authority to apply a certain law

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whether the federal common law or Brazilian law applied. In conducting its choice of law analysis, the court recognized that Brazil’s interest under § 188 of the Restatement (Second) of Conflict of Laws was greater than the United States’ interest; however, the court noted that this was not the “end of [the] inquiry or determinative of its conclusion.” The court found that the expectation of enforceability of contracts should be afforded greater weight than Brazilian law. In reaching this conclusion, the court applied the following two general principles of law: (1) “the well-settled ‘presumption in favor of applying that law tending toward the validation of the alleged contract’” and (2) “the general rule of contract that ‘presumes the legality and enforceability of contracts’”—*pacta sunt servanda*. *Id.* at 82; see also CHENG, *supra* note 12, at 142. Since these general principles favored enforcing the contract, they were weighed against Brazil’s interest in having its own law applied. The principle of *locus regit actum*—and the greater interest in applying the law of another interested sovereign—was displaced by the general principle of law that the contract may rather have effect than be nullified. *Ut res magis valeat quam pereat*.

138. Root, *supra* note 75, at 21.

139. CHENG, *supra* note 12, at 376.

140. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (“[T]he mere fact that every nation’s municipal law may prohibit theft does not incorporate the Eighth Commandment, ‘Thou shalt not steal’ [into] the law of nations.”); see also *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003) (“Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law.”).

141. CHENG, *supra* note 12, at 376.

142. CHENG, *supra* note 12, at 141.

to a transnational case – be it foreign or domestic – its authority is plenary, and it has the authority to *determine* foreign law before it applies it. This is vital, and it means that the *whole law*, including the superior norms and foundational principles to the black-letter rules, may be applied.<sup>143</sup> A foreign criminal law that purports to have retroactive effect may be rejected by the municipal court seized to apply it, for instance, on the grounds that such laws violate the “general principles of law recognized by civilized nations” (including, very likely, the nation whose legislature purported to ignore it). By the same token, a domestic law which requires witnesses to stand on their head as they testify should not foreclose the enforcement of a foreign judgment where the trial witnesses stand on their feet; the international standard of due process demands no more.<sup>144</sup> Whatever the fate of those “unprincipled” rules in the territories of the states that enacted them, they remain there. The application of the general principles keep *the law*<sup>145</sup> in good health, even though imperfect “laws” may be passed from time to time.

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143. See, e.g., Paulsson, *supra* note 2, at 12-13 (describing the multiple levels of rules that apply to sports). Federal Rule of Civil Procedure 44.1 is broad enough to encompass a deep study of systemic norms when asked to discern and apply a foreign law. Fed. R. Civ. P. 44.1 (“In determining foreign law, the court may consider *any* relevant material or source” (emphasis added)). Indeed, as Judge Posner has recently noted, judges are “experts on law,” and thus may resort to the “abundance of published materials, in the form of treatises, law review articles, statutes, and cases, . . . to provide neutral illumination of issues of foreign law.” See *Bodum, USA, Inc. v. La Cafeitere, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring). While interested foreign sovereigns often come into U.S. court, as *amicus* or otherwise, to espouse a particular interpretation, U.S. courts typically do not give these proffered interpretations determinative weight without due consideration and assessment of their correctness within the broader regime of the particular foreign law. See, e.g., *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (“we do not feel compelled to credit the [foreign agency’s] determinations without analysis”); *McNab v. United States*, 331 F.3d 1228, 1241-45 (11th Cir. 2003) (refusing to defer to the Honduran government’s interpretation of its own law because that interpretation conflicted with the text of three other Honduran statutes). This is the correct approach, especially when the proffering sovereign has a financial stake in the outcome of the case. *But see Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2002) (A foreign sovereign’s views regarding its own laws merit—although they do not command—“some degree of deference.”); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (the court owes “substantial deference to the construction a foreign sovereign places upon its domestic law, because [it has] long recognized the demands of comity in suits involving foreign states, either as parties, or as sovereigns with a coordinate interest in the litigation”).

144. See, e.g., PAULSSON, *supra* note 69, at 205.

145. I use the italicized word “*the law*” in this sense to mean the national law *in its totality*. “Laws,” on the other hand, are singular edicts, decrees, and the like. Paulsson, *supra* note 4, at 215. It is a flaw of the English language that there are not two words to make the distinction. In French, for instance, when the legislature passes “*le lois*,” it never dispenses with “*le droit*.” Replacing the latter would take a revolution. We are thus speaking here of the equivalent of France’s “*le droit*”—the system of legal norms that are the object and instrument of legal order in a society, and which create, modify, apply and impose respect for that order. *Id.* at 217 (citing S. ROMANO, L’ORDINAMENTO GUIRIDICO 10 (1918)).

Owing to their “inchoate” nature and corrective role, such principles actually do better resting *alongside* the black letter rules of municipal law, guiding the application of municipal law rather than forming a freestanding rule of decision themselves. For international law *writ large*, this is common territory. In many contexts, only once challenges are raised to the legitimacy or propriety of municipal law is the “[a]ttention . . . immediately switched to international law, to see whether it may have a corrective effect, by operation of such things as international minimum standards or international public policy.”<sup>146</sup> This is the norm before investment tribunals, where the “general principles of law” are very often applied in a corrective role. This apparent modesty, however, should not be overstated. As we have seen above, general principles of law can correct a rule of law in an outcome determinative way, even in municipal courts. When an otherwise applicable foreign law would shield a state-owned corporation from liability, and allow it to benefit from its own state’s international delicts, “general principles” step in to disregard the corporation’s separate legal status.<sup>147</sup> “[L]imited liability is [still] the rule,” but “controlling principles” imply an exception.<sup>148</sup> Similarly, even when parochial notions of due process might render a foreign judgment unenforceable, a “less demanding standard” of “international due process” – derived from certain principles and processes accepted by civilized nations – may be applied to recognize the judgment.<sup>149</sup> The acknowledgment and application of general principles derived from the positive laws of the forum and other legal traditions can be the difference between applying *a* rule of law, and applying *the* rule of law. While the former can waver with the shifting sands of political expediency (often to the detriment of the foreign litigant), the latter remains stubbornly constant.

This combination of features is precisely what makes the “general principles of law” so special, and so relevant, to modern transnational disputes. A court charged with applying a specific national law has both the duty and the authority to apply it as a whole. This not only includes its black letter rules, but also the underlying principles that provide intent and direction to those rules. These principles, then, reaffirm the correct result as a matter of *that* law, with no need to determine whether “better” national rules or the norms of international law should take precedence.<sup>150</sup> The

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146. *Id.* at .

147. *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 613 (1983)

148. *Id.*

149. *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

150. *See Jan Paulsson, Unlawful Laws and the Authority of International Tribunals*, 23 ICSID

outcome “is shown not to be an international imposition on [the applicable] national law,” but a “vibrant affirmation” of the very foundational core of that law, backed by the imprimatur of all “civilized nations, our peers.” So while there is some overlap with traditional doctrines dealing with the exclusion of foreign law – like public policy – the application of general principles to guide the outcome of a transnational case is far less intrusive (and perhaps, when defined correctly, far less arbitrary<sup>151</sup>). The otherwise applicable foreign law is not displaced and discarded as contrary to some *parochial* sense of “good morals [or] some deep-rooted tradition of the common weal” of the forum.<sup>152</sup> Rather, it is applied in its fullest and fairest sense, checked by the *international* minimum standard. This is also what differentiates general principles from applying uniform law instruments and *lex mercatoria*, which are non-state sources with little, if any, positive law footing. But still, the benefit of these non-state sources of law is realized. “General principles” allow judges to “play their proper role in ensuring that law does not present itself as a blank sheet of paper upon which any dictator or dominant group can write laws illegitimate within the legal order, and thereby debase law itself” – and the transnational commercial interests that depend upon it. The legal “conscience,” therefore, remains constant.

And that “conscience,” itself, is self-correcting. Even absent the doctrines of *stare decisis* or binding precedent, it is “pointless to resist the observation” that judicial decisions help “generate norms of international law.”<sup>153</sup> But if one municipal court or international tribunal characterizes a principle as one of general and universal applicability, the fallout from that observation should not be exaggerated. It will not instantly bind other parties and states in their international affairs and disputes, or trigger an immediate wave of jurisprudential change as a new, formal rule of international law. That decision will simply enter the fray of all international judicial decisions, where some shine as “bright[] beacons”

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Rev.—FOREIGN INVESTMENT L.J. 215, 221-22 (2008).

151. See, e.g., *Davies v. Davies* (1887), L. R. 36 C. D. 364 (Kekewich, J.,) (“Public policy does not admit of definition and is not easily explained. It is a variable quantity; it must vary and does vary with the habits, capacities, and opportunities of the public.”); *Besant v. Wood* (1879), L. R. 12 C. D. 620 (Jessel, M.R.) (“It is impossible to say what the opinion of a man or a Judge might be as to what public policy is.”)

152. *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111 (1918). See also *World Duty Free Company Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, ¶¶ 140, 147 (“Domestic courts generally refer to their own international public policy,” even though “some judgments” do refer to a “universal conception of public policy”).

153. Jan Paulsson, *International Arbitration and the Generation of Legal Norms*, in TREATY ARBITRATION AND INTERNATIONAL LAW 879 (2006)

and become norm-setting examples, while others “flicker and die near instant deaths.”<sup>154</sup> This is a function of the “Darwinian” and non-hierarchical system that permits those decisions that are unfit to be cast aside. “Good [decisions] will chase the bad, and set standards which will contribute to a higher level of consistent quality.”<sup>155</sup> Only if the decision is a good one, the characterization a defensible one, and the principle is indeed a universal one, will a new rule emerge.

This is where judges and scholars come in. In the realm of public international law, where the general principles were originally meant to apply, their development has long been stunted by the truncated reasoning of the international judge. When the ICJ ‘finds’ and applies a general principle of law, it typically does so without any formal reference or label.<sup>156</sup> And when it does name the source, it never publicizes its comparative process in divining the principle applied, but rather *ipse dixit* simply states that the principle is “admitted in all systems of law,”<sup>157</sup> or that it is “widely accepted as having been assimilated into the catalogue of general principles of law.”<sup>158</sup> To be sure, and as Justice Ginsburg noted in *Intel*, the “comparison of legal systems is slippery business, and infinitely easier to state than to apply.”<sup>159</sup> But difficulty cannot be allowed to excuse the entire exercise.<sup>160</sup> Commentators have noted that “[i]t would be

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154. *Id.*

155. *Id.*

156. See Jenks, *Prospects of International Adjudication*, pp. 268-305; Lauterpacht, *Development*, pp. 158-72.

157. *Corfu Channel Case (PCIJ)*

158. *Sea-Land Servs. (PCIJ)*

159. *Intel v. Advanced Micro Systems*, 542 U.S. at 252.

160. Indeed, at least one arbitration case was annulled for that very reason. The proper explication of the relevant principle as one that is indeed grounded in the positive law of all municipal systems is essential. The case of *Klöckner v. Cameroon* perhaps the best cautionary tale against the *ipse dixit* typically employed by the ICJ. Award, 21 October 1983, 2 ICSID Reports 59-61; Decision on Annulment, 16 May 1986, 1 ICSID Reports 515. In *Klöckner*, the applicable law was Cameroonian law, which in turn is based on French law. Rather than discerning the content of the former, the Tribunal instead exclusively based its decision on the “basic principle” of “frankness and loyalty” that can be divined from “French civil law” (while noting without citation that this is also a “universal requirement” that inheres in all “other national codes which we know of” and both “English law and international law”). On an application for annulment, the ad hoc Committee found that this truncated reasoning amounted to a failure to apply the proper law: “Does the ‘basic principle’ referred to by the Award . . . as one of ‘French civil law’ come from positive law, i.e., from the law’s body of rules? It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions. . . . [The Tribunal’s] reasoning [is] limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form.” Accordingly, the Award was annulled because the Tribunal did not apply “the law of the Contracting State,” but instead based its decision “more on a sort of general equity than on positive law . . . or precise contractual provisions.” In other words, the Tribunal’s error was not in

welcomed not only by the parties but also by the international legal world” if the reasoning of the Court’s judgments were to explain *how* it had examined, by comparative methods, “the assertion that a general principle of law, having a specified meaning and significance, forms part of binding general international law.”<sup>161</sup>

Perhaps the private international law world can do better. In helping to determine the substance of municipal laws applied to the transnational scenario, private international law scholars and judges might be better suited, and better situated, to explicate this source of law beyond its current state of arcane lore. Public international law scholars understandably spend their time hovering above the world’s municipal legal systems, descending to earth when they must but otherwise keeping a firm distance from the nuance of substantive and procedural rules, let alone the principles that underlie those rules. Private international law scholars, on the other hand, draw from diverse pools of municipal law specialists, who spend their days toiling in the quagmire of transnational procedures, in the comparative search for common substantive rules. And, after all, their reasoned work is another venerable source of international law – subsidiary, though complementary, to the general principles.<sup>162</sup>

In much the same way, municipal courts are the most common forum for private international law matters and the primary source of decisions that hone future precedent in the field. They may also be the most suitable courts to find and apply general principles of law. International judicial bodies like the ICJ depend upon the consent of states for their jurisdiction and their legitimacy. Its judges are understandably reluctant to find and expressly apply “new” substantive laws – especially those without a formal basis in state consent – lest they be accused of the unauthorized legislation of international law. For investment tribunals, too, who are subject to review and annulment, this is a real worry.<sup>163</sup> “The suspicion which states, especially those on the losing side, may entertain of indirect expansion of the scope of international law by a tribunal . . . no doubt largely accounts for the failure of the [international courts] . . . to make any significant use of this potentially very fertile source of development in international law.”<sup>164</sup> Municipal courts, however, have far fewer worries. With few

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resorting to the corrective and supplementary role of international law and general principles of law, but in not demonstrating the existence of concrete rules under that law as properly applied.

161. Hermann Mosler, *supra* at 180.

162. ICJ Statute, Art. 38(e)

163. *See supra* n. 154.

164. Wolfgang Friedmann, *The Uses Of “General Principles” In The Development Of International Law*, 57 AM. J. INT’L L. 279, 280-81

exceptions around the world, their jurisdiction and legitimacy is relatively stable. In the common law tradition, their discretion to resort to general principles to decide a transnational case before it is relatively unfettered. In the civil law tradition, that discretion is commonly enshrined in a Code. So, somewhat ironically, the “courts of civilized nations” may be the best forum for the “general principles of law recognized by civilized nations” to take hold.

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There is no sacred principle that pervades all decisions, and neither justice nor convenience is promoted by rigid adherence to any one principle as a means to effect justice between litigating parties. And to be sure, the application of general principles is not a panacea for the promise of universal justice. Judges are unlikely to exercise their authority to apply these principles very often. Still, it is important for private international law as a discipline to see to it that judges know such authority exists; that they know the application of foreign (or forum) law includes the application of its foundational norms; and that they know where other courts have trodden before in doing the same. The intent of this article is to open our mind’s door to a possible new frontier of private international law, and to be more than the “railway station” for transnational disputes.

# **Exhibit 13**

### **Ch.3 Modern Applications of the Principles of International Due Process**

**Charles T. Kotuby, Luke A. Sobota**

From: General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes

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### **(p. 157) Chapter 3 Modern Applications of the Principles of International Due Process**

*Whatever disagreement there may be as to the scope of the phrase “**due process** of law”, there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.*

—Justice Oliver Wendell Holmes, Jr.<sup>1</sup>

This Chapter reviews the attributes of international **due process** deriving from the adjectival norms common to all systems of law. A party must have notice of a proceeding against it. The court deciding the case must have jurisdiction, treat the parties equally, and impartially apply the law to the facts. In the mechanical processing of a case, each party has the burden of proving its own proffered facts, and there exist a number of general principles that prescribe the weight given to such proof. Once the proceedings end, it is universal that the decision is final—meaning that the issues actually decided cannot be relitigated and the operative part of the judgment must be carried out by the parties. As noted by Cheng, these are “the essential rules which govern the activity of every tribunal as a Court of Justice. They ensure the fulfilment of the fundamental purpose of all judicial proceedings, the final settlement of a dispute by an impartial authority in a manner just and equitable to the parties on the basis of respect for law.”<sup>2</sup>

### **(p. 158) A. Notice and Jurisdiction**

The Court exercises its jurisdiction for the enforcement of the truth ... .

—Sir John Romilly<sup>3</sup>

It is axiomatic that “a court of justice is never justified in hearing and adjudging the merits of a cause of which it has no jurisdiction.”<sup>4</sup> This, Cheng found, was “common to all systems of

jurisprudence.”<sup>5</sup>

Jurisdiction is an either-or proposition that must be satisfied. Two implications arise from a tribunal’s erroneous determination on jurisdiction, whether it be affirmative or negative. The first is that *any decision made without jurisdiction is a nullity*.<sup>6</sup> For example, if a tribunal enters interim orders to maintain the status quo between the parties prior to definitively addressing its own jurisdiction, those orders would “automatically lose their effect” if the tribunal eventually concludes that it lacks jurisdiction.<sup>7</sup> Similarly, if an arbitration award is rendered on a matter “not falling within the terms of the submission to arbitration,” the award is unenforceable.<sup>8</sup> The second implication is that *a court’s failure to decide a case that falls within its jurisdiction is an international delict*.<sup>9</sup> As declared in 1797 by Christopher Gore, a commissioner on the Mixed Commission set up under Article VII of the Jay Treaty, “ [t]o refrain from acting, when our duty calls us to act, is as wrong as to act where we have no authority. ”<sup>10</sup> What more (p. 159) commonly occurs is an unreasonable delay in issuing judgment, which has been likened to the refusal to judge.<sup>11</sup> Arising from the very nature of jurisdiction, both of these implications are considered to be general principles of law and fundamental components of international **due process**.<sup>12</sup>

Civil law attorneys might refer to this concept as *competency*, whereas common law attorneys would view it as *jurisdiction*. At base, it is the power of the court over the parties and issues before it. Whether a tribunal or court derives its authority from the parties’ consent (as in a commercial arbitration), a treaty (as in an investment arbitration), or positive law (as in a municipal litigation) is largely beside the point. In every case, there exists an external limit on the scope of jurisdiction, so questions of competence over particular parties or issues can be raised either by motion or *proprio motu*.<sup>13</sup> And when those questions are raised, the tribunal seised of the matter has the authority to answer them in the first instance.<sup>14</sup> The competence to decide one’s own competence (known as the doctrine of *Kompetenz-Komptenz*) is inherent in the very nature of adjudicatory authority and universally expressed in the institutional rules governing international arbitration.<sup>15</sup>

Although jurisdiction may be an either-or proposition, neither conclusion is necessarily absolute in a given case. That jurisdictional power has been exceeded on one issue does not affect the validity of decisions on other issues for which there is competence, just as a finding of jurisdiction does not necessarily extend to all parties or issues concerned.<sup>16</sup> That said, once jurisdiction is properly obtained, (p. 160) the tribunal’s power typically extends to all relevant and auxiliary questions necessary to decide the primary dispute—even when those questions technically fall beyond the scope of the tribunal’s authority.<sup>17</sup>

*A cardinal antecedent to the exercise of jurisdiction is “due notice” of the proceeding.* This principle stands anterior to the equally important principle of *audi alteram partem*. In 1878, the U.S. Supreme Court surveyed the practices of foreign jurisdictions and championed proper service as the means by which to fulfill this fundamental requirement:

[I]nternational law ... as it existed among the States in 1790, was that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant *had not been served with process or voluntarily made defence*; because neither the legislative jurisdiction nor that of courts of justice had binding force.<sup>18</sup>

The Court found this fixture of international law to be part of U.S. law as well, holding it to be no less than a “principle of natural justice” to “require[s] a person to have notice of a suit before he can be conclusively bound by its result” in order to “protect persons and property within one State from the exercise of jurisdiction over them by another.”<sup>19</sup> Adequate notice is thus a necessary predicate to recognition of a foreign judgment: “Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered ... upon regular proceedings and due notice.”<sup>20</sup> Indeed the twin requirements of notice and jurisdiction are universal prerequisites to enforcement of a foreign judgment, as reflected in the Montevideo Convention,<sup>21</sup> the (p. 161) Kiev Treaty,<sup>22</sup> the Foreign Judgments Act of 1991,<sup>23</sup> and Council Regulation (EU) No. 1215/2012.<sup>24</sup>

National laws are in accord.<sup>25</sup>

By virtue of this broad acceptance, due notice has long been a general principle of law, and its contours have been clarified through numerous applications on the international plane. The International Institute for the Unification of Private Law (UNIDROIT) Principles of Transnational Civil Procedure state that adjudicatory proceedings can commence only after notice that is “reasonably likely to be effective.”<sup>26</sup> Although different legal systems allow different mechanisms to transmit notice of adjudicatory proceedings, those mechanisms must, in the circumstances, adequately inform the interested parties of the “procedure for response and the possibility of default judgment for failure to make timely response.”<sup>27</sup> For example, in (p. 162) *Middle East Cement v. Egypt*, the host State seized and auctioned the claimant’s vessel after publicizing the proceeding in a newspaper as opposed to providing the claimant with personal service. An International Centre for Settlement of Investment Disputes (ICSID) tribunal found that this notice, and thus the resulting taking of the claimant’s property, was not in accordance with the international concept of **due process** of law—even though service by publication was authorized by Egyptian law.<sup>28</sup>

The requirement of due notice extends beyond formal judicial proceedings. Any state organ exercising adjudicatory powers is subject to similar, albeit more flexible, **due-process** standards. France’s *Conseil d’Etat* declared in 1944 that administrative measures with a material effect could be implemented only after notice, so that affected parties could defend their interests.<sup>29</sup> Article 41.2(a) of the Charter of Fundamental Rights of the European Union, concerning administration, likewise records the “right of every person to be heard, before any individual measure which would affect him or her adversely is taken.”<sup>30</sup> For its part, the Inter-American Court of Human Rights has stated that “both the jurisdictional organs and those of any other nature that exercise functions of a substantially jurisdictional nature have the obligation to adopt just decisions based on full respect for the guarantee of **due process**.”<sup>31</sup> This obligation goes unmet by an administrative process in which the claimant is “prevented from intervening, fully informed, in all the (p. 163) stages,” because, inter alia, “he was not told about the charges of which he was accused.”<sup>32</sup> The World Trade Organization (WTO) Appellate Body has also held that a U.S. regulatory requirement imposed upon shrimp-harvesting nets to protect turtles violated the General Agreement on Tariffs and Trade (GATT) because the United States had not observed basic notice and comment requirements.<sup>33</sup> And the tribunal in *Metalclad v. United Mexican States* condemned “procedural and substantive deficiencies” arising from inadequate notice of an administrative proceeding, noting that the permit at issue there “was denied at a meeting of the Municipal Town Council of which Metalclad received no notice.”<sup>34</sup>

This does not mean that all decisions taken prior to due notice and before jurisdictional certainty are void ab initio. As noted, national courts and international tribunals may issue interim and provisional measures on an ex parte basis and prior to resolving a challenge to their jurisdiction. It is “certain,” as Cheng wrote, that “an international tribunal need not be convinced, nor reasonably certain, that it would have jurisdiction before it can indicate interim measures.”<sup>35</sup> Given the complexities of international commerce, requests for precautionary measures are often urgent, and in certain cases they may be needed to maintain the status quo and protect the tribunal’s ability to provide meaningful relief at the end of the adjudicatory process. Although the formulation of the requisite jurisdictional showing has differed across fora and time, it may be stated as a general proposition that—given the immediacy with which these requests must be decided, their importance to the viability of the arbitration, and the inherent difficulties in resolving issues of jurisdiction on the hoof—a prima facie or reasonable possibility of jurisdiction suffices to allow an award of interim protection.<sup>36</sup> Prior notice (p. 164) can even be dispensed with in exceptional circumstances, provided that the party affected is promptly given notice of, and a chance to oppose, the continuation of the order.<sup>37</sup> This is less an exception to the general principle of jurisdiction than an affirmation that the parties must always respect the tribunal’s jurisdiction—a reflection of the “universally accepted” principle that “[p]arties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be taken and, in general, not allow any step of any kind to be taken which might aggravate or extend the

dispute.”<sup>38</sup>

Given that jurisdiction must obtain before an adjudication can occur, there have been various attempts to identify some baseline normative standard to assess that jurisdiction—viz., that a meaningful connection exists among the court, the parties, and the matters involved. The UNIDROIT Principles of Transnational Civil Procedure call for a “substantial connection between the forum state and the party or the transaction or occurrence in dispute.”<sup>39</sup> Such a “substantial connection” might exist when (1) “a significant part of the transaction or occurrence occurred in the forum state,” (2) “an individual defendant is a habitual resident of the forum state or a jural entity has received its charter of organization or has its principal place of business therein,” or (3) “property to which the dispute relates is located in the forum state.”<sup>40</sup> These fact-laden examples are subject to varying degrees of satisfaction—for instance, it is not self-evident when a residence becomes “habitual,” or when a “meaningful” or “substantial” connection to the forum state has been formed. Such nuance is not captured with a general principle. And the existence of permissible jurisdictional bases that fall outside the definition of a “substantial connection,” such as universal jurisdiction over crimes against humanity and transient (or tag) jurisdiction, make the existence of a general principle in this respect difficult to endorse. Perhaps the most that can be said is that the exercise (p. 165) of jurisdiction without any articulable or logical connection to the parties and the dispute is rare, difficult to justify, and unlikely to be recognized elsewhere.

## B. Judicial Impartiality and Judicial Independence

*The Best Judge . . . shall know nothing about the parties, everything about the case. He shall do everything for justice; nothing for himself; nothing for his friend; nothing for his patron; nothing for his sovereign. If on one side is the executive power and the legislature and the people—sources of his honors, the givers of his daily bread—and on the other side an individual nameless and odious, his eye is to see neither, great nor small; attending only to the trepidations of his balance . . .—or there is no judge.*

—Rufus Choate<sup>41</sup>

As reflected in the figure of Lady Justice, who is typically represented blindfolded while holding out scales in one hand and grasping a sword in the other, an impartial and independent judge has long been a fundamental tenet of international **due process**. As Cheng wrote, “[a] judge must not only be impartial, but there must be no possibility of suspecting his impartiality.”<sup>42</sup> This includes, as emphasized by Rufus Choate, judicial partiality toward the sovereign. Lord Chief Justices William Scroggs and George Jeffreys were Choate’s “exemplifications” of “judicial subserviency” during “the worst years of the Stuart dynasty.”<sup>43</sup> As he explained, when there is judicial capture by the political branches, the judge becomes “the tool of the hand that made him and unmade him,” sitting on a bench “packed for the enforcement of some new or more flagrant royal usurpation.”<sup>44</sup> But even with the advent of republican forms of government, the companion principles of impartiality and independence are far too often honored in the breach.

The travails of Jacob Idler offer a historical lens into the “vicissitudes of revolution” in nineteenth century Latin America.<sup>45</sup> Idler was an American businessman (p. 166) who sold arms and munitions to Venezuela during its wars of independence, yet nearly U.S. \$250,000 in invoices remained unpaid. The Venezuela Secretary of the Treasury explicitly acknowledged the propriety of Idler’s claim and the Venezuela Supreme Court affirmed a lower court decision that the Government should pay its debt. But the Executive Branch disregarded the order and, in an ex parte petition, requested that the Supreme Court annul its decision. Two of the four justices on that Court recused themselves and were replaced, by the vote of the two remaining justices, with members of the Caracas bar. The newly constituted Court reversed the order and extinguished the debt.

An arbitral tribunal, convened by treaty to resolve the dispute, “ha[d] no hesitation in saying that the effect of these judgments was a denial of justice.”<sup>46</sup> The first thing that engaged the attention of

the tribunal was the reorganization of the Supreme Court prior to the reversal. The tribunal acknowledged that “there is a facility of substitution as to judges” in civil law countries unknown in common law countries, but that “such change is believed to be always regulated by law.”<sup>47</sup> Here, “[w]hy any change at all was necessary was not apparent,” and, furthermore, such change was done contrary to the Constitution and governing law:

The difficulty is not that the court at Caracas was filled by members from the bar for this case, or that two judges made the appointments. [The difficulty is that] this was done *without the authority of the law*... . Venezuela could, of course, constitute her courts as she desired, but having established them, it was Idler’s right, if his affairs were drawn into litigation there, to have them adjudicated by the courts constituted under the forms of law.<sup>48</sup>

Given the illegality of the “reorganization of the court so as to change its *personnel* ... for this one case,” the tribunal could not “escape the conviction that it was the voice of Idler’s opponents which found expression in the [resubmitted] judgments ... and not that either of justice or of the supreme court of justice.”<sup>49</sup> This has properly been deemed one of the most “remarkable instance[s] of governmental manipulation of the judicial branch.”<sup>50</sup>

(p. 167) Robert Brown faced similar tribulations at the turn of the twentieth century in South Africa.<sup>51</sup> An American businessman, Brown had sought and obtained gold mining concessions from the South African Government in 1895.<sup>52</sup> When the president of South Africa unilaterally terminated the concession—which the legislature affirmed—Brown brought suit in the High Court of the South African Republic.<sup>53</sup> That Court declared the termination of the concession unconstitutional and invited Brown to pursue a claim for damages.<sup>54</sup> What ensued, according to the arbitral tribunal charged with reviewing the case, was “an amazing controversy between the Court and the Executive,” leading to a “unique judicial crisis” and the “virtual subjection of the High Court to the executive power.”<sup>55</sup>

In response to the High Court’s decision, the Legislature passed a law forbidding judges from striking down legislative enactments and, despite “a vigorous but vain fight for the independence of the judiciary ... by [members of] the bench, the bar, and the press,” the Executive Branch dismissed the Chief Justice of the Court.<sup>56</sup> When Brown sued for damages, as he was invited to do, the new High Court abandoned its previous decision and dismissed his case.<sup>57</sup> Once the case was elevated beyond the national courts, an arbitral tribunal declared that “Brown had substantial rights” and that “he was deprived of these rights by the Government of the South African Republic in such manner and under such circumstances as to amount to a denial of justice within the settled principles of international law.”<sup>58</sup> When a judiciary is “reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions,” the tribunal held, the “interest of elementary justice for all concerned ... disappear[s].”<sup>59</sup>

(p. 168) Today nearly every nation provides in its written law for an independent judiciary.<sup>60</sup> That consensus has been mirrored on the international plane, too, as intergovernmental and nongovernmental organizations have expressly recognized judicial impartiality and independence as integral to the basic right of access to justice. This began soon after World War II, when the United Nations promulgated the Universal Declaration of Human Rights. According to Article 10 of that instrument, “[e]veryone is entitled in full equality to a fair and public hearing by an *independent* and *impartial* tribunal, in the determination of his rights and obligations and of any criminal charge against him.”<sup>61</sup> The countries of the Organization of American States also recognize the right to an impartial and public hearing as a fundamental “right and duty of Man,”<sup>62</sup> whereas the European Convention for the Protection of Human Rights and Fundamental Freedoms requires that, in both civil and criminal cases, “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>63</sup> The more recent Charter of Fundamental Rights of the European Union states in its section on “Justice” that

“[e]veryone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial (p. 169) tribunal previously established by law.*”<sup>64</sup> The same standards apply to arbitrators as well.<sup>65</sup>

Despite these florid de jure pronouncements, undue executive and legislative pressure continues to be a de facto scourge on the judicial function.<sup>66</sup> Russian courts, for instance, have been found to have “bent to the will of Russian executive authorities to bankrupt [a privately-owned company (Yukos)], assign its assets to a State-controlled company, and incarcerate [its executive] who gave signs of becoming a political competitor.”<sup>67</sup> Similarly, the Inter-American Court for Human Rights (IACHR) held that the Peruvian courts in a particular case “did not satisfy the minimum requirements of independence and impartiality that Article 8(1) of the Convention establishes as essential elements of due legal process.”<sup>68</sup> In the late 1990s, the Peruvian Immigration and Naturalization Service revoked the citizenship of Baruch Ivcher Bronstein, a former Israeli citizen, which had the effect of ending his service as a director of a Peruvian television company that had aired programs critical of the Government.<sup>69</sup> When a case was brought challenging this government action, the IACHR found the domestic (p. 170) mechanisms for judicial review of the administrative decision wanting as they did not provide for a regular and impartial court: “[B]y creating *temporary* public law chambers and courts and appointing judges to them at the time that the facts of the case *sub judice* occurred, the State did not guarantee to Mr. Ivcher Bronstein the right to be heard by judges or courts ‘previously established by law,’ as stipulated in Article 8(1) of the American Convention.”<sup>70</sup> Whatever the issue *sub judice* and whoever the parties to the suit, judicial subservience to political expediency is anathema to law.<sup>71</sup>

Domestic courts typically will not give *res judicata* effect to a foreign decision,<sup>72</sup> enforce a foreign judgment,<sup>73</sup> or transfer a case to a foreign court<sup>74</sup> without first reviewing the independence and impartiality of the foreign judicial system. Applying a universal, rather than parochial, concept of **due process**,<sup>75</sup> courts and tribunals have denied recognition to foreign judgments where judges are “subject to continuing scrutiny and threat of sanction” by the political branches (p. 171) of government;<sup>76</sup> where “judges serve[] at the will of the leaders of [political] factions”;<sup>77</sup> and where there is a “close interwovenness” of the parties and the machinery of justice.<sup>78</sup>

A recent example comes from a Moroccan judgment arising out of the Talsint oil project, which held such promise that the King of Morocco personally announced during a nationally televised speech the discovery of “copious and high quality oil,” causing the Moroccan stock market to jump five percent.<sup>79</sup> When the anticipated oil did not materialize, the project disintegrated and the King’s credibility suffered.<sup>80</sup> Two of the project’s investors brought suit in Morocco against a third investor, John Paul DeJoria, on the theory that DeJoria had engaged in fraud and mismanagement.<sup>81</sup> The King had made similar accusations against DeJoria such that, if the co-investors’ suit against DeJoria failed, the King could “appear foolish if not downright dishonest for having promised so much oil during his now infamous speech.”<sup>82</sup> A Moroccan court ultimately entered a judgment of U.S. \$122.9 million against DeJoria.<sup>83</sup>

The U.S. district court, hearing a request to recognize and enforce that judgment, explained that “[w]here there is evidence that a country’s judiciary is dominated by the political branches of government or by an opposing litigant, or where a party cannot obtain counsel, secure documents, or secure a fair appeal, recognition of a foreign judgment may not be appropriate.”<sup>84</sup> Although noting that “serious strides” had been made in Morocco to establish “a societal framework founded upon the rule of law,” the court cited a 66-page report by (p. 172) the U.S. Government on the rule of law in Morocco, which concluded, *inter alia*, that the judicial system is “permeable to political influence” because “the mechanisms through which judges are appointed, promoted, sanctioned, and dismissed leave them vulnerable to political retribution.”<sup>85</sup> The court found it significant that the King of Morocco “presides over ... the body that appoints, disciplines, and promotes judges” and that roughly 1,000 Moroccan judges, armed with a petition signed by about two-thirds of all judges, had held a sit-in protest demanding structural reforms to guarantee their independence from the King.<sup>86</sup> The court also recited the admission by Morocco’s Foreign Minister that “phone call justice”—that is, a call from the Ministry of Justice to a judge on how to rule—means that judicial

independence “is not the reality today.”<sup>87</sup> All of this raised in the court’s mind “serious questions about whether any party that finds itself involved in a legal dispute in which the royal family has an apparent interest—be it economic or political—in the outcome of the case could ever receive a fair trial.”<sup>88</sup> In light of the King’s reputational interest in having the lawsuit against DeJoria succeed, the court refused to recognize the judgment: “Whether or not the King ... or some other official picked up the phone and ordered the judge to find against DeJoria is, in some sense, beside the point... . Judges are not stupid people oblivious to outside pressures... . Moroccan judges are keenly aware that their livelihoods (present and future) depend on remaining in the good graces of the King and the royal family.”<sup>89</sup> Notwithstanding these findings, the district court’s judgment denying enforcement was reversed on appeal—a testament to the deference afforded to foreign courts under the doctrine of comity.<sup>90</sup>

From these and other authorities, it is possible to ascertain certain constitutive elements of judicial independence. *No one can be judge in his own cause.*<sup>91</sup> This constitutes “the most elementary and essential guarantee of impartiality in the administration of justice” by disqualifying interested parties from adjudicating (p. 173) disputes.<sup>92</sup> Where, for instance, a contract delegates adjudicatory authority to an arbitral panel appointed solely by one of the parties, and including that party’s legal counsel as one of the arbitrators, the arbitration clause will be deemed invalid as an expression of the maxim nobody should be a judge in his own cause, which is one of the core elements securing the right to a fair hearing.<sup>93</sup> This is an extreme example, but the principle has greater scope than a literal interpretation of the Latin expression might suggest: it applies in all cases where judges and arbitrators have sufficient personal or pecuniary interest in the outcome of the proceedings so as to raise objective doubts as their independence and impartiality.

Impartiality means that “judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.”<sup>94</sup> This principle implies an unfettered freedom on the part of the judge to decide the case as she sees fit—according to the facts and the law, and not according to her own interests or the interests of one of the parties.<sup>95</sup> It is a species of the requirement that justice must not only be done, but appear to be done.<sup>96</sup> Thus, where a judge decides a case while at the same time being the director of one of the interested (if not nominal) parties, his judgment must be set aside where it was not first disclosed.<sup>97</sup> Similarly, the refusal of an arbitral tribunal to take any steps to address an apparent conflict of interest arising from the concurrent representation by the respondent’s counsel of related (p. 174) entities—including those in which all three arbitrators had an interest—led a reviewing court to vacate the ensuing award on grounds of evident partiality.<sup>98</sup>

Neutrality is necessarily a casuistic inquiry governed by the applicable disqualification standard, which varies by country and arbitral fora.<sup>99</sup> Bias may be visible against a certain class of parties (e.g., foreigners) or in certain types of cases (e.g., suits against state-owned entities).<sup>100</sup> Although disqualification applications have become “increasingly irksome” with the “extended growth of personal property and the wide distribution of interests in vast commercial concerns,” the general principle necessarily abides in light of the foundational importance of a fair hearing and public confidence in the administration of justice.<sup>101</sup> At the same time, (p. 175) abusive, frivolous, or dilatory motions for disqualification must be summarily rejected and appropriately sanctioned.<sup>102</sup>

The provision of neutral decision-makers is one aspect of a broader obligation on a sovereign to “guarantee” the independence of the judiciary.<sup>103</sup> To meet this obligation, a few fundamental components must obtain: (1) *a judiciary must be free from improper external political influences and (2) its judges must enjoy regularity of appointment and dismissal.* The violation of the *first* part of this principle was found in *Idler, Brown, Hulley, and DeJoria*. There can be no confidence in the administration of justice where undue pressure, whether political or otherwise, is brought to bear on the court.<sup>104</sup> “Evidence that the judiciary was dominated by the political branches of the government ... would support a conclusion that the legal system was one whose judgments are not entitled to recognition.”<sup>105</sup> As stated by the Office of the United Nations High Commissioner for Human Rights in its *Basic Principles on the Independence of the Judiciary*, in order to decide “on

the basis of facts and in accordance with the law,” a court must act “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from [other] quarter[s].”<sup>106</sup>

The *second* part of this principle can be seen as a specific manifestation of the first. “Security of tenure is basic to judicial independence. It is universally accepted that when judges can be easily or arbitrarily removed, they are much more vulnerable to internal or external pressures in their consideration of cases.”<sup>107</sup> This application of the principle must be handled with care, however, for there is no (p. 176) international consensus on either the appointment or removal of judges, and a polity may generally structure and staff its courts as it sees fit. With respect to dismissal, for example, it cannot be gainsaid that judges may be removed from office for cause; but the bells of caution ring when appointments or removals appear to be irregular, evince political capture, or are targeted toward the resolution of a particular case. A touchstone of judicial independence is security of tenure, so that judges—irrespective of their method of appointment or the length of their term—enjoy the confidence to decide the cases before them without fear of arbitrary removal or other reprisal.<sup>108</sup> At a minimum, “[s]ecurity of tenure means that a judge cannot be removed from his or her position during a term of office, except for good cause (e.g., an ethical breach or unfitness) pursuant to formal proceedings with procedural protections.”<sup>109</sup> In those judicial systems marked by frequent removals, political pressure, and general instability, judges may lack the confidence needed to rule in accordance with the dictates of law and fact, especially in cases of political or social interest.

### C. Procedural Equality and the Right to Be Heard

*When the court sits, which ought to be by sunrise, proclamation is made for the two parties and their champions, who are introduced by two knights, and are dressed in a coat of armour, with red sandals, barelegged from the knee downwards, bareheaded, and with bare arms to the elbows. The weapons allowed them are only batons, or staves of an ell long, and a fore-cornered leather target; so that death rarely ensued from this civil combat.*

—Sir James Dyer<sup>110</sup>

A related concept to judicial impartiality is juridical equality between the parties in their capacity as litigants—*audiatur et altera pars*. These are, as Cheng said, the “two cardinal characteristics of a judicial process.”<sup>111</sup> “At the heart of **due process** is the idea that adjudication cannot be considered legitimate if it does (p. 177) not prevent arbitrariness from the standpoint of the parties.”<sup>112</sup> As Jan Paulsson has argued, “[i]f a judgment is *grossly* unjust, it is because the victim has not been afforded fair treatment.”<sup>113</sup> Adjudicators must be vigilant to maintain equality between the litigants over the entire span of the adjudicatory process because it is a key component of a fair hearing,<sup>114</sup> so much so that it sits astride the requirement of impartiality in virtually all of the human rights instruments discussed in chapter 3.B.<sup>115</sup>

At its core, juridical equality means that each party has a “reasonable opportunity of presenting [its] case ... under conditions which do not place [it] at a substantial disadvantage vis-à-vis [its] opponent.”<sup>116</sup> As described by U.S. courts, it is the ability of the parties to be heard “at a meaningful time and in a meaningful manner”<sup>117</sup> during a “full and fair trial.”<sup>118</sup> At the international level, this principle means that a decision cannot be made under the rubric of **due process** without taking into account the arguments of each party.<sup>119</sup> Courts and tribunals must “ensure equal treatment and reasonable opportunity for litigants to assert or defend their rights.”<sup>120</sup>

(p. 178) The right to juridical equality begins with the right of equal access to courts, which is an affirmative obligation of every sovereign. In the words of Lord Diplock, “[e]very civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights.”<sup>121</sup> In *Golder v.*

*United Kingdom*, the European Court of Human Rights, after an extensive analysis of state practice, concluded that the principle of access to courts is grounded in the right to a fair hearing, which “secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.”<sup>122</sup> This facet of procedural equality has a substantive component in that it is not particularly meaningful to speak of a right that cannot be vindicated.<sup>123</sup>

Juridical equality, however, requires more than an unlocked courthouse door. “It is [also] fundamental, as a matter of procedure, that each party is given the right to ... state its [case] and to produce all arguments and evidence in support of it ... on an equal level.”<sup>124</sup> Breach of the principle is clear where a party is precluded from presenting her case, addressing key arguments, or introducing certain evidence.<sup>125</sup> Where one party is able to make a written submission to a (p. 179) tribunal without its adversary’s knowledge or reply, or where the judge or arbitrator admits to not receiving or reviewing the submissions of one of the parties and thereafter ignores pertinent arguments made in those submissions, the subsequent award will generally be unenforceable, as a violation of **due process** and fundamental fairness.<sup>126</sup> Orders that whipsaw the litigants also run afoul of this principle. Where, for example, an arbitrator initially tells a party that invoices may be submitted in summary form to prove its claims, only to switch course at the hearing on the merits and deny the claims for failure to submit the original invoices, that party may be “so mis[led]” as to deprive it of its right to present its claim “in a meaningful manner.”<sup>127</sup>

Just as when a party is denied the opportunity to marshal the necessary elements of its own case, **due process** is denied when the decision is based upon evidence and argumentation that a party has been unable to address.<sup>128</sup> An ICSID award, for instance, was annulled where the tribunal had relied upon evidence submitted after conclusion of the formal proceedings.<sup>129</sup> “The fundamentals of a trial [a]re denied” when a decision is made “upon the strength of evidential facts not spread upon the record,” and thus not made available for one of the parties to appreciate and address.<sup>130</sup> “This is not the fair hearing essential to **due process** . It is condemnation without trial.”<sup>131</sup>

(p. 180) The result is less clear when a party is merely surprised by a decision made *sua sponte* by the adjudicators, on a theory that it may not have anticipated.<sup>132</sup> The party in the latter scenario may technically have been deprived of its “opportunity to be heard” on the particular ratio decidendi adopted by the court or tribunal, but whether that rises to the level of violating a general principle of law is open to debate.<sup>133</sup> Consistent with the maxim *iura novit curia*, judges and arbitrators must be given wide berth to, inter alia, independently research the law bearing upon the parties’ arguments and to rely upon those sources in making and supporting their decisions.<sup>134</sup> As the ICJ held in rejecting an objection to a legal point being raised for the first time during the oral proceedings, “the matter is purely one of law such as the Court could and should examine *ex officio*.”<sup>135</sup>

The practical reality is that in most cases “the duty to secure equality of arms for a litigant rests primarily on his or her advocate.”<sup>136</sup> A court or tribunal will intervene only exceptionally to correct a grave and manifest juridical inequality, lest its efforts to ensure parity lead to accusations of partiality.<sup>137</sup> Despite uncertainty over the existence of an affirmative obligation for sovereigns to ensure parity between parties appearing before state adjudicative organs, a few rules have emerged under this principle that impose a negative obligation on States to refrain from actions that might upset the equality of arms. For example, (p. 181) because the right to legal representation is a fundamental tenet of **due process**,<sup>138</sup> the equality of arms principle will be breached if a State substantially interferes with a party’s counsel.<sup>139</sup> Even in international arbitration, outright intimidation of lawyers, or obstruction of access to them, violates the principle because such state action “strikes at principles which lie at the very heart of the ICSID [and other] arbitral processes,” including procedural fairness and the integrity of the tribunal.<sup>140</sup> Interference may come in more insidious ways as well. For instance, a NAFTA tribunal observed that “it would be wrong for the [State] *ex hypothesi* to misuse its intelligence assets to spy on [the claimant] (and its witnesses) and to introduce into evidence the resulting materials.”<sup>141</sup> Although a State may exercise its investigative powers, “[t]he coin has two sides,” and those powers must be exercised with “regard

to [the] other rights and duties” of parties to an active arbitration—including access to counsel and equality of arms.<sup>142</sup>

In another modern twist that arises primarily in the investment-arbitration context, a more pronounced role has been given to the non-discrimination aspect of juridical equality, especially when alienage is at issue.<sup>143</sup> The UNIDROIT principles state that “[t]he right to equal treatment includes avoidance of any kind of illegitimate discrimination, *particularly on the basis of nationality or residence.*”<sup>144</sup> Domestic courts are thus called upon to take “into account difficulties (p. 182) that might be encountered by a foreign party in participating in litigation.”<sup>145</sup> In *Loewen*, for instance, the tribunal observed that “the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant.”<sup>146</sup> These and other factors made the trial, “[b]y any standard of measurement ... a disgrace”—“the trial judge failed to afford Loewen the process that was due.”<sup>147</sup> The tribunal reaffirmed the “responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant [does] not become the victim of sectional or local prejudice.”<sup>148</sup> Concerns of discrimination are not limited to foreigners. Addressing the judiciary of post-revolution Iran, a U.S. district court found that the local courts routinely denied fair treatment to the members of the Shah’s family and concluded that the Shah’s sister “could not personally appear” before Iran’s courts, “obtain proper legal representation,” or “even obtain local witnesses on her behalf.”<sup>149</sup> The resulting Iranian judgment against her was deemed unenforceable because such procedural guarantees “are not mere niceties,” but rather the “ingredients of ‘civilized jurisprudence’ ” and “basic **due process**.”<sup>150</sup>

It would be pollutive of the adjudicative process, however, if the principle of equality of arms were understood to prevent arbitrators and judges from following procedures that facilitate the orderly resolution of the case. A court does not violate the principle by refusing to consider an argument first made in a reply brief where the applicable procedure requires both sides to present all legal arguments and available evidence in their opening submissions. Nor does *audiatur et altera pars* demand that irrelevant evidence be considered or that dilatory (p. 183) requests go unsanctioned. Although the right to be heard is paramount, it is not implicated by reasonable orders that move the case forward and simplify the issues.<sup>151</sup>

Equality of arms often works in conjunction with other principles. It, along with the principle that no party may be judge in its own cause, can be seen in subparagraphs 2(e) and (f) of Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration, which provide that claims of privilege relating to commercial or technical materials (often invoked by private parties) and to special governmental information (often invoked by sovereigns) will be recognized only if the tribunal itself finds the claims “compelling.” By preventing parties from withholding relevant evidence without first justifying their assertions of privilege, the IBA Rules give effect to these twin aims.

## D. Condemnation of Fraud and Corruption

*Perplexed and troubled at his bad success  
The Tempter stood, nor had what to reply,  
Discovered in his fraud, thrown from his hope*  
—John Milton<sup>152</sup>

“The concept of fraud refers to situations in which a person attempts to gain rights granted by a rule of law on the basis of deception, malicious intent, or dishonesty.”<sup>153</sup> Where a statement is solicited through fraudulent means, it may be inadmissible. Where a contract is induced by fraud or consummated to commit fraud, it is voidable. Where a judgment is procured by fraud, it can be nullified. *Fraus omnia corrumpit*—as Justice Samuel Miller wrote for the U.S. Supreme Court, “[t]here is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments.”<sup>154</sup>

(p. 184) As Cheng wrote, “[f]raud is the antithesis of good faith and indeed of law, and it would be self-contradictory to admit that the effects of fraud could be recognised by law.”<sup>155</sup> Modern cases illuminate the types of fraud and corruption that “can have no countenance in any court ... in any ... civilised country.”<sup>156</sup> In an ICC arbitration, for instance, the sole arbitrator found that a commission contract between an investor and a local agent was for the purpose of public bribery, and therefore dismissed the claim of the agent to collect under it.<sup>157</sup> “Parties who ally themselves in an enterprise of the present nature,” the sole arbitrator wrote, “must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.”<sup>158</sup>

As noted in the discussion of the prohibition on advantageous wrongs in chapter 2.D,<sup>159</sup> the tribunals in *World Duty Free v. Kenya*, *Inceysa v. El Salvador*, *Plama v. Bulgaria*, and *Metal-Tech v. Uzbekistan* arrived at similar conclusions,<sup>160</sup> affirming that fraud, bribery, and official corruption are contrary to “international *bonos mores*”<sup>161</sup> and “the international public policy of most, if not all, States.”<sup>162</sup> International law thus denies protection to an investment procured by bribery<sup>163</sup> or by the submission of doctored financial (p. 185) statements.<sup>164</sup> According to Emmanuel Gaillard, “[t]here is now little doubt that ... a transnational rule has been established according to which an agreement reached by means of corruption of one of the signatories ... is void.”<sup>165</sup> The catholic condemnation of fraud can further be seen in the wave of increasingly stringent anti-bribery instruments on both the national and world stage.<sup>166</sup> As the *condemnation of bribery and corruption* emanates from a convergence in national laws, international conventions, arbitral case law, and scholarly opinion,<sup>167</sup> it must under any view be considered a general principle of law.

The remedy for fraud can take many forms, “vitiat[ing] judgments, contracts and all transactions whatsoever.”<sup>168</sup> As noted, a contract aimed to further a corrupt scheme<sup>169</sup> or procured in the first instance by a corrupt scheme<sup>170</sup> can be denied effect as a general principle of law, irrespective of which municipal law governs the instrument. Judgments and arbitral awards are no different. “A judgment, which in principle calls for the greatest respect, will not be upheld if it is the result of fraud.”<sup>171</sup> Where it is shown that a tribunal has been corrupted in its formation or operation, as occurred with respect to the United States-Venezuelan (p. 186) Claims Commission of 1866,<sup>172</sup> “the entire proceedings will be regarded as null and void.”<sup>173</sup> And where there is evidence of “fraud on the part of the parties and witnesses ... which ... has affected the decision,”<sup>174</sup> “no tribunal worthy of its name or of any respect may allow its decision to stand if such allegations are well-founded.”<sup>175</sup>

The remedy of nullity befits the nature of the delict. Citing the “universally recognized need for correcting injustices,” the U.S. Supreme Court in 1944 vacated a final judgment of patent infringement issued 12 years earlier based upon the subsequent revelation that an article trumpeting the patent’s innovation and cited in the judgment had been secretly prepared by the patent holder’s legal representatives.<sup>176</sup> Rejecting the views of the lower appellate court that the article was not “basic” to the challenged judgments, the U.S. Supreme Court wrote:

Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal. [The patent holder]’s officials and lawyers thought the article material. They ... went to considerable trouble and expense to get it published... . They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of [the patent holder]’s deceptive attribution of authorship ... on the ground that what the article stated was true. Truth needs no disguise.<sup>177</sup>

The inverse of this final sentence is that fraud is borne of necessity: those with meritorious claims do not bear the costs and risks associated with manufacturing evidence or paying bribes. A party’s resort to fraud thus gives rise to reasonable inferences about the strength of its case. And because fraud taints all that it touches, it is virtually impossible to expiate its effects *ex post*. “A malefactor, caught red-handed, cannot simply walk away from a case, pay a new docket fee, and begin

afresh. History is not so glibly to be erased. Once a litigant chooses to practice fraud, that misconduct infects his cause of action, in whatever guises it (p. 187) may subsequently appear.”<sup>178</sup> It follows that nearly every jurisdiction will refuse to enforce arbitral awards<sup>179</sup> or foreign judgments<sup>180</sup> that are tainted by fraud or the corruption of the rendering tribunal. Like contracts affected by graft, such judgments and awards are null and lose all value—even innocent third parties have no legitimate claim to benefit from a fraudulent decision.<sup>181</sup>

Permutations on *fraus omnia corrumpit* are intertwined with other general principles. For example, parties engaging in fraud may be denied the ability to invoke the benefit of otherwise applicable legal rules. The Belgian Court of Cassation held that where a seller overestimated the net value of a company through false statements, the buyer’s gross negligence in failing to detect the fraud could not be invoked by the seller to prevent annulment of the contract—the seller’s fraud deprived it of the ability to invoke the general rule that only parties committing (p. 188) an excusable mistake may seek annulment of a contract.<sup>182</sup> In another case, a perpetrator who injured a bank through forged documents could not invoke the bank’s own contributory negligence, which typically would have been available to limit tort liability.<sup>183</sup> These outcomes might be viewed as the procedural embodiment of *nullus commodum capere potest de sua iniuria propria*.<sup>184</sup> In all events, “a legal act which is fraudulently concluded, or a rule of law of which the application is obtained through fraudulent conduct, must be entirely deprived of legal effect in order to prevent the perpetrator from taking any profit from this legal act or rule.”<sup>185</sup>

Garnering admissible proof of fraud, bribery, and corruption is exceedingly difficult. As Lord Coke noted, “secrecy is a mark of fraud.”<sup>186</sup> Cognizant of their wrongdoing, perpetrators of fraud frequently go to great lengths to conceal their misconduct. Yet, presuming regularity,<sup>187</sup> many courts and tribunals have held that “the graver the charge, the more confidence there must be in the evidence relied on.”<sup>188</sup> As a result, “[i]t is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof,”<sup>189</sup> and some international tribunals have likewise required “more persuasive evidence” than that for other allegations.<sup>190</sup> The presumption seems to be more a creature of comity (p. 189) than of experiential truth considering that, inter alia, 111 of 165 countries—over two-thirds of those surveyed—received scores below 50 on the 100-point scale of Transparency International’s 2015 corruption perceptions index.<sup>191</sup> It is true that charges of fraud are serious, but it is also true that direct evidence of such malfeasance is rare. As the *Metal-Tech* tribunal observed, “corruption is by essence difficult to establish and [] it is thus generally admitted that it can be shown through circumstantial evidence.”<sup>192</sup> An appropriate balance, it seems, would be to give the presumption no more than its due weight, that is, to presume normalcy only up and until there are evidentiary indications (direct or circumstantial) that something else is afoot. At that point the presumption drops away, and ordinary rules for weighing evidence should obtain.<sup>193</sup> A contrary approach would have the infelicitous effect of doubly immunizing malfeasants: *first*, by their own efforts at concealment and, *second*, by a heightened evidentiary standard that is made all the more difficult to satisfy in light of the first.<sup>194</sup> As in other areas, the (p. 190) truth-seeking function is best served by holistic consideration of all pertinent evidence.

## E. Evidence and Burdens of Proof

*Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.*

—John Adams<sup>195</sup>

Evidentiary standards, burdens of proof, and myriad other procedural rules can be dispositive of the outcome of a case.<sup>196</sup> As Gustave Flaubert wrote, “[t]ruth lies as much in its shading as it does in vivid tones.”<sup>197</sup> Uncovering this truth is the work of various adjectival rules. Both picayune and pivotal, procedural rules govern everything from a party’s ability to obtain emails from its adversary to the presumptions that the fact-finder shall indulge in assessing the record evidence. These are

the mechanics of the proceeding, and they can affect the **due process** rights of the participants, whether measured individually or systemically.<sup>198</sup> Certain of these rules, deriving from state practice *in foro domestic*, are properly deemed general principles of law and essential components of **due process**.<sup>199</sup>

The appropriate place to begin is with the lowest burden of proof: *courts and tribunals may take judicial notice of facts that are of common knowledge or public notoriety*.<sup>200</sup> Doing so does not offend **due process** and, conversely, a claim typically should not be dismissed based upon the claimant's inability to prove (p. 191) a self-evident and public fact.<sup>201</sup> Presumptions operate similarly but are more fraught. Whether forged in the crucible of experience or created for reasons of policy, presumptions that certain facts are true and that require the opposing party to rebut them are commonplace on the domestic and international plane. For example, it is trite to say that state actions enjoy a presumption of regularity and validity.<sup>202</sup> *Omnia praesumuntur rite esse acta* applies, for instance, "with respect to the validity of nationalisation and consular certificates as evidence of citizenship."<sup>203</sup> Similarly, deeds of ownership are entitled to a presumption of authenticity provided the party proffering it can offer some *prima facie* evidence to "inspir[e] a minimally sufficient degree of confidence" in the assertion.<sup>204</sup>

Allegations not admitted, noticed, or presumed must be proven. The traditional formulation of the principle governing the burden of persuasion is *actori incumbit onus probandi*.<sup>205</sup> This rule is universal save where, as noted, the burden (p. 192) is removed by the provisions of a statute or other evidentiary presumption.<sup>206</sup> Although the U.S. legal system also places the burden of *production* on the plaintiff (or claimant), this is not generally supported in the continental system, nor is it supported as a general principle of law.<sup>207</sup> Rather, the burden of production of evidence typically falls on both parties, and, where necessary, international tribunals may require one or both parties to produce additional evidence or undertake appropriate inquiries or research *sua sponte*.<sup>208</sup> It nonetheless remains constant that, once the record has been assembled, the claimant must persuade the tribunal of the truth of its allegations.<sup>209</sup> A common standard of persuasion before international tribunals, at least in civil cases, is "reasonably convinced"—which is functionally the same as the "preponderance of the evidence" standard that (p. 193) obtains in most national legal systems.<sup>210</sup> The standard can, however, be altered depending upon the factual and procedural circumstances of the case; it is not considered a general principle of law.

It should be kept in mind that the nominal ordering of the parties in the case caption is irrelevant to the burden. It is not so much the "claimant" as it is the party who alleges a particular fact that must introduce sufficient evidence in support.<sup>211</sup> The requirement that a party establish the facts supporting its legal claims and defenses is found in, *inter alia*, the laws of France, Germany, Iran, Italy, and the Netherlands.<sup>212</sup> Article 1257 of the Iranian Civil Code provides that "[w]hosoever claims a right must prove it and if the defendant, in defence, claims a matter which requires proof it is incumbent upon him to prove the matter."<sup>213</sup> This could be the claimant trying to establish the tribunal's jurisdiction, but it could also be the respondent raising a counterclaim or an affirmative defense. In *Temple of Preah Vihear*, for example, the ICJ explained that "[t]he burden of proof in respect of [a particular matter] will of course lie on the [p]arty asserting or putting [the matter] forward," irrespective of whether that party is the claimant or the respondent.<sup>214</sup> And the *Tecmed v. United Mexican States* tribunal held (p. 194) that the burden of proving an exception to the presumption of non-retroactivity "naturally lies with the party making the claim."<sup>215</sup> Consequently, the burden of proof may shift from one party to another in the course of a proceeding depending on which side asserts the fact or makes the request. At least a *prima facie* case is usually required on any matter before the burden shifts to the other party.<sup>216</sup>

International tribunals have leeway in assessing the weight of evidence they receive,<sup>217</sup> but when the question turns to whether the burden of proof is satisfied, the answer is again guided by a number of basic principles. For instance, an unsworn statement of fact from one of the parties is rarely regarded as conclusive proof without corroboration. Doing so, according to Cheng, would be a violation of the international minimum standard for the administration of justice.<sup>218</sup> Although more recent authority has undercut the extent of this concern,<sup>219</sup> tribunals continue to favor receipt of

“contemporaneous evidence from persons with direct knowledge” of the facts being asserted, in a form capable of being tested for its veracity.<sup>220</sup> Evidence “obtained by examination of persons directly involved, (p. 195) and who were subsequently cross-examined by [persons] skilled in examination ..., merits special attention.”<sup>221</sup> Also accorded great weight is contemporaneous documentary evidence, which is typically free from the “frailt[ies] of human contingencies” and “distrust.”<sup>222</sup>

The ranking of preferred evidence is not a universal principle, but it is a reflection of one that is: *a litigant must produce the most trustworthy evidence to support its claim “tempered by considerations of possibility.”*<sup>223</sup> The corollary to this principle is that a litigant who fails to produce the best evidence in its possession must “bear the consequences”<sup>224</sup> of that non-production—viz., an adverse inference “[w]hen it appears that a party has possession or control of relevant evidence that it declines without justification to produce.”<sup>225</sup> As a result of a litigant’s “duty to cooperate with international courts and tribunals in bringing forward evidence that will help them to decide the case,” adverse inferences may even be drawn against the party that does *not* bear the burden of proof where it has better access to the pertinent evidence.<sup>226</sup> This is considered a general principle of law and **due process** “admitted in all systems of law.”<sup>227</sup>

But sometimes the best evidence may not be all that good. Where direct evidence is unavailable, “it is a general principle of law that proof may be administered by means of circumstantial evidence.”<sup>228</sup> Appropriate inferences may be drawn from “a series of facts linked together and leading logically to a single conclusion.”<sup>229</sup> For instance, evidence that there were sea mines in Albania’s territorial waters (p. 196) and that Albania carefully monitored those waters could support the (inferential) conclusion that Albania knew of the mines located in its waters.<sup>230</sup> The allowance of circumstantial evidence has a practical dimension in other contexts, too. Notorious corruption in a certain country can be considered as circumstantial evidence of corruption in a particular case arising from that country given that “partiality and dependence by their very nature take place behind the scenes.”<sup>231</sup>

Where a party is “unable to furnish direct proof of facts giving rise to responsibility,” it is typically “allowed a more liberal recourse to inferences of fact and circumstantial evidence.”<sup>232</sup> This indirect evidence is “admitted in all systems of law, and its use is recognized by international decisions.”<sup>233</sup> Although circumstantial evidence standing alone rarely carries the day, it may be sufficient where corroborative evidence lies solely within the hands of the party opposite but was not forthcoming, or where the circumstantial evidence is not contradicted by direct proof in the record.<sup>234</sup> The inferences to be drawn from circumstantial evidence will also vary in each case, depending on the other record evidence. The tribunal in *Oostergetel v. Slovak Republic*, for instance, found that although general reports of bribery of judges are relevant to a denial of justice claim, they cannot substitute for some direct evidence of a treaty breach in a specific instance, as mere insinuations cannot meet the burden of proof that rests with the claimant.<sup>235</sup>

One final note deserves mention. It should come as no surprise—based on previous discussions of good faith, procedural equality, and fraud—that *proof acquired by unlawful or otherwise improper means may be stricken out from the record or denied any weight*. Where, for example, a party acquires documentation “by successive and multiple acts of trespass, ... it would be wrong to allow [that party] to introduce this documentation into the[] proceedings.”<sup>236</sup> Any other conclusion would “offend[] (p. 197) basic principles of justice and fairness.”<sup>237</sup> The same principle applies to evidence of questionable provenance. In *Libananco*, for example, the tribunal excluded from the record incomplete audio recordings whose authenticity was questioned in several expert reports.<sup>238</sup> This is not particularly controversial, and it might be argued that the principle is predicated less on evidentiary rules and more on the principles of “good faith,” “equal treatment,” and “procedural fairness.”<sup>239</sup>

## F. The Principle of Res Judicata

*It appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to the "general principles of law recognized by civilized nations," [then it is with respect to] the binding effect of res judicata.*

—Judge Dionisio Anzilotti<sup>240</sup>

The final principle is, according to Cheng and early twentieth century jurists, the least controversial: "There seems little, if indeed any question as to *res judicata* being a general principle of law."<sup>241</sup> It serves both a general and specific purpose. Generally, "the stability of legal relations requires that litigation come to an end"; specifically, "it is in the interest of [all] part[ies] that an issue which has already been adjudicated ... be not argued again."<sup>242</sup> The rules defining this principle originate in Roman civil law, including several cases from the Digest of 529 A.D.<sup>243</sup> The principle has evolved little over the course of two millennia, leaving "no doubt that *res judicata* is a ... general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice."<sup>244</sup>

(p. 198) *Res judicata*, has two consequences, both of which seek to avoid the repetition of what has already been raised and decided. *First*, as an affirmative matter, the terms of judgments and awards are binding and obligatory on the parties. By virtue of the general principle of *res judicata*, *parties to a final judgment or award are obligated to carry it out.*<sup>245</sup> This is not only a function of *res judicata*, but of other basic rules shared by all systems of law, including the principles of good faith and estoppel.<sup>246</sup>

*Second*, and as a negative corollary to the first, the same claims may not be tried again by another court or tribunal—*non bis in idem*.<sup>247</sup> In practice, *successive courts and tribunals are obligated to defer to the jurisdiction of the first if the same matter is submitted for adjudication a second time, and all of the rights, issues, and facts that were "distinctly put in issue and directly determined" by the first court or tribunal cannot be disputed again.*<sup>248</sup> To reopen the matter again undercuts the "seriousness and stability"<sup>249</sup> of adjudicated legal relationships—core notions of international **due process**.<sup>250</sup>

(p. 199) Though the principle itself is a general one, the precise elements for its application differ across jurisdictions.<sup>251</sup> Some basic precepts are nonetheless discernible. As to the threshold elements, only decisions on the merits, decided after full and fair adjudication, are entitled to *res judicata* effect. A dismissal by a court or tribunal for lack of jurisdiction, for example, is not a decision on the merits and does not preclude a subsequent airing of the issues before a tribunal that has jurisdiction.<sup>252</sup> Thus, if a claimant complains of a denial of justice before exhausting local remedies, and the claim is denied on that ground, the claimant may reinstate its claims after local claims have run their course.<sup>253</sup> The same is true of decisions regarding issues of admissibility,<sup>254</sup> such as instances where the claim advanced is "time-barred" under national law, but the same dispute may be brought before a tribunal under international law.<sup>255</sup> "The point is simply that a decision which does not deal with the merits of the claim, even if it deals with issues of substance, does not constitute *res judicata* as to those merits."<sup>256</sup> In *Bosh v. Ukraine*, the tribunal found that a Ukrainian court had not violated the principle of *res judicata* when it heard a case that had been previously dismissed by a prior Ukrainian judge. On reviewing Ukrainian civil procedure law, the tribunal found that *res judicata* does not attach to a case where the first judge declined to formally open proceedings, as was the case there.<sup>257</sup>

The requirement of a full and fair adjudication usually leaves default judgments outside the scope of the general principle. Though default judgments have the full effect of *res judicata* in some legal systems,<sup>258</sup> the existence of contrary (p. 200) authority<sup>259</sup> denies it the status of a general principle. Also, as Cheng noted, "not everything contained in [a] decision acquires the force of *res judicata*."<sup>260</sup> The claims and defenses decided by the court are *res judicata*.<sup>261</sup> *Obiter dicta*, however, do not have the effect of *res judicata*; views which are not relevant to the actual decision have no binding force. Preclusive effect typically attaches only to the operative portions of the judgment (*dispositif*) directed to matters fairly put before the court, and not to matters incidental and unnecessary to the ultimate decision.<sup>262</sup>

Almost all judicial systems require an identity of the parties (in the legal, not physical, sense), object (*petitum*), and grounds (*causa petendi*) between the first and the second suit before *res judicata* will apply. This is known as the “triple identity” standard, which was formulated by the Roman jurist Paolo,<sup>263</sup> redefined by the French jurist Pothier,<sup>264</sup> and applied by tribunals today.<sup>265</sup>

(p. 201) The first of the “triple identities” is usually the easiest: the requirement that the parties be the same between the first and second case means that the first judgment binds only the parties and their privies. This is not a nominal test, but a legal one—the first judgment covers not only the persons who actually appeared in the litigation, but those who were represented by, or in privity with, the litigating parties. It follows that a minor who is unsuccessfully represented in a personal-injury case by her father cannot later file the same claim when she comes of age, because she was the real party in interest in the first suit, even if she did not formally appear. An UNCITRAL tribunal applied the same principle to a government’s settlement of a claim of diffuse environmental rights against an oil operator, holding that *res judicata* may extend to non-signatories seeking to raise the same diffuse rights against the same company.<sup>266</sup>

Moving to the second and third identities, the *causa petendi* is the reason or motive for requesting something in a complaint: in other words, the material facts in dispute between the parties that give rise to the legal claim. The legal rights implicated by a contract, a damaged plot of land, or a personal injury might all constitute the *causa petendi* of a complaint. The object, or *petitum*, is the legal benefit that the suit seeks to obtain. This requirement cannot be evaded through artful pleading. A claimant cannot seek money damages for environmental damage to real property in one suit, and then sue for remediation in another. Although the remedies sought may be different, the nature of the legal recourse is not, and the first suit (litigated to conclusion between the same parties) will typically bar the second. In some cases, the latter two elements of *res judicata* will collapse into a single inquiry regarding the general similarities between the substance of the two suits.<sup>267</sup> These elements dovetail with considerations of practicality and efficiency, as legal systems function more effectively if related claims are pursued together rather than piecemeal.

Despite its broad acceptance as a fundamental principle, *res judicata* does not prohibit a party from advancing in different legal systems a legally distinct cause of action arising from the same set of facts. “The doctrine applies only where a point (p. 202) falls for decision twice within *one and the same legal context*, ... [and] does not preclude the [re-]hearing of a claim on a *separate legal basis*.”<sup>268</sup> It has thus been held that one tribunal hearing a dispute under an investment treaty cannot bind a second tribunal hearing the “same” dispute under a different treaty.<sup>269</sup> Or where a claimant initiates arbitration against a host State pursuant to a private contract or a domestic investment law, a decision from that tribunal will not bind a later tribunal convened under an investment treaty addressing different legal claims.<sup>270</sup>

One final point brings things full circle. Judgments from permanent courts are not the only form of formal dispute resolution. Settlement agreements may be more ubiquitous, and the policies behind *res judicata* (the advancement of stability and certainty in the legal process) are no less applicable when the parties settle their differences themselves. But although there is no consensus on whether such contracts are *res judicata*,<sup>271</sup> all agree that they are binding and enforceable, and therefore can act to bar subsequent litigation as a general principle of law. In this context, the finality and repose provided by *res judicata* are also provided through other general principles, such as estoppel and *pacta sunt servanda*.<sup>272</sup>

## Footnotes:

1 *Frank v. Magnum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting).

2 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 389–90 (Cambridge Univ. Press 1953).

3 *Laver v. Fielder*, [1862] 32 Beav. 13.

**4** Cheng, *supra* note 2, at 259 (citing *Mavrommatis Palestine Concessions Case (Greece v. U.K.)*, Objection to the Jurisdiction of the Court, Judgment, 1924 P.C.I.J. (Ser. A) No. 2 (Aug. 30) (dissenting opinion of M. Moore)).

**5** *Id.*

**6** *Id.* at 261; *see also Pennoyer v. Neff*, 95 U.S. 714, 733–34 (1878).

**7** Cheng, *supra* note 2, at 273–74.

**8** Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) art. V(1)(c), June 10, 1958, 330 U.N.T.S. 3.

**9** Cheng, *supra* note 2, at 261–62. A tribunal might also fail to address all issues presented to it, known as *infra petita*. *See* BLC and ors v. BLB and anor, [2014] SGCA 40, 91 (Singapore Appellate Court) (holding that the failure to address an argument could be grounds for annulment where it caused actual prejudice); Gary B. Born, *International Commercial Arbitration* 3293 (2d ed. 2014) (“an arbitral tribunal’s failure to consider issues presented to it in fact amounts to an excess of authority, even if it appears only to be the reverse, because it effectively rewrites the tribunal’s mandate, which is an act beyond the arbitrators’ competence”). A party’s claim of *infra petita* should be first raised with the tribunal itself absent compelling circumstances, with the usual remedy being completion of the award by the tribunal rather than annulment.

**10** Cheng, *supra* note 2, at 261–62 (quoting *Jay Treaty (Art. VII) Arbitration* (1794), 4 Int. Adj., M.S. 179, 193).

**11** *Antoine Fabiani (No. 1) (Fr. v. Venez.)*, in J.B. Moore, *History and Digest of International Arbitrations to which the United States Has Been a Party* 4895 (1898) (“Upon examining the general principles of international law with regard to denial of justice, that is to say, the rules common to most bodies of law or laid down by doctrine, one finds that denial of justice includes not only the refusal of a judicial authority to exercise his functions and, in particular, to give a decision on the request submitted to him, but also wrongful delays on his part in giving judgment.”); *see also White Indus. Australia Ltd. v. Republic of India*, UNCITRAL, Award (Nov. 30, 2011); *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits (Mar. 30, 2010).

**12** Cheng, *supra* note 2, at 261–62.

**13** *Id.* at 266.

**14** *See* Redfern & Hunter on International Arbitration ¶¶ 5.104–5.109 (6th ed. 2015); *see also* Cheng, *supra* note 2, at 275–78.

**15** *See, e.g.*, UNCITRAL Rules art. 23; ICC Rules art. 6(4)–(5); LCIA Rules art. 23.1; ICSID Convention Rule 41; *see also* Statute of the International Court of Justice art. 36(6); *see also* UNCITRAL Model Law art. 16.

**16** *See, e.g., ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, ¶¶ 315–17 (Sept. 3, 2013) (interpreting treaty to limit scope of tribunal’s review of tax measures, but proceeding to sustain jurisdiction over other claims).

**17** *See, e.g., Land, Island and Maritime Frontier Dispute (El Sal./Hond.)*, Order on Application for Permission to Intervene, 1990 I.C.J. 3, 134 (Feb. 28); *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 3 (Oct. 4, 2006); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 89 (June 21); *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, ¶¶ 116–20 (July 17, 2003); *see also* Cheng, *supra* note 2, at 266–67 (citing cases).

**18** *Pennoyer v. Neff*, 95 U.S. 714, 730 (1878) (emphasis added; quoting *D’Arcy v. Ketchum*, 52 U.S. 165, 176 (1851)).

**19** *Id.* (quoting *Lafayette Ins. Co. v. Fench*, 59 U.S. 404, 406 (1856)).

**20** *Hilton v. Guyot*, 159 U.S. 113, 166–67 (1895) (emphasis added).

**21** Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 art. 2(d), O.A.S.T.S. No. 51 (entered into force June 14, 1980) (“The judge or tribunal rendering the judgment is competent in the international sphere to try the matter.”); art. 2(e) (“The plaintiff has been summoned or subpoenaed in due legal form substantially equivalent to that accepted by the law of the State where the judgment, award or decision is to take effect.”).

**22** Treaty concerning the Modalities of the Settlement of Disputes Related to the Exercise of Commercial Activity art. 9(c) (entered into force Dec. 19, 1992) (denial of enforcement of commercial decision from jurisdiction in the Commonwealth of Independent States where court was “incompetent according to this Treaty”); art. 9(d) (requiring that the judgment debtor “be served with a summons”).

**23** Foreign Judgments Act 1991 arts. 7(2)(a)(iv) and 7(3)–(4), No. 112, 1991 as amended, available at <https://www.comlaw.gov.au/Details/C2013C00640> (last visited Aug. 30, 2015) (denying recognition to foreign judgments where the “original court had no jurisdiction in the circumstances of the case” and providing that such jurisdiction exists if the judgment debtor, inter alia, brought a counterclaim in the suit or maintained a residence or principal place of business in the country); *id.* art. 7(2)(a)(v) (denying recognition where judgment debtor “did not ... receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear,” irrespective of “whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court”).

**24** Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 45.1(b), 2012 O.J. (L 351) 1 (Member State commercial judgment shall not be enforced “if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.”). Although the Council Regulation does not permit an enforcing court to review the jurisdiction of the Member State that issued the judgment, *id.* art. 45.2, chapter 2 of the Council Regulation is dedicated to setting forth the standards for when a Member State may exercise jurisdiction, *id.* arts. 4–35.

**25** See, e.g., Korean Code of Civil Procedure art. 217 (jurisdiction of foreign court must satisfy the principle of international jurisdiction, and legitimate service of process must have been effected); German Civil Code [ZPO] § 328(1) (requiring that the foreign court had jurisdiction as measured against German law and that service allowed sufficient time to defend); *Club Resorts Ltd. v. Van Breda* (2012), 343 D.L.R. 4th 577 (Can. Sup. Ct.) (foreign judgment recognition dependent upon foreign court having a “real and substantial connection” to the parties or the facts in dispute, and identifying the following presumptive connecting factors: (1) defendant is domiciled or resident in the jurisdiction, (2) defendant carries on business in the jurisdiction, (3) tort was committed in the jurisdiction, and (4) contract was made in the jurisdiction); *Adams v. Cape Indus. plc*, [1990] ch. 433 (U.K. Court of Appeal) (requiring that foreign court have the competence to summon the defendant before it and to decide such matters as it has decided).

**26** ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 5.1, 2004-4 Unif. L. Rev. 758.

**27** *Id.*

**28** *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶¶ 142–43 (Apr. 12, 2002), 7 ICSID Rep. 173 (2005); see also *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1129–30 (7th Cir. 1997) (“[A]n arbitrator must provide a fundamentally fair hearing,” defined as “one that meets the minimal requirements of fairness—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.”) (quotation marks omitted; emphasis added); *Hilton v. Guyot*, 159 U.S. 113, 158 (1895) (requiring “a

full and fair trial abroad before a court of competent jurisdiction, ... *after due citation or voluntary appearance of the defendant*") (emphasis added); *Pennoyer v. Neff*, 95 U.S. 714, 735 (1878) ("It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.").

**29** *Dame Veuve Trompier-Gravier*, CE Sect. (May 5, 1944), Rec. Lebon 133. Adjectival requirements such as this stem, as another decision made clear, from the proposition that the executive branch is bound by "applicable general principles of law, even in the absence of a [legal] text." *Aramu*, CE Ass. (Oct. 26, 1945), Rec. Lebon 213. Indeed, "[t]he doctrinal foundations of French administrative law are almost entirely the product of an ongoing jurisprudence of general principles." Alec Stone Sweet & Giacinto della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to José Alvarez*, 46 N.Y.U. J. Int'l L. & Pol. 911, 945–46 (2013–2014).

**30** Charter of Fundamental Rights of the European Union (2000/C 364/01) art. 41.2(a), *signed and proclaimed* by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting, Nice (Dec. 7, 2000).

**31** *Case of Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 74, ¶ 104 (Feb. 6, 2001).

**32** *Id.* ¶¶ 106, 107.

**33** Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) (*adopted* Nov. 6, 1998).

**34** *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 91, 97 (Aug. 30, 2000).

**35** Cheng, *supra* note 2, at 273.

**36** See *LaGrand Case (Ger. v. U.S.)*, Request for the Indication of Provisional Measures, Order, 1999 I.C.J. 9, ¶ 13 (Mar. 3) ("*LaGrand* Provisional Measures Order") ("[O]n a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but that it may not indicate them unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded."); *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ 39 (May 8, 2009) ("While the Tribunal need not satisfy itself that it has jurisdiction to determine the merits of this case for the purposes of ruling on the application for provisional measures, it will not order such measures unless there is at least a *prima facie* basis upon which such jurisdiction might be established.").

**37** ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 5.8, 8.2, 2004-4 Unif. L. Rev. 758.

**38** Cheng, *supra* note 2, at 268 (quoting *Elec. Co. of Sofia and Bulgaria*, Interim Measures of Protection, Order, 1939 P.C.I.J. (Ser. A/B) No. 79, at 199 (Dec. 5)).

**39** ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 2.1.2 & cmt. P2-B, 2004-4 Unif. L. Rev. 758. Scholars have stated the "substantial connection" standard differently, for example by requiring a "clear connecting factor," or a factual "linking point" "between the legislating state and the conduct that it seeks to regulate [abroad]." Vaughan Lowe, *Jurisdiction, in* International Law 342 (Malcolm D. Evans ed., 2d ed. 2006); see also Ian Brownlie, Principles of Public International Law 309–10 (4th ed. 1990) (requiring a "substantial and bona fide connection between subject matter and the source of the jurisdiction"); Francesco Francioni, *Extraterritorial Application of Environmental Law, in* Extraterritorial Jurisdiction in Theory and Practice 125 (Karl M. Meessen ed., 1996) (an assertion of extraterritorial jurisdiction over subjects who have no significant relation to the forum, except transitory presence or an indirect effect, may well constitute a breach of an international **due process** standard).

**40** ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 2.1.2, 2004-4 Unif. L. Rev. 758.

- 41** Rufus Choate, Speech Delivered to the Massachusetts Constitutional Convention of 1853: The Judicial Tenure.
- 42** Cheng, *supra* note 2, at 289.
- 43** Choate, *supra* note 41, at 12.
- 44** *Id.* at 10–11.
- 45** See *Jacob Idler v. Venezuela*, United States and Venezuela Claims Commission, in J.B. Moore, History and Digest of International Arbitrations to which the United States Has Been a Party 3491 (1898).
- 46** *Id.* at 3516–17.
- 47** *Id.* at 3506.
- 48** *Id.* at 3508.
- 49** *Id.* at 3517.
- 50** Jan Paulsson, Denial of Justice in International Law 162 (2005). See also Restatement (Third) Foreign Relations Law of the United States § 711, Reporter’s note 2(A) (Am. Law Inst. 1987) (noting that in *Idler*, the State was held internationally responsible where its judicial tribunal was “manipulated by the executive”).
- 51** See *Robert E. Brown (United States v. Great Britain)*, Decision (Nov. 23, 1923), 6 R.I.A.A. 120.
- 52** See *id.* at 121–22.
- 53** See *id.* at 122.
- 54** *Id.* at 120.
- 55** *Id.* at 124–25.
- 56** *Id.* at 125–26.
- 57** See *id.* at 126.
- 58** *Id.* at 128.
- 59** *Id.* at 129. Though a denial of justice was found, Brown was eventually denied recovery because the arbitration was lodged against the United Kingdom, the successor to the South African Republic after the Boer War, and the tribunal decided that—in that specific circumstance—a successor sovereign did not assume the liabilities of its predecessor. *Id.* at 131 (“The relation of suzerain did not operate to render Great Britain liable for the acts complained of.”).
- 60** See, e.g., Germany Judiciary Act § 25 (1972) (“A judge shall be independent and subject only to the law.”); Code of Conduct for United States Judges, Canon 1 (“An independent and honorable judiciary is indispensable to justice in our society.”) and Canon 2 (“A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”); Kazakhstani Constitutional Law on the Judicial System and Status of Judges art. 1(3) (2000, amended 2014) (“In the administration of justice, judges shall be independent and subordinate only to the Constitution and the law.”); Constitution of the French Republic art. 64 (Oct. 4, 1958) (“The President of the Republic shall be the guarantor of the independence of the Judicial Authority.”); Russian Federal Constitutional Law on the Judicial System art. 1 (1996, amended 2011) (“The judicial power shall be separate and shall act independently of the legislative and executive powers.”); Iceland Act on the Judiciary art. 24 (1998, as amended 2011) (“Judges shall discharge their judicial functions independently and on their own responsibility. They shall, in resolving a case, proceed solely according to law, and shall never be subject to the authority of any other person.”).
- 61** Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 10 (Dec. 10, 1948) (emphasis added).
- 62** American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *adopted by the Ninth*

International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, Doc. 6 rev. 1, art. XXVI (1992) (establishing the right to an impartial and public hearing) (“Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.”).

**63** Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, as amended by Protocols No. 11 and 14, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) (providing for right to a fair trial).

**64** Charter of Fundamental Rights of the European Union art. 47(2) (2000/C 364/01), *signed and proclaimed by* the Presidents of the European Parliament, the Council and the Commission at the European Council meeting, Nice (Dec. 7, 2000) (emphasis added).

**65** See, e.g., IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 1 (2014) (“Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.”).

**66** Chapter 3.D contains various surveys and statistics on the general functioning of court systems around the world.

**67** See *Hulley Enters. Ltd. v. Russian Federation*, UNCITRAL, PCA Case No. AA226, Final Award, ¶ 1583 (July 18, 2014). In the proceedings that led to the criminal prosecutions of Yukos executives, the individual defendants received “harsh treatment,” were “remotely jailed and caged in court,” and their counsel were routinely “mistreat[ed]” and encountered obstacles in “reading the record and conferring with [their clients].” *Id.* When Russia tried to extradite other executives for prosecution,

courts in the United Kingdom refused [those requests] on the basis that the prosecutions were “so politically motivated that there is a substantial risk that the Judges of the Moscow City court would succumb to political interference in a way which would call into question their independence.” Courts in Lithuania, Cyprus and the Czech Republic also refused to extradite former Yukos managers or former Yukos service providers on the basis of the political dimensions of the underlying requests.

*Id.* ¶ 786.

**68** *Case of Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 74, ¶ 139 (Feb. 6, 2001).

**69** *Id.* ¶ 3.

**70** *Id.* ¶ 114. Contemporaneous with the revocation of his citizenship, “the Judiciary’s Executive Committee modified the composition of the Constitutional and Social Chamber of the Supreme Court of Justice” and “adopted a norm giving this Chamber the power to create, on a ‘[t]emporary basis’ superior chambers and courts of public law, and also to ‘appoint and/or ratify’ their members, which effectively occurred two days later.” *Id.* ¶ 113. It was one of these temporary public law courts that heard Mr. Ivcher Bronstein’s appeals.

**71** *Id.* ¶¶ 113–14.

**72** See *Chevron Corp. v. Donziger*, 886 F. Supp. 2d 235, 240 (S.D.N.Y. 2012) (a foreign judgment “may not be afforded *res judicata* or collateral estoppel effect unless it is entitled to recognition and enforcement here”).

**73** See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 2029 (1895) (requiring “a system of ... impartial administration of justice”); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 608–09 (S.D.N.Y. 2014); Restatement (Third) Foreign Relations Law of the United States § 482 cmt. b (Am. Law Inst. 1987) (“the judiciary [must not be] dominated by the political branches of government or by an

opposing litigant”). Most countries deny recognition of foreign judgments that are contrary to universal standards of **due process** or public policy, and decisions issued by foreign judges who lack independence and impartiality necessarily fall within this proscription. See, e.g., Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of Dec. 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 45.1(a), 2012 O.J. (L 351) 1 (denying recognition to Member State judgments that are “manifestly contrary to public policy (ordre public)”); *Ellefsen v. Ellefsen*, Civil Jurisdiction 1993, No. 202 (Oct. 22, 1993) (denial of recognition in Bermuda of foreign judgments that are contrary to public policy and natural justice); Foreign Judgments (Reciprocal Enforcement) Act, ch. F35, Laws of the Federation of Nigeria art. 6(1)(a)(v) (denying enforcement of a foreign judgment that is “contrary to public policy in Nigeria”).

**74** See, e.g., *Vidovic v. Losinjka Plovidka Oour Broadarstvo*, 868 F. Supp. 695, 699–702 (E.D. Pa. 1994) (denying dismissal on the *forum non conveniens* grounds because “the courts of the Republic of Croatia may be biased in favor of the government,” rendering them an inadequate forum in a suit by a non-Croatian citizen against an instrumentality of the government).

**75** *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 476–77 (7th Cir. 2000).

**76** *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412–13 (9th Cir. 1995) (where judges “under the post-Shah regime ... are subject to continuing scrutiny and threat of sanction,” they “cannot be expected to be completely impartial,” which means that Iran’s judiciary lacked fundamental notions of “civilized jurisprudence”) (quotation marks omitted).

**77** *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999), *aff’d*, 201 F.3d 134 (2d Cir. 2000) (where “regular procedures governing the selection of justices and judges had not been followed”; where “justices and judges served at the will of the leaders of the warring factions”; and where “judicial officers were subject to political and social influence,” the Liberian judicial system during the period in question “simply did not provide for impartial tribunals”).

**78** *Yukos Capital S.A.R.L. v. OAO Rosneft*, Amsterdam Court of Appeal, Case No. 200.005.269/01, Decision, ¶¶ 3.9.1, 3.8.9 (Apr. 28, 2009) (where “[t]here is a close interwovenness of [the claimant] and the Russian state,” the respondent could not have expected to receive the process that was due).

**79** *Dejoria v. Maghreb Petro. Exploration S.A.*, 38 F. Supp. 3d 805, 808–09 (W.D. Tex. 2014).

**80** *Id.* at 809.

**81** *Id.*

**82** *Id.* at 816.

**83** *Id.* at 810.

**84** *Id.* at 812.

**85** *Id.* at 812–13 (citation and quotation marks omitted).

**86** *Id.* at 814.

**87** *Id.*

**88** *Id.* at 812.

**89** *Id.* at 816–17.

**90** *Dejoria v. Maghreb Petro. Exploration, S.A.*, 804 F.3d 373 (5th Cir. 2015). Notably, unlike the district court, the Court of Appeals gave no heed to the specific nature of the underlying case, explaining that under the Texas Recognition Act “the court’s inquiry ... focuses on the fairness of the foreign judicial system as a whole, and we do not parse the particular judgment challenged.” *Id.* at 381. The flaws of this approach are discussed in chapter 1.B(3)(b).

**91** See Cheng, *supra* note 2, at 279–80.

**92** *Id.* at 284. See also *In re Pinochet*, [1999] UKHL 52 (Jan. 15, 1999) (Lord Hope of Craighead:

“One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered,” and the “guiding principle is that no one may be a judge in his own cause”).

**93** *LLC First Excavator Co. v. JSC Union of Indus.* RosProm, Case No. 1308/11 (Russ.); see also *Sramek v. Austria*, App. No. 8790/79, Eur. Ct. H.R., Judgment, ¶ 42 (Oct. 22, 1984) (“Where, as in the present case, a tribunal’s members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person’s independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society.”).

**94** U.N. Human Rights Committee, *General Comment No. 32*, U.N. Doc. CCPR/C/GC/32, ¶ 21 (Aug. 23, 2007); see also *Karttunen v. Finland*, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989, ¶ 7.2 (Nov. 5, 1992); Office of the High Commissioner for Human Rights, *Basic Principles on the Independence of the Judiciary* princ. 2.

**95** See ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 1.1 & 1.3, 2004-4 Unif. L. Rev. 758.

**96** Cheng, *supra* note 2, at 286.

**97** *In re Pinochet*, [1999] UKHL 52 (Jan. 15, 1999) (Lord Hope of Craighead); see also *Micallef v. Malta*, App. No. 17056/06, Eur. Ct. H.R., Judgment (Oct. 15, 2009) (“the close family ties between the opposing party’s advocate and the judge sufficed to justify objectively ... fears that the presiding judge lacked impartiality”); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 111 (9th Cir. 2007) (conflict where the sole arbitrator was simultaneously sitting in judgment over the New Regency dispute and serving as chief administrative officer for a company negotiating a substantial contract with New Regency). Of course not all relationships require disqualification. For example, an arbitrator’s appointment as a nonexecutive director of a bank that had business dealings with, or held stock in, the claimant companies were held not to warrant disqualification under the ICSID Rules. See *EDF Int’l S.A., SAUR Int’l S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Prof. Gabrielle Kaufmann-Kohler (June 25, 2008); see *Suez et al. v. Argentine Republic*, ICSID Case Nos. ARB/03/19 & ARB/03/17 (July 30, 2010), and *AGW Grp. Ltd. v. Argentine Republic*, UNCITRAL, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008).

**98** *TCR Sports Broadcasting Holding, LLP v. WN Partner LLC*, 2015 WL 6746689 (N.Y. Sup. Ct. N.Y. Co. Nov. 4, 2015).

**99** See, e.g., *Suez et al. v. Argentine Republic*, ICSID Case Nos. ARB/03/19 & ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007) and *AGW Grp. Ltd. v. Argentine Republic*, UNCITRAL, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008) (holding that “the alleged connection [between arbitrator and party] must be evaluated *qualitatively*,” and evaluating the proximity, intensity, and materiality of—as well as the arbitrator’s dependence on—the alleged connection); *Micallef v. Malta*, App. No. 17056/06, Eur. Ct. H.R., Judgment, ¶ 93 (Oct. 15, 2009) (“the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality”); see generally Chiara Giorgetti, *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (2015); 2014 IBA Guidelines on Conflicts of Interest in International Arbitration.

**100** See, e.g., *Loewen Grp., Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 135 (June 26, 2003) (“a judgment is manifestly unjust ... if it has been inspired by ill-will towards foreigners as such or as citizens of a particular states”); A.O. Adede, A

*Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law*, 14 Can. Y.B. Int'l L. 73, 91 n.83 (1976) (“a ... decision which is ... discriminatory cannot be allowed to establish legal obligations for the alien litigant”).

**101** *In re Pinochet*, [1999] UKHL 52 (Jan. 15, 1999) (Lord Hope of Craighead) (citation and quotation marks omitted).

**102** See generally Giorgetti, *supra* note 99.

**103** European Charter on the Statute for Judges art. 1, 2 (1997); see also Office of the High Commissioner for Human Rights, Basic Principles on the Independence of the Judiciary princ. 1; U.N. Human Rights Committee, *General Comment No. 32*, U.N. Doc. CCPR/C/GC/32, ¶ 19 (Aug. 23, 2007).

**104** See, e.g., *Sovtransavto Holding v. Ukraine*, App. No. 48553/99, Eur. Ct. H.R., Judgment, ¶ 82 (July 25, 2002) (“Having regard to interventions of the executive branch of the State in the court proceedings ... the Court finds that the applicant company’s right to have a fair hearing in public by an independent and impartial tribunal ..., construed in the light of the principles of the rule of law and legal certainty, was infringed.”).

**105** Restatement (Third) Foreign Relations Law of the United States § 482 cmt. B (Am. Law Inst. 1987).

**106** Office of the High Commissioner for Human Rights, Basic Principles on the Independence of the Judiciary princ. 2; see also *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, 18 (Mar. 29, 2005) (holding that “Government intervention in judicial proceedings is not in conformity with the rule of law in a democratic society”).

**107** United States Agency for International Development, *Guidance for Promoting Judicial Independence and Impartiality*, at 19 (Jan. 2002). See also ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 1.2, 2004-4 Unif. L. Rev. 758.

**108** U.N. Human Rights Committee, *General Comment No. 32*, U.N. Doc. CCPR/C/GC/32, ¶ 20 (Aug. 23, 2007) (citations omitted); see also United States Agency for International Development, *Guidance for Promoting Judicial Independence and Impartiality*, at 19 (Jan. 2002); Council of Europe Recommendation No. R (94) 12, princ. VI (2).

**109** United States Agency for International Development, *Guidance for Promoting Judicial Independence and Impartiality*, at 19 (Jan. 2002).

**110** Describing a “trial by battel” in 1571 at the Westminster court of common pleas, as quoted by Sir William Blackstone, *The Student’s Blackstone* 572 (Robert Malcolm Kerr ed., 1865).

**111** Cheng, *supra* note 2, at 290.

**112** Sweet & della Cananea, *supra* note 29, at 943–44.

**113** Paulsson, *supra* note 50, at 82.

**114** Cheng, *supra* note 2, at 290–91; see also UNCITRAL Model Law on Commercial Arbitration art. 18 (“The parties shall be treated with equality.”); 4 William Blackstone, *Commentaries*, ch. 20 (1765) (reiterating foundational importance of *audiatur et altera pars*).

**115** See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

**116** *Kaufman v. Belgium*, App. No. 10938/84, 50 Eur. Comm’n H.R. Dec. & Rep. 98, 115 (1986). See also *Dombo Beheer B.V. v. Netherlands*, App. No. 14448/88, Eur. Ct. H.R., Judgment, ¶ 33 (Oct. 27, 1993); *Delcourt v. Belgium*, App. No. 2689/65, Eur. Ct. H.R., Judgment, ¶ 34 (Jan. 17, 1970).

**117** See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (a fundamental requirement of **due process** is the opportunity to be heard “at a meaningful time and in a meaningful manner” (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) and *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)));

*Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932) (all litigants must be afforded “an opportunity to present every available defense”); *Philip Morris U.S.A. v. Williams*, 549 U.S. 346, 353 (2007) (the **due process** clause prohibits a state from punishing an individual without first providing that individual with “an opportunity to present every available defense”); *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (the State must afford litigants a “meaningful opportunity to be heard by removing obstacles to their full participation in judicial proceedings”) (quotation marks omitted).

**118** *Hilton v. Guyot*, 159 U.S. 113, 117 (1895).

**119** *Dombo Beheer BV v. Netherlands*, ECtHR, App. No. 1448/88, Merits and Just Satisfaction, ¶ 33 (Oct. 27, 1993).

**120** ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 3.1, 2004-4 Unif. L. Rev. 758 (emphasis added); see also *id.* at princ. 5.4 (“The parties have the right to submit relevant contentions of fact ... and to offer supporting evidence.”). The principle of course concerns the *opportunity* to be heard; if a party refuses to appear before a competent tribunal after due notification, it cannot thereafter challenge the default judgment as a violation of procedural equality. See Cheng, *supra* note 2, at 296.

**121** *Bremer Vulkan v. South India Shipping Corp. Ltd.*, [1981] A.C. 909 (H.L.) 917.

**122** *Golder v. United Kingdom*, App. No. 4451/70, Eur. Ct. H.R., Merits and Just Satisfaction, Judgment, ¶¶ 18, 35–36 (Feb. 21, 1975).

**123** See Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, No. 1831/12, at 5 (June 19, 2012) (unofficial translation), available at <http://www.msamoylov.ru/?p=3888> (the “[p]rinciples of adversarial nature and equality of the parties imply that the parties participating in the court hearing will be granted equal procedural opportunities to defend their rights and lawful interests”).

**124** *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 57 (Feb. 5, 2002); *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 1973 I.C.J. 166, ¶ 36 (July 12) (equality of arms/procedural equality).

**125** *China Property Development (Holdings) LTD. v. Mandecly LTD.*, CACV 92 & 9312012 (Hong Kong Court of Appeal, May 24, 2016) (partially setting aside an award where the arbitral tribunal ascribed liability to one party based upon arguments directed solely against another party: it is impermissible for a tribunal to “carr[y] out its own investigation or inquiry on primary facts, or decide[] a case based on a wholly new point of law or fact without giving the parties a fair opportunity to consider and respond to such point”); *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997) (“When the exclusion of relevant evidence actually deprived a party of a fair hearing, therefore, it is appropriate to vacate an arbitral award.”); *Btp Structural Pvt. Ltd. v. Bharat Petroleum Corp. Ltd.*, Arb. Petition No. 442 of 2010, High Court of Judicature, Bombay Ord. Civil Jur. (Apr. 27, 2012) (“unilaterally pass[ing] [an] award after taking written argument of Respondent” but with “no opportunity given to Petitioner to submit arguments” is a “clear breach of the principle of natural justice”); Restatement (Third) Foreign Relations Law of the United States § 482 cmt. b (Am. Law Inst. 1987) (a defendant must be able to “secure documents or attendance of witnesses” for **due process** to obtain and allow a foreign judgment to be enforced).

**126** See Judgment of Jan. 31, 2012, 4A\_360/2011 (Switzerland, First Civil Law Court). Numerous other cases are discussed in Dirk Otto & Omaia Elwan, “Article V(2),” in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* 345–414 (Herbert Kronke et al. eds., 2010).

**127** *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992) (refusing recognition of arbitral award under the **due process** defense of the New York Convention).

**128** See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that an individual is entitled to an oral hearing before an impartial decision-maker, the right to confront and cross-examine witnesses, and

the right to a written opinion setting out the evidence relied upon and the legal basis for the decision); *Greene v. McElroy*, 360 U.S. 474, 496 (1959) (holding that “where governmental action seriously injures an individual, and the reasonableness of the action depends on factfindings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue”).

**129** *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶¶ 197–247 (Dec. 23, 2010) (citing UNCITRAL Model Law in interpreting right to be heard).

**130** *Ohio Bell Tel. Co. v. Pub. Utils. Comm’n*, 301 U.S. 292, 300 (1937).

**131** *Id.* This notion also incorporates the basic requirements that, except in emergent circumstances, cases should not be decided *ex parte*. As recently held by the UK Supreme Court,

[t]he idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties.

Judgment in *Bank Mellat v. Her Majesty’s Treasury*, [2013] UKSC.

**132** See *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Dissenting Opinion of Arbitrator Dr. Jürgen Voss, ¶¶ 224–25, 336, 350 (Mar. 1, 2011).

**133** *Id.*

**134** Cheng, *supra* note 2, at 229–301.

**135** *Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden/Poland)*, P.C.I.J., Series A, No. 23, at 18–19 (1929). There has also been some debate over whether a litigant is denied access to justice when he is subject to conflicting decisions within a municipal legal system, but is thereafter denied any appellate right to resolve that inconsistency. See *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (July 8, 2016). Although, on one hand, inconsistent decisions is a natural feature of federalized or hierarchical court systems, see *id.* ¶¶ 528–29, where different decisions are made against the same party and applying the same law, with no right of appeal, it may offend the “basic requirements of fairness and access to justice that international law demands.” *Id.* Concurring and Dissenting Op. of Gary Born, ¶¶ 40–72.

**136** *Richardson v. Lynda Rivers*, A1993/02 (Aug. 23, 2004).

**137** *Id.*; see also Thomas W. Wälde, “Equality of Arms” in *Investment Arbitration: Procedural Challenges*, in *Arbitration under International Investment Agreements: A Guide to the Key Issues* 180 (Katia Yannaca-Small ed., 2010).

**138** See, e.g., Eur. Ct. H.R. art. 6(3)(b)–(c).

**139** See Wälde, *supra* note 137, at 171–72.

**140** *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶ 78 (June 23, 2008); see also The Basic Principles on the Role of Lawyers princ. 16, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990) (“Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”); Abba Kolo, *Witness Intimidation, Tampering and Other Related Abuses of Process in Investment*

*Arbitration: Possible Remedies Available to the Arbitral Tribunal*, 26 Arb. Int'l 43, 53 (2010) (stating that counsel and witness intimidation "should be viewed as a fundamental threat to rule of law and **due process**").

**141** *Methanex Corp. v. United States of America*, NAFTA, Final Award, ¶ 54 (Aug. 3, 2005) (stating that "the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them"); see also *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶ 72 (June 23, 2008).

**142** *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶ 79 (June 23, 2008).

**143** ALI/UNIDROIT Principles of Transnational Civil Procedure cmt. P-3B, 2004-4 Unif. L. Rev. 758.

**144** *Id.* princ. 3.2 (emphasis added).

**145** *Id.*

**146** *Loewen Grp., Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, NAFTA, Award, ¶ 136 (June 26, 2003).

**147** *Id.* ¶ 119.

**148** *Id.* ¶ 123. See also *Bird v. Glacier Elec. Coop. Inc.*, 255 F.3d, 1136, 1140, 1152 (9th Cir. 2001) (noting that "[t]he trial throughout had racial overtones that culminated a closing argument by Glacier Construction that repeatedly appealed to racial and ethnic prejudice" and concluding that "appeal to racial prejudice in closing argument in its civil case in tribal court offended fundamental fairness and violated **due process**").

**149** *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995); see also Restatement (Third) Foreign Relations Law of the United States § 482 cmt. b (Am. Law Inst. 1987) (a defendant must be able to "secure documents or attendance of witnesses" for **due process** to obtain).

**150** *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (citing *Hilton v. Guyot*, 159 U.S. 113, 205 (1895)). See also *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1336, 1341 (S.D. Fla. 2009) (where provisions of the Nicaraguan special law unfairly targeted "a narrowly defined group of foreign defendants and subject[ed] them to discriminatory provisions that d[id] not apply to domestic defendants," the law offended the general principle of equality before the law that is "basic to any definition of **due process** or fair play.").

**151** See Charles T. Kotuby Jr. & Luke A. Sobota, *Practical Suggestions to Promote the Legitimacy and Vitality of International Investment Arbitration*, 28 ICSID Rev. 454, 461 (2013).

**152** John Milton, *Paradise Regained*, Book IV, ll at 1–3.

**153** Annekatrien Lenaerts, *The Role of the Principle Fraus Omnia Corruptit in the European Union: A Possible Evolution Towards a General Principle of Law?*, 32 Y.B. Eur. L. 460, 460 (2013).

**154** *United States v. Throckmorton*, 98 U.S. 61, 64 (1878). See also *The Amistad*, 40 U.S. 518, 520 (1841) ("Fraud will vitiate any, even the most solemn transactions; and any asserted title founded upon it, is utterly void."); *The Amiable Isabella*, 19 U.S. 1, 27 (1821) ("Fraud will vitiate even a judgment, and the most solemn instruments and assurances. This is a principle of universal law...").

**155** Cheng, *supra* note 2, at 158.

**156** ICC Case No. 1110, Award (1963), 10(3) Arb. Int'l 282, 294 (1994); see also ICC Case No. 6497 of 1994, Final Award, 24 Y.B. Comm. Arb. 71, 72 (1999) ("If the bribery nature of the agreements would be demonstrated, such agreements would be null and void in Swiss law. This is not because such bribe would be prohibited by the criminal law of the country in which bribes had been paid, but because the bribes in themselves cannot be, in Swiss law, the object of a valid contract. This is also admitted in most legal systems.") (citation omitted).

**157** ICC Case No. 1110, Award (1963), 10(3) Arb. Int'l 282, 294 (1994).

**158** *Id.* ¶ 23.

**159** The overlap here with other general principles is evident. For instance, in some European countries, such as Belgium and France, the “principle *fraus omnia corrumpit* is perceived as a distinct corrective mechanism in relation to the general principle prohibiting the abuse of rights,” whereas in others, such as Germany and the Netherlands, “the principle *fraus omnia corrumpit* is considered a specific application of the principle of good faith in its limitative function.” Lenaerts, *supra* note 153, at 472, 473.

**160** *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶¶ 327, 373 (Oct. 4, 2014) (dismissing BIT claim for lack of jurisdiction where investment was tainted by corruption).

**161** *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶ 111 (Dec. 8, 2000).

**162** *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006) (where the tribunal dismissed an investor’s claim after discovering that he had bribed the president of Kenya); see also Carolyn B. Lamm, Hansel T. Pham & Rahim Maloo, *Fraud and Corruption in International Arbitration*, TDM 3 (May 2013) (“The prohibition of bribery and corruption is widely recognized as a quintessential rule of transnational public policy. International consensus vehemently declares that bribery and corruption is morally and economically unacceptable [and] fundamentally wrong. [This view] is so universal that it has developed into a well-established example of a rule of transnational public policy.”).

**163** *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

**164** *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006).

**165** Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID Rev. 208, 214 (1995).

**166** See, e.g., Foreign Corrupt Practices Act (FCPA), Pub. L. 95-213, 91 Stat. 1494 (1977), as amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-148, Title V, § 50003(c), 102 Stat. 11 07, 1419 (1988) (codified at 15 U.S.C. 78dd-1, 2), and further amended by The International Anti-Bribery and Fair Competition Act of 1998, § 2375; The Inter-American Convention against Corruption, done at Caracas on Mar. 29, 1996 (entered into force Mar. 6, 1997), 35 I.L.M. 724 (1996); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997 (entered into force Feb. 15, 1999); Council of Europe Criminal Law Convention on Corruption, done at Strasbourg on Jan. 27, 1999 (entered into force Jan. 7, 2002), CETS No. 173, 38 I.L.M. 505 (1999); Council for Europe Civil Law Convention on Corruption, done at Strasbourg on Apr. 11, 1999 (entered into force Jan. 11, 2003), CETS No. 174; African Union Convention on Preventing and Combating Corruption, done at Maputo on July 11, 2003, 43 I.L.M. 5 (2004); United Nations Convention against Corruption, done at New York on Oct. 31, 2003 (entered into force Dec. 14, 2005), G.A. Res. 58/4, U.N. Doc. N58/422 (currently 140 Signatories, of which 137 have ratified).

**167** Lamm et al., *supra* note 162, at 712.

**168** *Lazarus Estates Ltd. v. Beasley*, [1956] 1 Q.B. 702, 712 per Denning L.J.

**169** *E.g., id.*; see also ICC Case No. 1110, Award (1963), 10(3) Arb. Int'l 282, 294 (1994).

**170** See, e.g., *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006); *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006); *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1960) (deciding not to allow the enforcement of a government contract where, in the negotiations of the contract, the Government had been represented by a consultant to the Budget Bureau who was at

the same time an officer in an investment bank that was expected to profit from the transaction by becoming a financial agent for the project).

**171** Cheng, *supra* note 2, at 159.

**172** *Id.* at 358.

**173** *Id.* at 160.

**174** *Id.* at 360.

**175** *Id.* at 159. The ability to overturn an otherwise final judgment constitutes an exception to the competing principle of *res judicata* discussed in chapter 3.G. Although “error through fraud of the parties does not, strictly speaking, constitute a cause of nullity,” it does, in this context, present “a cause of voidability.” *Id.* at 360–61.

**176** *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

**177** *Id.* at 246–47.

**178** *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1121 (1st Cir. 1989).

**179** See, e.g., *European Gas Turbines v. Westman Int'l Ltd.*, ICC, Rev. Arb. 359 (1994) (ICC award annulled by Paris Court of Appeal because Respondent had submitted fraudulent financial reports to the tribunal); Australian International Arbitration Act 1974 § 19 (stating that an award is in conflict with the public policy of Australia if it was “induced or affected by fraud”); Belgian Judicial Code art. 1717, § 3(b)(ii)–(iii) (stating that an arbitral award can be set aside if it was obtained by fraud or it is contrary to public policy); India Arbitration and Conciliation Act 1996 §§ 34(2)(b)(ii), 48(2)(b) (“for the avoidance of any doubt” “an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption”); Netherlands Arbitration Act of 1986 art. 1068 (allowing for revocation of arbitral awards if fraud is discovered); New Zealand Arbitration Act of 1996 art. 36(3)(a) (stating that an award is in conflict with the public policy of New Zealand if it was “induced or affected by fraud”); United Kingdom Arbitration Act of 1996 § 68(2)(g) (providing the ability to challenge an award “obtained by fraud”); United States Federal Arbitration Act, 9 U.S.C. § 10(a)(1) (authorizing courts to set aside awards obtained by fraud); Zimbabwe Arbitration Act of 1996 arts. 34(5)(a), 36(3) (stating that if the making of the award was induced or effected by fraud or corruption, “the ‘award is in conflict with the public policy of Zimbabwe’ ”); see generally Lamm et al., *supra* note 162, at 716–17.

**180** See, e.g., Uniform Foreign Money Judgments Recognition Act § 4(b)(2) (no recognition if “the judgment was obtained by fraud”); N.Y. CPLR § 5304(b)(3) (a foreign judgment need not be recognized or enforced if it was “obtained by fraud”); *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895) (stating that “fraud in procuring the judgment” will bar recognition); *de Manes Lopez v. Ford Motor Co.*, 470 F. Supp. 2d 917 (S.D. Ind. 2006); *Powell v. Cockburn* (1977) 2 S.C.R. 218 (Can.); *Aboulloff v. Oppenheimer*, (1882) 10 Q.B.D. 295 (Eng.); *Price v. Dewhurst*, (1837) 8 Sim. 279 (Eng.); *Munzer Case*, Cour de Cassation (Fr.) (Jan. 7, 1964) (J. Droit Int'l (Clunet) 302 (1964)); Foreign Judgments Enforcement Act 5718-1958 § 6(1) (Israel); Italian Code of Civil Procedure arts. 798 & 395.

**181** In light of the inherent wrongfulness of fraudulent conduct, the reasonable inferences that may be drawn from a party’s decision to resort to fraud, and the need to deter future acts of fraud, the remedy for fraud is appropriately more exacting than that for abuse of rights. See Lenaerts, *supra* note 153, at 469, 493 (“[T]he principle of the prohibition of abuse of rights has a more limited corrective function than *fraus omnia corrumpit*: the judge may only limit the exercise of the subjective right to what would be reasonable and fair or refuse it to the extent that this is necessary to neutralize the improper conduct (reduction to zero)... . On the contrary, the principle of *fraus omnia corrumpit* will totally exclude the application of a rule of law in the case of fraud.”).

**182** Judgment of Sept. 23, 1977, Cour de Cassation (1978) Pasicrisie 100. Confirmed in Judgment of May 29, 1980, Cour de Cassation (1980) Pasicrisie 1190; Judgment of Mar. 18, 2010, Cour de Cassation (2010). Decisions from France are in accord. See, e.g., Judgment of May 23, 1977, Cour

de Cassation (Ch civ) (1977) Bulletin civil, I, 244. Confirmed in Judgment of Feb. 21, 2001, Cour de Cassation (Ch civ) (2001) Bulletin civil, III, 20.

**183** Judgment of Nov. 6, 2002, Court de Cassation (2003) Journal des Tribunaux 310.

**184** See *supra* chapter 2.D.

**185** Lenaerts, *supra* note 153, at 466.

**186** *Twyne's Case* (1601), 3 Co. 80, 81a.

**187** See chapter 3.E.

**188** *Case concerning Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803, 856 (Dec. 12) (separate opinion of Judge Rosalyn Higgins); see Aloysius P. Llamzon, *Corruption in International Investment Arbitration* 233 (2014) ("When serious allegations of wrongdoing are involved in civil proceedings ... both [national and international] systems generally demand a heightened standard of proof.").

**189** *Waguïh Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, ¶ 326 (May 11, 2009) (applying a "clear and convincing" standard that was greater than "the balance of probabilities" but less than "beyond a reasonable doubt"); see Caroline E. Foster, *Burden of Proof in International Courts and Tribunals*, 29 *Austl. Y.B. Int'l L.* 27, 61 (2010) ("Where the charges leveled against a state are considered to be particularly serious there has been some inclination to maintain a higher standard of proof.").

**190** *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, ¶ 125 (Sept. 2, 2011); see also *Westinghouse and Burns & Roe (USA) v. Nat'l Power Co. and Republic of the Philippines*, ICC Case No. 640, Preliminary Award (Dec. 19, 1991); *Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A.*, ICC Case No. 5622, ¶ 23 (1988); *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009); *Himpurna California Energy Ltd. v. Perusahaan Listrik Negara*, 25 *Y.B. Comm. Arb.* 11, 42 (2000).

**191** Transparency International, *Corruption Perceptions Index 2015: Results*, available at <https://www.transparency.org/cpi2015#results-table>. The notorious presence of corruption in certain countries may be considered as circumstantial evidence of fraud in a particular case. See, e.g., *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, ¶ 446 (July 29, 2008) (finding that international reports and articles indicated a general lack of impartiality in Kazakhstan's judiciary); *Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Co.*, [2011] *EWHC* 1461, ¶ 36 (taking a country's reputation for corruption into account as circumstantial evidence because "partiality and dependency by their very nature take place behind the scenes"). A similar practice obtains in the United States, where generalized proof of systemic **due process** concerns can be sufficient to refuse recognition of a foreign judgment from that country. See, e.g., *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995).

**192** *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶ 243 (Oct. 4, 2014) (noting that, on the facts of that case, corruption had been established with "reasonable certainty").

**193** See Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 25 *ICSID Rev.* 47, 57 (2010) (noting that "those who presume that courts around the world unquestionably raise the standard of proof when dealing with serious allegations of fraud should tread with care") (citing *Sec. of State for the Home Dep't v. Rehman*, [2001] *UKHL* 47, [2002] 1 *All ER* 122, ¶ 55 (applying the "more probable than not" standard to allegations of fraud)); *Romp petrol Grp. N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, ¶¶ 180–83 (May 6, 2013) (rejecting the argument that allegations of fraud and other serious wrongdoing, without more, require a heightened standard of proof and instead adopting a "more nuanced approach" to the balance-of-probabilities standard when deciding "whether an allegation of seriously wrongful conduct ... has been proved on the basis of the entire body of direct and indirect evidence before it").

**194** See Llamzon, *supra* note 188, at 230, 237 (“The clandestine and highly complex nature of transnational corruption requires a candid admission that unless the evidentiary principles applied by the tribunal matches the ingenuity of those who are engaged in corruption, it will be difficult to find corruption in any arbitration... [T]he degree of confidence a tribunal should have in the evidence of [] corruption must be high. However, this does not mean that the standard of proof should necessarily be higher, or that circumstantial evidence, inferences, or presumptions and indicators of possible corruption (such as ‘red flags’) cannot come to the aid of the fact-finder. Tribunals are given the freedom and burden of choice, which they should not abdicate by rote reference to an abstract ‘heightened’ standard of proof.”).

**195** Argument in Defense of the British Soldiers in the Boston Massacre Trials (Dec. 4, 1770).

**196** For the distinction between the *standard of proof* and the *burden of proof*, see *Romp petrol Grp. N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (May 6, 2013) (establishing that the burden of proof defines which party has to prove what in order for its case to prevail, and the standard of proof defines how much evidence is needed to establish either an individual issue or the party’s case as a whole).

**197** Gustave Flaubert, *Correspondence 1846*, at 417 (1927).

**198** See, e.g., *Caratube Int’l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment Application, ¶ 97 (Feb. 21, 2014) (noting that a reversal of the burden of proof could lead to a violation of fundamental rules of procedure).

**199** See Cheng, *supra* note 2, at 302–03.

**200** *Id.* at 303. With related transnational disputes often arising simultaneously in different fora, both international and municipal courts have shown a willingness to apply the holdings and accept evidence adduced at the parallel proceedings. See, e.g., *Mohle Case* (German-Venezuelan Commission), 10 Rec. Des Sent’s Arb. 113, 114 (1903); *Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Co.*, [2011] EWHC 1461, ¶¶ 162, 173 (“I therefore accept Yukos Capital’s submission that *Cherney* and like cases [that analyze ‘whether substantial justice would or could be done in Russia’] provide powerful and principled general support for its case.”); *Yukos Capital S.a.r.l. v. OAO Rosneft*, Amsterdam Court of Appeal, Case No. 200.005.269/01, Decision, ¶ 3.8.8 (Apr. 28, 2009); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 n.3 (9th Cir. 1995) (“For purposes of this opinion, we will assume, without deciding, that the Banks are instrumentalities of Iran. Although they have not submitted evidence to that effect, other courts have said that they are.”).

**201** See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 43, ¶ 42 (Feb. 26) (separate order of Judge Lauterpacht) (advocating for the Court taking judicial notice of matters that are “public knowledge,” provided that they are consistent with the main facts proven by evidence in the case); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14, ¶ 62, at 40 (June 27) (relying on press articles and extracts from books as corroborating material to evince the existence of a fact); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. 3, ¶¶ 12–13, at 9–10 (May 24) (same).

**202** Cheng, *supra* note 2, at 305; Foster, *supra* note 189, at 36 (“The presumption of compliance is supported by the idea that what is normal is to be presumed and any other state of affairs is subject to proof.”); Durward v. Sandifer, *Evidence before International Tribunals* 144 (Univ. Press of Virginia rev. ed. 1975) (“Presumptions in favor of the validity of acts of various Government authorities are often invoked.”).

**203** See Foster, *supra* note 189, at 57.

**204** *Abraham Rahman Golshani v. Gov’t of the Islamic Republic of Iran*, 29 Iran-U.S. Cl. Trib. Rep. 78 (1993).

**205** Cheng, *supra* note 2, at 327 (citing 2 Arb. Int’l 706, 708 (Transl.)); see also *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, ¶¶ 121, 124 (July 26, 2007); *Alpha Projektholding*

*GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, ¶¶ 236–37 (Nov. 8, 2010); *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, ¶ 74 (Apr. 29, 1999) (it “can be considered as a general principle of international procedure—and probably also of virtually all national civil procedural laws—[] that it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim”); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID ARB/02/13, Award, ¶ 70 (Jan. 31, 2006) (“It is a well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim.”); *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 56 (June 27, 1990), 6 ICSID Rev. 526 (1991); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID ARB/00/5, Award, ¶ 110 (Sept. 23, 2003); *Int’l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, ¶ 95 (Jan. 26, 2006); ICC Award No. 1434, J. Droit Int’l (Clunet), at 978, 982 (1976); *Perenco Ecuador Ltd. v. Republic of Ecuador & Petroecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction ¶ 98 (June 30, 2011) (stating that the burden to establish the facts supporting a claim lies with the claimant); *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, ¶ 79 (Feb. 10, 2012) (holding that the claimant bears the initial burden of proof in substantiating its claims); *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶ 89 (Apr. 12, 2002); *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, ¶¶ 19.1, 19.4 (Sept. 16, 2003); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 100 (Oct. 12, 2005); *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction, ¶ 83 (Mar. 21, 2007).

**206** Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* 72 (1996) (citing Jackson H. Ralston, *The Law and Procedure of International Tribunals* 220 (1973)); see also *id.* at 53–75 *et seq.*

**207** See Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* 9 (1998); Foster, *supra* note 189, at 45. Cheng also distinguishes between the two, in particular, interpreting the meaning of the decision in the *Parker Case* where the Commission referred to the burden of production rather than persuasion. Consequently, he suggests that the universally accepted principle of *actori incumbit onus probandi* refers to the burden of persuasion. See Cheng, *supra* note 2, at 329 (“It means that a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.”). See also K.P.E. Lasok, *The European Court of Justice, Practice and Procedure* 256 (2d ed. 1994).

**208** Kokott, *supra* note 207, at 186 (referring to Durward V. Sandifer, *Evidence Before International Tribunals* 131 (1975) with references); see also *id.* at 154 (citing K.P.E. Lasok, *The European Court of Justice Practice and Procedure* 422 (2d ed. 1994) (“even in contentious proceedings, there is no allocation of the burden to produce evidence or sources of evidence as between the parties. Both lie under an equal duty to the court to produce evidence or sources of evidence relating to the issue of fact in the case”)).

**209** *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 56 (June 27, 1990), 6 ICSID Rev. 526 (1991); see also ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 21, 2004-4 Unif. L. Rev. 758.

**210** ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 21 & cmt. P-21B, 2004-4 Unif. L. Rev. 758; see also *Inmaris Perestroika Sailing Maritime Servs. GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Award (Mar. 1, 2012).

**211** See, e.g., UNCITRAL Rules (1976) art. 27 (1) (holding that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence”); *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 56 (June 27, 1990), 6 ICSID Rev. 526 (1991); *William Nagel v. Czech Republic*, SCC Case No. 049/2002, Final Award, ¶ 177 (Sept. 9, 2003); *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, ¶ 113 (June

30, 2009) (establishing that the burden of proof lies with the party alleging the fact, whether it is the claimant or the respondent); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, ¶ 8.9 (Aug. 25, 2014) (This is “a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions.”); *Abraham Rahman Golshani v. Gov’t of the Islamic Republic of Iran*, 29 Iran-U.S. Cl. Trib. Rep. 78 (1993).

**212** See Foster, *supra* note 189, at 42–44.

**213** *Id.* at 44.

**214** *Case concerning the Temple of Preah Vihear (Cambodia v. Thai.)*, Merits, Judgment, 1962 I.C.J. 6, at 16 (June 15); *Case concerning the Gabčíkovo kovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. 7, at 42 (Sept. 25) (holding that Hungary bore the burden of proof regarding its defense of ecological necessity for breaching its obligations under a treaty); *Case concerning Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶ 162 (Apr. 20) (“[I]t is the duty of the party which asserts certain facts to establish the existence of such facts.”); Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India at pg. 14 (US-Wool Shirts)*, WT/DS33/AB/R (Apr. 25, 1997) (“[I]t is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.”); see also Bin Cheng, *Burden of Proof before the I.C.J.*, 2 Int’l & Comp. L.Q. 595, 596 (1953); ICC Award No. 3344, J. Droit Int’l (Clunet) at 978, 983 (1982) (acknowledging the “rule of procedure, generally acknowledged in the various domestic legal systems, according to which every party must prove the facts which it alleges”); ICC Award No. 6653, J. Droit Int’l (Clunet) at 1040, 1044 (1993) (same).

**215** *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 63 (May 29, 2003).

**216** See, e.g., *William A. Parker (U.S.A.) v. United Mexican States* (Mar. 31, 1926), 4 R.I.A.A. 35, 39 (“when the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting”); *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, ¶ 84 (Apr. 29, 1999); see also Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (Apr. 25, 1997).

**217** See *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (Dec. 24, 1996) and Award (Apr. 29, 1999), 25 Y.B. Comm. Arb. 221, 240–41 (2000); *Case concerning Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo)*, Merits, Judgment, 2010 I.C.J. 639, ¶ 54 (Nov. 30) (“The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case.”).

**218** Cheng, *supra* note 2, at 310.

**219** See *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (Dec. 24, 1996) and Award (Apr. 29, 1999), 25 Y.B. Comm. Arb. 221, 240 (2000); *Buckamier v. Islamic Republic of Iran et al.*, 28 Iran-U.S. Cl. Trib. Rep. 307 (1992); ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 16 & cmt. 16-B, G, 2004-4 Unif. L. Rev. 758 (stating that, although it may be the rule in national systems, courts should not ascribe negative value to an interested party’s testimony); see also Nathan D. O’Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* 122 (2013) (noting the modern “departure from the view of early international tribunals,” and citing Bin Cheng as ascribing to that earlier view).

**220** *Case concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 61 (Dec. 19).

**221** *Id.*

**222** Cheng, *supra* note 2, at 318–19.

**223** *Id.* at 322.

**224** *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3, ¶ 35 (Aug. 29, 2008).

**225** ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 21.3, 2004-4 Unif. L. Rev. 758; see also Cheng, *supra* note 2, at 325; Christopher H. Schreuer, The ICSID Convention: A Commentary 656 (2001); *Europe Cement Inv. & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, ¶¶ 164–66 (Aug. 13, 2009); *Rompétrol Grp. N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, ¶¶ 178–86 (May 6, 2013); *Riahi v. Islamic Republic of Iran*, 37 Iran-U.S. Cl. Trib. Rep. 158, 176 (2003) (Brower, J., dissenting); *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 178 (Dec. 16, 2002).

**226** See Foster, *supra* note 189, at 48.

**227** *Corfu Channel Case (U.K. v. Alb.)*, Judgment, Merits, 1949 I.C.J. 4, 18 (Apr. 9); see also ALI/UNIDROIT Principles of Transnational Civil Procedure cmt. P.17B, 2004-4 Unif. L. Rev. 758.

**228** Cheng, *supra* note 2, at 322; see ICC Award No. 4145 (Second Interim Award), 12 Y.B. Comm. Arb. 97 (1987) (also published in: J. Droit Int'l (Clunet), at 985 (1985)) (acknowledging the “general principle[] of interpretation [that] a fact can be considered as proven even by the way of circumstantial evidence”).

**229** *Corfu Channel Case (U.K. v. Alb.)*, Judgment, Merits, 1949 I.C.J. 4, 18 (Apr. 9). Although the ICJ in the *Corfu Channel* case included the caveat that such inference must leave “no room for reasonable doubt,” that high threshold has disappeared in more recent cases; see also *Abrahim Rahman Golshani v. Gov't of the Islamic Republic of Iran*, 29 Iran-U.S. Cl. Trib. Rep. 78 (1993); *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 45 (June 27, 1990).

**230** *Corfu Channel Case (U.K. v. Alb.)*, Judgment, Merits, 1949 I.C.J. 4, 18–20 (Apr. 9).

**231** *Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Co.*, [2011] EWHC 1461, ¶ 36.

**232** *Corfu Channel Case (U.K. v. Alb.)*, Judgment, Merits, 1949 I.C.J. 4, 18 (Apr. 9).

**233** *Id.*

**234** See Michael P. Scharf & Margaux Day, *The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences*, 13 Chi. J. Int'l L. 123, 131 (2012).

**235** *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Award, ¶¶ 302–03 (Apr. 23, 2012).

**236** *Methanex Corp. v. United States of America*, NAFTA, Final Award, ¶¶ 54–59 (Aug. 3, 2005). The Tribunal also noted, “*ex hypothesi*,” that “[i]t would be wrong for the USA ... to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials.” *Id.* ¶ 54; see also *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3, ¶ 38 (Aug. 29, 2008).

**237** *Methanex Corp. v. United States of America*, NAFTA, Final Award, ¶ 59 (Aug. 3, 2005).

**238** See, e.g., *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, ¶¶ 383–84 (Sept. 2, 2011).

**239** *Id.*; see also *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3, ¶ 38 (Aug. 29, 2008).

**240** Dissenting in *Factory at Chorzów (Fed. Rep. Ger. v. Pol.)*, Interpretation of Judgments Nos. 7 and 8, Judgment, 1927 P.C.I.J. (Ser. A) No. 13 (Dec. 16).

**241** Cheng, *supra* note 2, at 336.

**242** *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*

(*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, 51 ¶ 116 (Feb. 26).

**243** See 3 Digest of Justinian, Book 44, 2.6.

**244** See *Waste Mgmt., Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objections concerning the Provisions Proceedings, ¶ 39 (June 26, 2002); see also *Industria Nacional de Alimentos, S.A. and Indalsa Peru, SA. v. Peru*, ICSID ARB/03/4, Decision on Annulment, ¶ 86 (Sept. 5, 2007); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, ¶ 7.11 (Aug. 25, 2014); *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Resubmitted Case, Decision on Jurisdiction (May 10, 1988), 89 Int’l L. Rep. 552, 560; *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, at 53 (July 13); *Case concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)*, Judgment, 1960 I.C.J. 192 (Nov. 18); *Boundary Dispute between Argentina and Chile concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy*, Award (Oct. 21, 1994), 22 R.I.A.A., ¶ 68. Butressing this conclusion, the principle of *res judicata* is well established in the common law jurisdictions of England, Ireland, Canada, India, Australia, New Zealand, and the United States; the continental civil law systems of France, Belgium, the Netherlands, Germany, Italy, and Belgium; and the Latin American civil law systems of Mexico and Argentina, just to name a few. See generally ILA Berlin Conference, Interim Report on *Res Judicata* and Arbitration (2004).

**245** *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, 53 (July 13) (it is a “well-established and generally recognized principle of law [that] a judgment rendered by a judicial body is *res judicata* and has binding force between the parties to the dispute.”).

**246** See *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, ¶¶ 205-07 (Feb. 6, 2008). See also D.W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, 33 Brit. Y.B. Int’l L. 176, 177 (1957).

**247** Cheng, *supra* note 2, at 337–38.

**248** *Company General of the Orinoco Case*, 10 RIAA 184, 276 (July 31, 1905). Of course, where different legal systems are involved, the prior decision must be recognized before it will be given *res judicata* effect. *Chevron Corp. v. Donziger*, 886 F. Supp. 2d 235, 240 (S.D.N.Y. 2012).

**249** Decision of Nov. 30, 1995, RDJ t. XCII sec. 1, at 116 (Chilean Supreme Court).

**250** Like many general principles, this rule is not absolute, but those exceptions do not denigrate the principle of *res judicata*. Where, for instance, new facts have “come to light subsequent to [its] decision” that cast doubt as to the correctness of the decision, a case may be reopened and reconsidered. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, 2007 I.C.J. 43, 53 ¶ 120 (Feb. 26).

**251** See, e.g., Stavros Brekoulakis, *The Effect of an Arbitral Award and Third Parties in International Arbitration*, 16 Am. Rev. Int’l Arb. 177, 182 (2005) (detailing the “great divergence among national legal regimes with regard to *res judicata*,” with the “differences[] particularly marked between common and civil law jurisdictions”).

**252** See, e.g., *Trail Smelter Arbitration*, 3 RIAA 1905 (1953) (Mar. 11, 1941).

**253** *Waste Mgmt., Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objections concerning the Previous Proceedings, ¶ 43 (June 26, 2002).

**254** *Id.*

**255** *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Keith Highet, ¶ 58 n.45 (May 8, 2000).

**256** *Waste Mgmt., Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objections concerning the Previous Proceedings, ¶ 43 (June 26,

2002).

**257** *Bosh Int'l, Inc and B&P Ltd Foreign Invs. Enter. v. Ukraine*, ICSID Case No. ARB/08/11, Award, ¶¶ 260–86 (Oct. 25, 2012).

**258** See, e.g., Code of Civil Procedure of Argentina art. 67; *Horton v. Horton*, 18 Cal. 2d 579, 585 (1941) (stating that “[i]t is immaterial that the judgment which is assailed was procured by default. The defendants in that action had an opportunity to appear and protect their interest. They deliberately waived the right to their day in court by failing to appear and answer the complaint. A default judgment is an estoppel as to all issues necessarily litigated therein and determined thereby exactly like any other judgment provided the court acquired jurisdiction of the parties and subject matter involved in the suit.”); *Maddux v. County Bank*, 129 Cal. 665, 667 (1900) (finding that “[a] judgment by default stands on the same footing as a judgment after answer and trial with respect to issues tendered by the plaintiff’s complaint”); *Kahn v. Kahn*, 68 Cal. App. 3d 373, Court of Appeals of California, First Appellate District, Division One (Mar. 24, 1977).

**259** See, e.g., Civil Procedure Rules 1998 of England art. 13.2.

**260** Cheng, *supra* note 2, at 348.

**261** ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 28.2, 2004-4 Unif. L. Rev. 758, 804.

**262** Cheng, *supra* note 2, at 349–50. Generally speaking, if the issue falls within the court’s competence (i.e., it relates to the rights between the parties before the court and is not subject to the exclusive jurisdiction of another court), and is a necessary and essential condition to the determination of the principal question, then the decision on that issue is *res judicata*. Thus, if a tribunal holds that a claimant was denied justice, the essential holding that the claimant has exhausted his local remedies is likewise *res judicata*. *Id.* at 355. This is not collateral estoppel or issue preclusion—which generally obtains only in common law systems and is thus not a general principle of law; see, e.g., ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 28.3, 2004-4 Unif. L. Rev. 758, 806—but rather a holistic interpretation of the judgment and all things necessary to it. See *Delimitation of the Continental Shelf (U.K. v. Fr.)*, Decision (Mar. 14, 1978), 18 R.I.A.A. 271, 295 (although *res judicata* “attaches in principle only to the provisions of [the decision’s] *dispositif* and not to its reasoning,” it is equally clear that “having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the *dispositif*”).

**263** Eugene Petit, *Tratado Elemental de Derecho Romano* 630–31 (1994).

**264** Robert Pothier, *Tratado de las Obligaciones* (1761).

**265** See *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF/12/1), Award, ¶¶ 7.10–7.32 (Aug. 25 2014); *Waste Mgmt., Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings, ¶¶ 40–41 (June 26, 2002); *Factory at Chorzów (Fed. Rep. Ger. v. Pol.)*, Interpretation of Judgments Nos. 7 and 8, Judgment, 1927 P.C.I.J. (Ser. A) No. 13 (Dec. 16) (dissenting opinion by Judge Dionisio Anzilotti); *Trail Smelter Case (U.S. v. Canada)*, Award (Mar. 11, 1941), 3 R.I.A.A. 1905, 1952–53; see also Cheng, *supra* note 2, at 339–40.

**266** See *Chevron Corp. et al. v. Republic of Ecuador*, PCA Case No. 2009-23, First Partial Award on Track I, ¶¶ 94–108 (Sept. 17, 2013).

**267** See, e.g., *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF) 12/1, Award, ¶¶ 7.41–7.62 (Aug. 25, 2014) (finding that the triple identity standard provides a stringent test, and applying a simpler twofold test that only requires there to be an identity of the parties and an identity of the matter of the dispute); Cheng, *supra* note 2, at 339–40. Regardless of the articulation, the legal standard in those systems are functionally the same.

Where the object and *causa petendi* are subsumed in a single question whether the “matter in dispute” is the same, the “matter” is interpreted to encompass the requests for a legal benefit arising out of a certain set of facts, so the difference in nomenclature does not denigrate the general principle or its application.

**268** Vaughn Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 Afr. J. Int'l & Comp. L. 38, 40–41 (1996). To avoid piecemeal litigation, in certain circumstances the alternative legal theory may be waived or barred if it could have been, but was not, brought at the same time.

**269** *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award on Damages, ¶ 435 (Mar. 14, 2003).

**270** See *Petrobart Ltd. v. Kyrgyz Republic*, SCC Arbitration No. 126/2003, Award, 65–68 (Mar. 29, 2005) (when a claimant initiates “two separate UNCITRAL proceedings, based on different arbitration clauses, one in the Foreign Investment Law and the other in the Treaty, the first one dealing with the question of investments under Kyrgyz law and the other one with compliance or not with the Treaty,” a decision by one tribunal will not operate as *res judicata* over the other).

**271** Compare *Carver v. Nall*, 172 F.3d 513, 515 (7th Cir. 1999) (“[T]he fundamental point remains that *res judicata* cannot operate in the absence of a judgment,” and a “settlement agreement that has not been integrated into a consent decree is not a judgment and cannot trigger *res judicata*.”); *Meyer v. Rigdon*, 36 F.3d 1375, 1379 (7th Cir. 1994) (“[S]ettlement agreements not approved by a court are not given preclusive effect.”); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 852 (9th Cir. 2000) (“[A] settlement [that] is not incorporated into a judgment ... cannot have preclusive effect.”); with *Chevron Corp. et al. v. Republic of Ecuador*, PCA Case No. 2009-23, First Partial Award on Track I, ¶¶ 107–08 (Sept. 17, 2013) (holding that, under Ecuadorian law, diffuse environmental claims had been extinguished by a settlement agreement); French Civil Code art. 2052 (“Transactions [a contract by which the parties put an end to an existing controversy, or prevent a future contestation] have, between the parties, the authority of *res judicata* of a final judgment.”); Chilean Civil Code art. 2460 (“The transaction [a contract by which the parties extra-judicially put an end to an existing controversy, or prevent eventual litigation] has the effect of *Res Judicata* in last resort ... .”); Ecuadorian Civil Code art. 2362 (“The transaction has the effect of *Res Judicata* in last resort ... .”); Colombian Civil Code art. 2483 (“The transaction has the effect of *Res Judicata* in last resort ... .”).

**272** *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, ¶¶ 205–07 (Feb. 6, 2008).

# **Exhibit 14**



[GET STARTED \(/GET-STARTED\)](/GET-STARTED)

[NEWS & MEDIA \(/NEWS\)](/NEWS)

[POLICY \(/POLICY\)](/POLICY)

[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](/PUBLIC-COMMENTS)

[RESOURCES \(/RESOURCES\)](/RESOURCES)

[COMMUNITY \(/COMMUNITY\)](/COMMUNITY)

[IANA STEWARDSHIP  
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](/STEWARDSHIP-ACCOUNTABILITY)

## Preliminary Report | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

04 Feb 2018

**Formal Minutes are still to be approved by the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#).**

**Note: This has not been approved by the Board and does not constitute minutes but does provide a preliminary attempt setting forth the unapproved reporting of the resolutions from that meeting. Details on voting and abstentions will be provided in the Minutes, when approved at a future meeting.**

**NOTE ON ADDITIONAL INFORMATION INCLUDED WITHIN PRELIMINARY REPORT – ON RATIONALES – Where available, a draft Rationale for each of the Board's actions is presented under the associated Resolution. A draft Rationale is not final until approved with the minutes of the Board meeting.**

**A Regular Meeting of the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board of Directors](#) was held in person on 4 February 2018 in Santa Monica, California at 21:15 UTC.**

**Cherine Chalaby, Chair, promptly called the meeting to order.**

In addition to the Chair, the following Directors participated in all or part of the meeting: Maarten Botterman, Becky Burr, Ron da Silva, Sarah Deutsch, Chris Disspain (Vice Chair), Avri Doria, Rafael Lito Ibarra, Khaled Koubaa, Akinori Maemura, Göran Marby (President and CEO), George Sadowsky, Léon Sanchez, Matthew Shears, Mike Silber, and Lousewies van der Laan.

The following Board Liaisons participated in all or part of the meeting: Manal Ismail (GAC (Governmental Advisory Committee) Liaison), Ram Mohan (SSAC (Security and Stability Advisory Committee) Liaison), Kaveh Ranjbar (RSSAC (Root Server System Advisory Committee) Liaison), and Jonne Soininen (IETF (Internet Engineering Task Force) Liaison).

Secretary: John Jeffrey (General Counsel and Secretary).

The following ICANN (Internet Corporation for Assigned Names and Numbers) Org Executives and Staff participated in all or part of the meeting: Akram Atallah (President, Global Domains Division), Susanna Bennett (Chief Operating Officer), Duncan Burns (Senior Vice President, Global Communications), Xavier Calvez (Senior Vice President, Chief Financial Officer), David Conrad (Senior Vice President and Chief Technology Officer), Samantha Eisner (Deputy General Counsel), John Jeffrey (General Counsel and Secretary), Aaron Jimenez (Board Operations Senior Coordinator), Tarek Kamel (Sr. Advisor To President & SVP, Government And IGO (Intergovernmental Organization) Engagement), Vinciane Koenigsfeld (Director, Board Operations), Elizabeth Le (Associate General Counsel), David Olive (Senior Vice President, Policy Development Support), Wendy Profit (Board Operations Specialist), Ashwin Rangan (Senior Vice President Engineering & Chief Information Officer), Lisa Saulino (Board Operations Senior Coordinator), Diane Schroeder (Senior Vice President of Global Human Resources), Amy Stathos (Deputy General Counsel), and Theresa Swinehart (Senior Vice President, Multistakeholder Strategy And Strategic Initiatives).

This is a Preliminary Report of the Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board, which was held in person on 4 February 2018 in Santa Monica, California.

1. Consent Agenda:

a. Approval of Board Meeting Minutes

b. Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) Appointments

*Rationale for Resolution 2018.02.04.02*

c. **Root Server System Advisory Committee (Advisory Committee) Appointments**

*Rationale for Resolution 2018.02.04.03*

d. **Singapore Office Lease Renewal**

*Rationale for Resolution 2018.02.04.04*

e. **Brussels Office Lease Renewal**

*Rationale for Resolutions 2018.02.04.05 – 2018.02.04.06*

f. **SSAC (Security and Stability Advisory Committee) Advisory on Registrant (Registrant) Protection related to credential management lifecycle**

*Rationale for Resolution 2018.02.04.07*

g. **Renewal of .MUSEUM Registry Agreement**

*Rationale for Resolution 2018.02.04.08*

2. **Main Agenda:**

a. **Confirmation of Reserve Fund Target Level**

*Rationale for Resolutions 2018.02.04.09 – 2018.02.04.10*

b. **Adoption of FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget**

*Rationale for Resolution 2018.02.04.11*

c. **Addressing the New gTLD (generic Top Level Domain) Program Applications for .CORP, .HOME, and .MAIL**

*Rationale for Resolution 2018.02.04.12*

d. **GAC (Governmental Advisory Committee) Advice : Abu Dhabi Communiqué (November 2017)**

*Rationale for Resolution 2018.02.04.13*

e. **Next Steps in Community Priority Evaluation Process Review – UPDATE ONLY**

f. **AOB**

1. Consent Agenda:

The Chair introduced the items on the Consent Agenda. George Sadowsky moved and Khaled Koubaa seconded. The Chair then called for a vote of the items on the Consent Agenda. The Board then took the following action:

Resolved, the following resolutions in this Consent Agenda are approved:

a. Approval of Board Meeting Minutes

Resolved (2018.02.04.01), the Board approves the minutes of the 13 December 2017 Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

b. Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) Appointments

Whereas, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) reviews its membership and makes adjustments from time-to-time.

Whereas, the SSAC (Security and Stability Advisory Committee) Membership Committee, on behalf of the SSAC (Security and Stability Advisory Committee), requests that the Board appoint Barry Leiba and Chris Roosenraad to the SSAC (Security and Stability Advisory Committee) for terms beginning immediately upon approval of the Board and ending on 31 December 2020.

Resolved (2018.02.04.02), the Board hereby appoints Barry Leiba and Chris Roosenraad to the SSAC (Security and Stability Advisory Committee) for terms beginning immediately upon approval of the Board and ending on 31 December 2020.

*Rationale for Resolution 2018.02.04.02*

The SSAC (Security and Stability Advisory Committee) is a diverse group of individuals whose expertise in specific subject matters enables the SSAC (Security and Stability Advisory Committee) to fulfil its charter and execute its mission. Since its inception, the SSAC (Security and Stability Advisory Committee) has invited

individuals with deep knowledge and experience in technical and security areas that are critical to the security and stability of the Internet's naming and address allocation systems.

The SSAC (Security and Stability Advisory Committee)'s continued operation as a competent body is dependent on the accumulation of talented subject matter experts who have consented to volunteer their time and energies to the execution of the SSAC (Security and Stability Advisory Committee) mission.

Many of the SSAC (Security and Stability Advisory Committee) members have known Barry Leiba from his extensive work in the Internet Engineering Task Force (IETF (Internet Engineering Task Force)), including being working group chair, being Applications Area Director, and serving on the Internet Architecture Board. He brings significant expertise in Internet messaging and messaging-related standards, more broadly application layer protocols and the security and privacy aspects of them. He has a strong background in internationalization issues.

Chris Roosenraad has participated extensively in the Messaging Anti-Abuse Working Group (MAAWG). He has been active with the Technology Coalition and advising the US Government through the FCC (Federal Communications Commission (USA)) Communications Security (Security – Security, Stability and Resiliency (SSR)), Reliability and Interoperability Council (CSRIC) process. He has extensive experience managing some of the largest Internet infrastructure services, including DNS (Domain Name System), DHCP, email, and identity management.

The SSAC (Security and Stability Advisory Committee) believes Barry Leiba and Chris Roosenraad would be significant contributing members of the SSAC (Security and Stability Advisory Committee).

The appointment of SSAC (Security and Stability Advisory Committee) members is not anticipated to have any fiscal impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the SSAC (Security and Stability Advisory Committee).

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it is

exercising a responsibility specifically reserved to the Board within the Bylaws, and supports the community's work on security and stability-related issues.

This is an Organizational Administrative Function that does not require public comment.

c. Root Server System Advisory Committee (Advisory Committee) Appointments

Whereas, Article 12, Section 12.2(c)(ii) of the Bylaws states that the Board of Directors shall appoint the co-chairs and members of the Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)).

Whereas, on 5 December 2017, the RSSAC (Root Server System Advisory Committee) conducted an election for one co-chair position and re-elected Brad Verd of Verisign (A/J-root server operator organization) to a final two-year term as co-chair.

Whereas, the RSSAC (Root Server System Advisory Committee) requests the Board of Directors action with respect to the appointment of its co-chair.

Resolved (2018.02.04.03), the Board of Directors accepts the recommendation of the RSSAC (Root Server System Advisory Committee) and appoints Brad Verd to a two-year term as co-chair of RSSAC (Root Server System Advisory Committee) and extends its best wishes on this important role.

*Rationale for Resolution 2018.02.04.03*

The ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws call for the ICANN (Internet Corporation for Assigned Names and Numbers) Board to appoint the RSSAC (Root Server System Advisory Committee) co-chairs as selected by the membership of the RSSAC (Root Server System Advisory Committee). The appointment of RSSAC (Root Server System Advisory Committee) co-chairs will allow the RSSAC (Root Server System Advisory Committee) to be properly composed to serve its function as an advisory committee.

The appointment of the RSSAC (Root Server System Advisory Committee) Co-Chairs is not anticipated to have any fiscal impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the RSSAC (Root Server System Advisory Committee).

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it is exercising a responsibility specifically reserved to the Board within the Bylaws, and supports the community's work on root server operational issues.

This is an Organizational Administrative Function for which no public comment is required.

#### d. Singapore Office Lease Renewal

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has maintained a Regional Office in Singapore, since 2013.

Whereas, the lease for the current ICANN (Internet Corporation for Assigned Names and Numbers) Regional Office space in Singapore expires in 2018.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization has evaluated the options to renew the existing lease, or to move to another suitable location.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) org has recommended that the Board authorize the President and CEO, or his designee(s), to take all actions necessary to execute the lease renewal for the current office facility in Singapore, as reflected in the Reference Materials, and make all necessary disbursements pursuant to that lease.

Whereas, during its meeting on 24 January 2018, the Board Finance Committee (BFC) reviewed the financial implications of the options evaluated for the ICANN (Internet Corporation for Assigned Names and Numbers) Regional Office in Singapore.

Whereas, the BFC has determined that the proposal for renewing the lease of the existing Singapore Regional Office is reasonable and properly reflected in the draft FY19 Operating Plan and Budget.

Resolved (2018.02.04.04), the Board authorizes the President and CEO, or his designee(s), to take all necessary actions to execute the lease renewal for the current office facility in Singapore, as reflected in the Reference Materials, and make all necessary disbursements pursuant to that lease.

### *Rationale for Resolution 2018.02.04.04*

To support its globalization strategy, ICANN (Internet Corporation for Assigned Names and Numbers) established a Regional Office in Singapore to better service its stakeholders. To further show ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to its globalization strategy, and meet the demand for increased space to accommodate the projected growth of ICANN (Internet Corporation for Assigned Names and Numbers) organization in Singapore, a three-year lease beginning October 2015 with South Beach Tower was signed. The Singapore Regional Office was moved from a serviced office to a more permanent facility. The current lease expires on 30 September 2018, and ICANN (Internet Corporation for Assigned Names and Numbers) org and the Board Finance Committee (BFC) propose that the lease be renewed for an additional three years.

ICANN (Internet Corporation for Assigned Names and Numbers) org has conducted a market review and performed a cost analysis of renewing the lease versus relocating to another location, and finds lease renewal to be a more viable and cost-effective solution.

The Board reviewed ICANN (Internet Corporation for Assigned Names and Numbers) org's and the Board Finance Committee's recommendations for renewing the current lease for an additional three years and the determination that the proposal met the financial and business requirements of the organization.

Taking this decision is both consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and in the public interest as having a Regional Office in the Asia Pacific region helps serve ICANN (Internet Corporation for Assigned

Names and Numbers)'s stakeholders in a more efficient and effective manner.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) to renew the current lease for an addition three years. This impact is currently included in the FY19 Draft Operating Plan and Budget that is pending Board approval.

This decision will have no direct impact on the security or the stability of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

#### e. Brussels Office Lease Renewal

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has maintained a Regional Office in Brussels, for more than a decade.

Whereas, the lease for the current Brussels Regional Office expires in 2021.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization has evaluated the options to negotiate a reduced rate for the existing lease subject to committing to three more years, or to move to another suitable location.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) org has recommended that the Board authorize the President and CEO, or his designee(s), to take all actions necessary to execute the updated lease for the current office facility in Brussels, as reflected in the Reference Materials, and make all necessary disbursements pursuant to that lease.

Whereas, during its meeting on 24 January 2018, the Board Finance Committee (BFC) reviewed the financial implications of the options evaluated for the ICANN (Internet Corporation for Assigned Names and Numbers) Regional Office in Brussels.

Whereas, the BFC has determined that the proposal for updating the lease of for the existing Brussels Regional Office is reasonable and properly reflected in the draft FY19 Operating Plan and Budget.

Resolved (2018.02.04.05), the Board authorizes the President and CEO, or his designee(s), to take all necessary actions to execute the updated lease for the current office facility in Brussels, as reflected in the Reference Materials, and make all necessary disbursements pursuant to that lease.

Resolved (2018.02.04.06), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, Sections 3.5(b) and 3.5(d) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

### *Rationale for Resolutions 2018.02.04.05 – 2018.02.04.06*

To support its globalization strategy, ICANN (Internet Corporation for Assigned Names and Numbers) established an office in Brussels early on in its history to better service its stakeholders. To further show ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to its globalization strategy, and meet the demand for increased focus on serving European stakeholders through the Brussels Regional Office, ICANN (Internet Corporation for Assigned Names and Numbers) organization undertook to evaluate the cost-effectiveness of the current lease for the Brussels office. ICANN (Internet Corporation for Assigned Names and Numbers) org conducted a market review and an analysis of updating the current lease versus relocating to several other locations, and finds updating the lease for the current facilities to be a more viable and cost-effective solution.

In November 2017, ICANN (Internet Corporation for Assigned Names and Numbers) org invoked an option for early termination of the Brussels Regional Office lease, which led to a discussion with the landlord about the current lease terms. The landlord eventually offered to reduce lease payments from annual payments of [REDACTED FOR NEGOTIATION PURPOSES] to annual payments of [REDACTED FOR NEGOTIATION PURPOSES], subject to entry into an updated lease with early termination option in six years (2024) and a final termination date of 2027.

In total, once property tax and other charges are included, the annual commitment (incentives included) would amount to [REDACTED FOR NEGOTIATION PURPOSES] compared to the

current arrangement at [REDACTED FOR NEGOTIATION PURPOSES], or an overall saving of just over 12 percent.

In addition, the landlord has pledged a contribution of [REDACTED FOR NEGOTIATION PURPOSES] for the potential costs of renovating the office, which would enable ICANN (Internet Corporation for Assigned Names and Numbers) org to consider functional improvements to the office, such as creating a larger meeting room space, better suited to being used to host ICANN (Internet Corporation for Assigned Names and Numbers) workshops, or policy working groups, for example.

The Board reviewed ICANN (Internet Corporation for Assigned Names and Numbers) org's and the Board Finance Committee's recommendations for renewing the current lease for an additional three years at a reduced rate as offered by the landlord and the determination that the proposal met the financial and business requirements of the organization.

Taking this decision is both consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and in the public interest as having a Regional Office in the Brussels region helps serve ICANN (Internet Corporation for Assigned Names and Numbers)'s stakeholders in a more efficient and effective manner.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) to renew the current lease for an additional three years. This impact is currently included in the FY19 Draft Operating Plan and Budget that is pending Board approval.

This decision will have no direct impact on the security or the stability of the domain name system.

This is an Organizational Administrative function that does not require public comment.

f. SSAC (Security and Stability Advisory Committee) Advisory on Registrant (Registrant) Protection related to credential management lifecycle

Whereas, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory

Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) submitted four recommendations in SAC Document: SAC074, SSAC (Security and Stability Advisory Committee) Advisory on Registrant (Registrant) Protection: Best Practices for Preserving Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) in the Credential Management Lifecycle.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization has evaluated the feasibility of the SSAC (Security and Stability Advisory Committee)'s advice and developed implementation recommendations for each.

Whereas, the Board has considered the SSAC (Security and Stability Advisory Committee) Advice and ICANN (Internet Corporation for Assigned Names and Numbers) org's implementation recommendations relating to this advice.

Resolved (2018.02.04.07), the Board adopts the scorecard titled "Implementation Recommendations for SSAC (Security and Stability Advisory Committee) Advice Document SAC074 (/en/system/files/files/resolutions-implementation-recs-ssac-advice-scorecard-04feb18-en.pdf)" [PDF, 49 KB], and directs the President and CEO, or his designee(s), to implement the advice as described in the scorecard.

### *Rationale for Resolution 2018.02.04.07*

The Action Request Register is a framework intended to improve the process for the Board's consideration of recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, including advice from its Advisory Committees (Advisory Committees). This framework has been under development since 2015, and as part of the initial effort, ICANN (Internet Corporation for Assigned Names and Numbers) organization reviewed SSAC (Security and Stability Advisory Committee) Advice issued between 2010 and 2015 to identify items that had not yet received Board consideration.

The results of this initial review were communicated to the SSAC (Security and Stability Advisory Committee) Chair in a letter from the Chair of the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 19 October 2016 (see

<https://www.icann.org/en/system/files/correspondence/crocker-to-faltstrom-19oct16-en.pdf> (</en/system/files/correspondence/crocker-to-faltstrom-19oct16-en.pdf>) [PDF, 627 KB]. This Advisory was identified as part of the open advice inventory assessment done in 2016 to launch the Action Request Register. This resolution is intended to address one of the SSAC (Security and Stability Advisory Committee) Advisories that were identified as open at that time.

As part of the Action Request Register process, for each advice item presented with this resolution, ICANN (Internet Corporation for Assigned Names and Numbers) org has reviewed the request, confirmed its understanding of the SSAC (Security and Stability Advisory Committee)'s request with the SSAC (Security and Stability Advisory Committee), and evaluated the feasibility of the request. As part of ICANN (Internet Corporation for Assigned Names and Numbers) org's assessment of feasibility to implement the advice, ICANN (Internet Corporation for Assigned Names and Numbers) org considered if the advice could be implemented within the existing FY19 operating budget request, and that is noted within each recommendation on the scorecard.

In taking this action, the Board considered the ICANN (Internet Corporation for Assigned Names and Numbers) org recommendations reflected in the scorecard (</en/system/files/files/resolutions-implementation-recs-ssac-advice-scorecard-04feb18-en.pdf>) [PDF, 49 KB].

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as ICANN (Internet Corporation for Assigned Names and Numbers)'s mission specifically relates to the upholding the secure and stable operation of the Internet DNS (Domain Name System), and is also upholding the advisory input structures specified in the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.

Implementation of advice from SSAC (Security and Stability Advisory Committee) supports the security or the stability of the domain name system.

This is an Organizational Administrative function that does not require public comment.

## g. Renewal of .MUSEUM Registry Agreement

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) commenced a public comment period from 24 August 2017 through 3 October 2017 on the proposed Renewal Registry Agreement for the .MUSEUM top-level domain (TLD (Top Level Domain)), receiving comments from four organizations as well as a reply from the .MUSEUM Registry Operator. A summary and analysis of the comments were provided to the Board.

Whereas, the .MUSEUM Renewal Registry Agreement includes new provisions consistent with the comparable terms of the New gTLD (generic Top Level Domain) Registry Agreement.

Whereas, the Board has determined that no further revisions to the proposed .MUSEUM Renewal Registry Agreement are necessary after taking the comments into account.

Resolved (2018.02.04.08), the proposed .MUSEUM Renewal Registry Agreement is approved and the President and CEO, or his designee(s), is authorized to take such actions as appropriate to finalize and execute the Agreement as approved.

### *Rationale for Resolution 2018.02.04.08*

#### ***Why is the Board addressing the issue now?***

ICANN (Internet Corporation for Assigned Names and Numbers) and MuseDoma entered into a Registry Agreement on 17 October 2001 for operation of the .MUSEUM top-level domain (TLD (Top Level Domain)). The current .MUSEUM Registry Agreement expires on 2 March 2018. The proposed Renewal Registry Agreement was posted for public comment between 24 August 2017 and 3 October 2017. At this time, the Board is approving the proposed .MUSEUM Renewal Registry Agreement for the continued operation of the .MUSEUM TLD (Top Level Domain) by MuseDoma.

#### ***What is the proposal being considered?***

The proposed .MUSEUM Renewal Registry Agreement, approved by the Board, is based on the current .MUSEUM Registry Agreement with modifications agreed upon by ICANN (Internet

Corporation for Assigned Names and Numbers) and MuseDoma and includes certain provisions from the base New gTLD (generic Top Level Domain) Registry Agreement.

***Which stakeholders or others were consulted?***

ICANN (Internet Corporation for Assigned Names and Numbers) organization conducted a public comment period on the proposed .MUSEUM Renewal Registry Agreement from 24 August 2017 through 3 October 2017. Additionally, ICANN (Internet Corporation for Assigned Names and Numbers) engaged in negotiations with the Registry Operator to agree to the terms to be included in the proposed .MUSEUM Renewal Registry Agreement that was posted for public comment.

***What concerns or issues were raised by the community?***

The public comment forum on the proposed .MUSEUM Renewal Registry Agreement closed on 3 October 2017, with ICANN (Internet Corporation for Assigned Names and Numbers) organization receiving five (5) comments. The comments can be summarized in the three main categories listed below.

1. Inclusion of new gTLD (generic Top Level Domain) rights protection mechanisms and safeguards in legacy gTLDs: Two commenters expressed support for the inclusion of certain rights protection mechanisms, such as Uniform Rapid Suspension and Trademark Post-Delegation Dispute Resolution Procedure, and the inclusion of the Public Interest Commitments (i.e., safeguards) contained in the New gTLD (generic Top Level Domain) Registry Agreement such as the requirement to use registrars under the 2013 Registrar Accreditation Agreement. Conversely, two commenters expressed concern over the inclusion of New gTLD (generic Top Level Domain) rights protection mechanisms in legacy agreements. They suggested that these provisions should not be added as a result of contract negotiations, but should be addressed through the policy development process ("PDP (Policy Development Process)"). Further, the recommendation is for the Board to "declare a moratorium on the imposition of new gTLD (generic Top Level Domain) RPMs on legacy TLDs until the above referenced PDP (Policy Development Process) has

been concluded, the GNSO (Generic Names Supporting Organization) Council has acted upon its recommendations, and any implementation and transition issues have been addressed".

2. The transition of .MUSEUM from a "Sponsored" TLD (Top Level Domain) to a "Community" TLD (Top Level Domain): Two commenters expressed concern regarding the updated eligibility requirements for .MUSEUM as outlined in Specification 12 versus the requirements new gTLD (generic Top Level Domain) community applicants are required to have in their registration policies. To these commenters, there is an alleged lack of consistency with regard to the concept of a "community" TLD (Top Level Domain) and how it is applied.
3. Negotiation process for the proposed renewal of the .MUSEUM Registry Agreement and legacy gTLD (generic Top Level Domain) registry agreement negotiations in general: Two commenters questioned whether the negotiation process for renewing and amending legacy registry agreements is sufficiently transparent and how the renewal agreement was arrived at.

In response to the comments expressed about .MUSEUM transitioning from a "sponsored" TLD (Top Level Domain) to a "community" TLD (Top Level Domain), MuseDoma, the Registry Operator for .MUSEUM, issued a written posted response, stating the Registry Operator will "implement mechanisms for enforcement" of their registration policies. Further, MuseDoma explained in its response:

"The Registry will proceed to post-validation on the basis of eligibility criteria, through a targeted random validation process or upon request of a third party. Validation will include checks about the registered domain name actual use. Documentation or proof will be required from the registrant; eligibility will often most easily be demonstrated by membership in ICOM or another professional museum association.

The purpose of the enforcement mechanisms is to protect the credibility of the .museum TLD (Top Level Domain) for its worldwide public. In particular, to uphold the community-based purpose of the

.museum TLD (Top Level Domain) and help prevent misuse or malicious behavior."

***What significant materials did the Board review?***

As part of its deliberations, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- Proposed .MUSEUM Renewal Registry Agreement
- Redline showing changes compared to the current .MUSEUM Registry Agreement
- Current .MUSEUM Registry Agreement
- New gTLD (generic Top Level Domain) Agreement – 31 July 2017
- Public Comment Summary and Analysis

***What factors has the Board found to be significant?***

The Board carefully considered the public comments received for the .MUSEUM Renewal Registry Agreement, along with the summary and analysis of those comments. The Board also considered the terms agreed upon by the Registry Operator as part of the bilateral negotiations with ICANN (Internet Corporation for Assigned Names and Numbers) org.

While the Board acknowledges the concerns expressed by some community members regarding the inclusion of the URS (Uniform Rapid Suspension) in the Renewal Registry Agreement, the Board notes that the inclusion of the URS (Uniform Rapid Suspension) in the Renewal Registry Agreement is based on the negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) and the Registry Operator, where Registry Operator expressed their interest to renew their registry agreement based on the new gTLD (generic Top Level Domain) Registry Agreement.

The Board notes that the URS (Uniform Rapid Suspension) was recommended by the Implementation Recommendation Team (IRT (Implementation Recommendation Team (of new gTLDs))) as a mandatory rights protection mechanism (RPM (Rights Protection Mechanism)) for all new gTLDs. The GNSO (Generic Names Supporting Organization) was asked to provide its view on whether

certain proposed rights protection mechanisms (which included the URS (Uniform Rapid Suspension)) were consistent with the GNSO (Generic Names Supporting Organization)'s proposed policy on the introduction of New gTLDs and were the appropriate and effective option for achieving the GNSO (Generic Names Supporting Organization)'s stated principles and objectives. The Special Trademark Issues Review Team (STI (Specific Trademark Issues)) considered this matter and concluded that "Use of the URS (Uniform Rapid Suspension) should be a required RPM (Rights Protection Mechanism) for all New gTLDs." That is, the GNSO (Generic Names Supporting Organization) stated that the URS (Uniform Rapid Suspension) was not inconsistent with any of its existing policy recommendations.

Although the URS (Uniform Rapid Suspension) was developed and refined through the process described here, including public review and discussion in the GNSO (Generic Names Supporting Organization), it has not been adopted as a consensus policy and ICANN (Internet Corporation for Assigned Names and Numbers) has no ability to make it mandatory for any TLDs other than new gTLD (generic Top Level Domain) applicants who applied during the 2012 New gTLD (generic Top Level Domain) round.

Accordingly, the Board's approval of the Renewal Registry Agreement is not a move to make the URS (Uniform Rapid Suspension) mandatory for any legacy TLDs, and it would be inappropriate to do so. In the case of .MUSEUM, inclusion of the URS (Uniform Rapid Suspension) was developed as part of the proposal in negotiations between the Registry Operator and ICANN (Internet Corporation for Assigned Names and Numbers).

Additionally, the Board considered the comments regarding the eligibility requirements for .MUSEUM as outlined in Specification 12 versus the requirements new community gTLD (generic Top Level Domain) applicants are required to have in their registration policies. The Board notes that the registry is taking the required steps to ensure the registration policies are consistent with the other "Community" TLDs by implementing restrictions on what persons or entities may register .MUSEUM domain names, restrictions on how .MUSEUM domain names may be used, and mechanisms to enforce eligibility and instituting post-validation procedures to protect the credibility of the .MUSEUM TLD (Top Level Domain). While the Board acknowledges the concern raised

regarding ICANN (Internet Corporation for Assigned Names and Numbers) org's position to permit .MUSEUM to update the registration eligibility requirements while moving from a "sponsored" TLD (Top Level Domain) to a "community" TLD (Top Level Domain), the Board recognizes the opportunity for .MUSEUM to define the eligibility requirements during the registry agreement renewal process as other community TLDs did during the application process. As such, the registry operator is committed to maintaining the eligibility requirements as other community TLDs must do or until a reconsideration of Specification 12 and the eligibility requirements are agreed to by the community.

***Are there positive or negative community impacts?***

The Board's approval of the .MUSEUM Renewal Registry Agreement offers positive technical and operational benefits. For example, the .MUSEUM Renewal Registry Agreement mandates the use of accredited registrars that are subject to the 2013 Registrar Accreditation Agreement which provides numerous benefits to registrars and registrants, and also includes other enhancements from the New gTLD (generic Top Level Domain) Registry Agreement. Taking this action is in the public interest as it contributes to the commitment of ICANN (Internet Corporation for Assigned Names and Numbers) organization to strengthen the security, stability, and resiliency of the DNS (Domain Name System).

***Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) organization (e.g. strategic plan, operating plan, budget), the community, and/or the public?***

There is no significant fiscal impact expected from the .MUSEUM Renewal Registry Agreement.

***Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?***

The .MUSEUM Renewal Registry Agreement is not expected to create any security, stability, or resiliency issues related to the DNS (Domain Name System). The .MUSEUM Renewal Registry Agreement includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS

(Domain Name System), as well as other technical benefits expected to provide consistency across all registries leading to a more predictable environment for end-users.

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as ICANN (Internet Corporation for Assigned Names and Numbers)'s role in the coordination of the DNS (Domain Name System) includes contracting with TLD (Top Level Domain) Registry Operators, and this action considered the public's inputs in exercising this coordination role.

This is an Organizational Administrative Function for which public comment was received.

**All members of the Board present voted in favor of Resolutions 2018.02.04.01, 2018.02.04.02, 2018.02.04.03, 2018.02.04.04, 2018.02.04.05, 2018.02.04.06, 2018.02.04.07, and 2018.02.04.08. The Resolutions carried.**

## 2. Main Agenda:

### a. Confirmation of Reserve Fund Target Level

Ron da Silva, the Chair of the Finance Committee, introduced the agenda item. Ron provided the Board with background on the ongoing process of evaluation and analysis of the ICANN (Internet Corporation for Assigned Names and Numbers) Reserve Fund. As part of this process, the Board and ICANN (Internet Corporation for Assigned Names and Numbers) org published for public comment an updated rationale and target level for the Reserve Fund. The proposed resolution comes out of the public consultation process and is consistent with the outcome of the public comments. Ron noted that further work is still required relative to the Reserve Fund, including further analysis on the comments received relative to a separate policy for the Reserve Fund for Public Technical Identifies/IANA (Internet Assigned Numbers Authority) Functions to determine the extent by which this should lead to additional changes. Further work is also required to the develop governance provisions for the Reserve Fund and actions to replenish the Reserve Fund to the target level.

Ron moved, and Chris Disspain seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, the Board and ICANN (Internet Corporation for Assigned Names and Numbers) organization posted for public comment an updated rationale and target level for the ICANN (Internet Corporation for Assigned Names and Numbers) Reserve Fund.

Whereas, the Board Finance Committee (BFC) has reviewed the comments submitted through the public comment process, the responses provided by ICANN (Internet Corporation for Assigned Names and Numbers) org, and the changes to the rationale for the Reserve Fund suggested as a result of public comments.

Whereas, certain comments received require further analysis to determine the extent by which they should lead to additional changes, including submitted comments relative to Public Technical Identifiers/IANA (Internet Assigned Numbers Authority) functions and comments relative to a separate policy for the Reserve Fund.

Whereas, further work has been planned to develop governance provisions for the Reserve Fund and actions to replenish the Reserve Fund to the target level.

Resolved (2018.02.04.09), the Board adopts the recommended changes to the ICANN (Internet Corporation for Assigned Names and Numbers) Investment Policy that include an updated rationale for the Reserve Fund and confirms the target level of the Reserve Fund at a minimum of 12 months of operating expenses.

Resolved (2018.02.04.10), the Board instructs the President and CEO, or his designee(s), to further analyze certain comments received and determine the extent by which additional changes to the Investment Policy should be considered.

**All members of the Board present voted in favor of Resolutions 2018.02.04.09 and 2018.02.04.10. The Resolutions**

**carried.**

### *Rationale for Resolutions 2018.02.04.09 – 2018.02.04.10*

Based on its fiduciary duties, and considering the significant evolution that ICANN (Internet Corporation for Assigned Names and Numbers) has seen since the creation of its Reserve Fund, the Board determined that the Reserve Fund required to be reviewed. It therefore created a working group, supported by ICANN (Internet Corporation for Assigned Names and Numbers) organization, that evaluated the Reserve Fund. This evaluation led to define an updated rationale and target level for the Reserve Fund. Considering the importance of the Reserve Fund to ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability, the Board determined that public input was necessary and requested ICANN (Internet Corporation for Assigned Names and Numbers) Org to post the analysis performed on the rationale and target level for public comment.

The Board also determined that, once the rationale and target level have been updated, after taking into account public comments, further work would be required to define governance mechanisms for the Reserve Fund, and to define a strategy to replenish the Reserve Fund from its current level to the target level.

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it substantiates a fundamental mechanism supporting ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability. Maintaining an appropriate reserve fund contributes to ICANN (Internet Corporation for Assigned Names and Numbers)'s to continue carrying out its mission in the public interest.

The update of the rationale and target level for the Reserve Fund, as reflected in the ICANN (Internet Corporation for Assigned Names and Numbers) Investment Policy, will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers) in that it contributes to improving ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability, and also provides the basis for the organization to be held accountable in a transparent manner. This will have a

fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) and the Community as is intended. This should have a positive impact on the security, stability and resiliency of the domain name system (DNS (Domain Name System)) as ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability contributes to ICANN (Internet Corporation for Assigned Names and Numbers)'s ability to help ensure to the security, stability and resiliency of the DNS (Domain Name System).

This is an Organizational Administrative Function that has already been subject to public comment as noted above.

b. **Adoption of FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget**

Ron da Silva, the Chair of the Board Finance Committee (BFC), introduced the agenda item, which came through the BFC. The FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget (OP&B) was published for public comments. The comments received were reviewed and responded to by ICANN (Internet Corporation for Assigned Names and Numbers) org and provided to BFC members for review and comment. All the public comments have been taken into consideration, and where appropriate and feasible, have been incorporated and a final FY19 IANA (Internet Assigned Numbers Authority) OP&B. The PTI Board approved the PTI Budget on 09 January 2018, and the PTI Budget was received as input into the FY19 IANA (Internet Assigned Numbers Authority) Budget.

The Board acknowledged that the process by which FY19 IANA (Internet Assigned Numbers Authority) OP&B was developed, including the community consultation process was very smooth and well-managed. The Board expressed its appreciation to the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO and the Chief Financial Officer, as well as the PTI Board.

Ron moved and Lousewies van der Laan seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, the draft FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget (OP&B) was posted

for public comment in accordance with the Bylaws on 9 October 2017.

Whereas, comments received through the public comment process were reviewed and responded to and provided to the Board Finance Committee (BFC) members for review and comment.

Whereas, all public comments have been taken into consideration, and where appropriate and feasible, have been incorporated and a final FY19 IANA (Internet Assigned Numbers Authority) OP&B.

Whereas, per the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the IANA (Internet Assigned Numbers Authority) OP&B is to be adopted by the Board and then posted on the ICANN (Internet Corporation for Assigned Names and Numbers) website.

Whereas, in addition to the public comment process, ICANN (Internet Corporation for Assigned Names and Numbers) actively solicited feedback and consultation with the ICANN (Internet Corporation for Assigned Names and Numbers) Community by other means, including conference calls, meetings at ICANN (Internet Corporation for Assigned Names and Numbers) 60 in Abu Dhabi and email communications.

Resolved (2018.02.04.11), the Board adopts the FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget, including the FY19 IANA (Internet Assigned Numbers Authority) Budget Caretaker Budget.

**All members of the Board present voted in favor of Resolution 2018.02.04.11. The Resolution carried.**

### *Rationale for Resolution 2018.02.04.11*

In accordance with Article 22, Section 22.4 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board is to adopt an annual budget and publish it on the ICANN (Internet Corporation for Assigned Names and Numbers) website. On 9 October 2017 drafts of the FY19 PTI O&B and the FY19 IANA

(Internet Assigned Numbers Authority) OP&B were posted for public comment. The PTI Board approved the PTI Budget on 09 January 2018, and the PTI Budget was received as input into the FY19 IANA (Internet Assigned Numbers Authority) Budget.

The published draft FY19 PTI OP&B and the draft FY19 IANA (Internet Assigned Numbers Authority) OP&B were based on numerous discussions with members of ICANN (Internet Corporation for Assigned Names and Numbers) org and the ICANN (Internet Corporation for Assigned Names and Numbers) Community, including extensive consultations with ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and other stakeholder groups throughout the prior several months. All comments received in all manners were considered in developing the FY19 IANA (Internet Assigned Numbers Authority) OP&B. Where feasible and appropriate these inputs have been incorporated into the final FY19 IANA (Internet Assigned Numbers Authority) OP&B proposed for adoption.

The FY19 IANA (Internet Assigned Numbers Authority) OP&B will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers) in that it provides a proper framework by which the IANA (Internet Assigned Numbers Authority) services will be performed, which also provides the basis for the organization to be held accountable in a transparent manner.

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it is fully consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s strategic and operational plans, and the results of which in fact allow ICANN (Internet Corporation for Assigned Names and Numbers) to satisfy its mission.

This decision will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) and the Community as is intended. This should have a positive impact on the security, stability and resiliency of the domain name system (DNS (Domain Name System)) with respect to any funding that is dedicated to those aspects of the DNS (Domain Name System).

This is an Organizational Administrative Function that has already been subject to public comment as noted above.

c. Addressing the New gTLD (generic Top Level Domain) Program Applications for .CORP, .HOME, and .MAIL

Chris Disspain introduced the agenda item. Chris noted that, while there remains a large volume of work on the technical side relative to the issue of "name collision", the proposed resolution provides the solution with respect to the pending applications for .CORP, .HOME, and .MAIL. The proposed resolutions specify that these applications should not proceed and that, to account for the unforeseen impact to application processing, the applicants should receive a full refund of their application fees.

Akram Atallah, the President of the Global Domains Division, stated that, given that there is no foreseeable change around the "name collision" issue in the near future, it is important to provide clarity to the pending applications for .CORP, .HOME, and .MAIL that they will not be moving forward with their applications.

The Board remarked that the proposed resolution is a very positive resolution and noted its appreciation to ICANN (Internet Corporation for Assigned Names and Numbers) org for its work on this resolution.

Chris moved and Mike Silber seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, in March 2013, the SSAC (Security and Stability Advisory Committee) issued SAC057: SSAC (Security and Stability Advisory Committee) Advisory on Internal Name Certificates, wherein the SSAC (Security and Stability Advisory Committee) referred to the issue of "name collision" and provided the ICANN (Internet Corporation for Assigned Names and Numbers) Board with steps for mitigating the issue.

Whereas, on 18 May 2013, the ICANN (Internet Corporation for Assigned Names and Numbers) Board adopted a resolution regarding SAC057, commissioning a study on the

use of TLDs that are not currently delegated at the root level of the public DNS (Domain Name System) in enterprises.

Whereas, in August 2013, Interisle Consulting Group released a report which looked at historical query traffic and found that .HOME and .CORP were the top two most frequently appearing top-level domains (TLDs) in queries.

Whereas, in August 2013, ICANN (Internet Corporation for Assigned Names and Numbers) organization, in conjunction with the study, sought broad community participation in the development of a solution, and a draft mitigation plan was published for public comment along with the report by Interisle. The draft mitigation plan cited .HOME and .CORP as high-risk strings, proposing not to delegate these two strings.

Whereas, on 7 October 2013, the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee (NGPC) took a resolution to implement the mitigation plan for managing name collision occurrences as proposed in the "New gTLD (generic Top Level Domain) Name Collision Occurrence Management Plan."

Whereas, on 30 July 2014, the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee adopted the Name Collision Management Framework. In the Framework, .CORP, .HOME, and .MAIL were noted as high-risk strings whose delegation should be deferred indefinitely.

Whereas, on 28 October 2015, JAS Global Advisors issued the "Mitigating the Risk of DNS (Domain Name System) Namespace Collisions (Final Report)." The recommendations in the final report were consistent with the recommendations made in the Phase One report.

Whereas, in 2015, individuals in the IETF (Internet Engineering Task Force)'s DNS (Domain Name System) Operations working group wrote an Internet Draft, the first step in developing an RFC (Request for Comments) that reserved the CORP, HOME, and MAIL labels from delegation

into the top-level of the DNS (Domain Name System), but the working group and the authors of that draft were unable to reach consensus on the criteria by which labels would be reserved and the effort to create an RFC (Request for Comments) on the topic was abandoned.

Whereas, on 24 August 2016, applicants for .CORP, .HOME, and .MAIL sent correspondence to the ICANN (Internet Corporation for Assigned Names and Numbers) Board requesting that "the Board commission a timely examination of mitigation measures that will enable the release of .HOME, .CORP, and .MAIL."

Whereas, on 2 November 2017, the ICANN (Internet Corporation for Assigned Names and Numbers) Board took a resolution requesting the ICANN (Internet Corporation for Assigned Names and Numbers) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) to conduct a study in a thorough and inclusive manner that includes technical experts (such as members of IETF (Internet Engineering Task Force) working groups, technical members of the GNSO (Generic Names Supporting Organization), and other technologists), to present data, analysis and points of view, and provide advice to the Board regarding the risks posed to users and end systems if .CORP, .HOME, .MAIL strings were to be delegated in the root, as well as possible courses of action that might mitigate the identified risks.

Whereas, on 2 November 2017, the ICANN (Internet Corporation for Assigned Names and Numbers) Board took a resolution directing the President and CEO, or his designee(s), to provide options for the Board to consider to address the New gTLD (generic Top Level Domain) Program applications for .CORP, .HOME, and .MAIL by the first available meeting of the Board following the ICANN60 meeting in Abu Dhabi.

Whereas, on 13 December 2017, ICANN (Internet Corporation for Assigned Names and Numbers) organization presented options to the Board for addressing the New gTLD

(generic Top Level Domain) Program applications for .CORP, .HOME, and .MAIL.

Whereas, the Board engaged in a discussion of the relative merits and disadvantages of the various options presented to address the applications. The Board's discussion focused on issues of fairness, whether the applicants expressed a preference for any of the options, and how to address applications for .CORP, .HOME, and .MAIL that had been withdrawn. Also, the Board discussed budget implications of the options presented.

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board does not intend to delegate the strings .CORP, .HOME, and .MAIL in the 2012 round of the New gTLD (generic Top Level Domain) Program.

Whereas, the Board considered that the applicants were not aware before the application window that the strings .CORP, .HOME, and .MAIL would be identified as high-risk, and that the delegations of such high-risk strings would be deferred indefinitely.

Resolved (2018.02.04.12), the Board directs the President and CEO, or his designee(s), that the applications for .CORP, .HOME, and .MAIL should not proceed and, to account for the unforeseen impact to application processing, the Board directs the President and CEO to, upon withdrawal of the remaining applications for .CORP, .HOME, and .MAIL, provide the applicants a full refund of the New gTLD (generic Top Level Domain) Program application fee of \$185,000.

**All members of the Board present voted in favor of Resolution 2018.02.04.12. The Resolution carried.**

### *Rationale for Resolution 2018.02.04.12*

#### ***Why is the Board addressing the issue now?***

Previously, the Board has considered the applications for .CORP, .HOME and .MAIL and determined to defer delegation of these names indefinitely because of name collisions. A name collision occurs when an attempt to resolve a name used in a private name

space (e.g., under a non-delegated TLD (Top Level Domain), or a short, unqualified name) results in a query to the public Domain Name (Domain Name) System (DNS (Domain Name System)). When the administrative boundaries of private and public namespaces overlap, name resolution may yield unintended or harmful results. The introduction of any new domain name into the DNS (Domain Name System) at any level creates the potential for name collision. However, the New gTLD (generic Top Level Domain) Program has brought renewed attention to this issue of queries for undelegated TLDs at the root level of the DNS (Domain Name System) because certain applied-for new TLD (Top Level Domain) strings could be identical to name labels used in private networks (i.e., .HOME, .CORP, and .MAIL). A secure, stable, and resilient Internet is ICANN (Internet Corporation for Assigned Names and Numbers)'s number one priority. To support this, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has made a commitment to the Internet community to mitigate and manage name collision occurrence. As part of this commitment, ICANN (Internet Corporation for Assigned Names and Numbers) organization published in July 2014 the Name Collision Occurrence Management Framework. Guided by recommendations in reports from the SSAC (Security and Stability Advisory Committee) and JAS Global Advisors, the Framework recommended that the delegation of the strings .HOME, .CORP, and .MAIL be deferred indefinitely. These strings were identified as "high-risk."

These findings and recommendations prompting the Board's previous action on .CORP, .HOME, and .MAIL have not changed and are expected to continue to be applicable in the near term. In the Board resolution of 2 November 2017, the Board directed the ICANN (Internet Corporation for Assigned Names and Numbers) org to provide options to the Board for addressing the applications for .CORP, .HOME, and .MAIL. ICANN (Internet Corporation for Assigned Names and Numbers) org presented options to the Board at the Board meeting of 13 December 2017. The Board discussed the merits and disadvantages of the options presented and is taking action at this time to address the applications.

***What are the options being considered? What factors did the Board find significant?***

Contemplating that the Board does not intend to delegate the .CORP, HOME and .MAIL strings before the end of the 2012 round of the New gTLD (generic Top Level Domain) Program, the options presented to the Board took into account two key questions: What type of refund should be provided to the applicants? Should the applicants receive priority over other applications for these strings in any subsequent round of the New gTLD (generic Top Level Domain) Program? The Board considered a range of options and arrangements resulting from these questions: from a standard refund and no priority, to a full refund and priority.

In discussing the options regarding the refund amount, the Board considered that a standard refund would most closely adhere to the terms that all applicants agreed to in the Applicant Guidebook (AGB). Applicants acknowledged the Terms and Conditions in the AGB establishing that "ICANN (Internet Corporation for Assigned Names and Numbers) has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN (Internet Corporation for Assigned Names and Numbers)'s discretion."

However, the Board also considered issues of fairness and acknowledged that—although the issue of name collision was described in AGB Section 2.2.1.3—applicants were not aware before the application window that the strings .CORP, .HOME, and .MAIL would be identified as high-risk. Additionally, in light of the recommendations made in the JAS Report, SAC062, SAC066, and the Name Collision Management Framework adopted by the NGPC on 30 July 2014, delegation of these strings was deferred indefinitely.

The Board found that this situation was unique within the New gTLD (generic Top Level Domain) Program. Other applications within the New gTLD (generic Top Level Domain) Program were not delegated or allowed to proceed based on established New gTLD (generic Top Level Domain) Program processes. For example, the AGB contemplated that not all applications would pass evaluation (Initial or Extended Evaluation), and all applicants were thus aware of the possibility that there was a potential for not passing the string reviews and not being eligible for delegation. The

applicants for .CORP, .HOME, and .MAIL were not aware of the forthcoming years of study on the issue of name collision and that they ultimately would be ineligible to proceed in the New gTLD (generic Top Level Domain) Program.

As such, the Board has determined it would be appropriate in this case to account for the unforeseen impact to application processing and to provide the remaining applications for .CORP, .HOME, and .MAIL a full refund of the New gTLD (generic Top Level Domain) Program application fee of \$185,000, upon withdrawal of the application by the applicant.

Regarding priority in a subsequent round, the Board considered several different factors. The Board considered that there is currently no indication that the strings .CORP, .HOME, and .MAIL will be able to be delegated at any time in the future. While the Board has taken a resolution requesting the ICANN (Internet Corporation for Assigned Names and Numbers) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) to conduct a study and provide advice to the Board regarding the risks and possible mitigation of the risks associated with delegating the .CORP, .HOME, .MAIL strings in the root, the outcome of this study will not be available in the near term. The Board also considered the potential complexity associated with establishing procedures and rules for granting priority and that this may be an issue to be handled via the policy development process and not Board action. Based on these reasons, the Board has determined not to grant priority in a subsequent round to the applicants for .CORP, .HOME, and .MAIL who might reapply.

### ***What significant materials did the Board review?***

In adopting this resolution, the Board has reviewed, in addition to the options provided by ICANN (Internet Corporation for Assigned Names and Numbers) org, various materials, including, but not limited to:

- SAC045: Invalid Top-Level Domain Queries at the Root Level of the Domain Name (Domain Name) System (<https://www.icann.org/en/committees/security/sac045.pdf> (/en/committees/security/sac045.pdf) [PDF, 507 KB])

- SAC057: SSAC (Security and Stability Advisory Committee) Advisory on Internal Name Certificates  
(<https://www.icann.org/en/system/files/files/sac-057-en.pdf> (/en/system/files/files/sac-057-en.pdf) [PDF, 1.14 MB])
- SAC062: SSAC (Security and Stability Advisory Committee) Advisory Concerning the Mitigation of Name Collision Risk  
(<https://www.icann.org/en/groups/ssac/documents/sac-062-en.pdf> (/en/groups/ssac/documents/sac-062-en.pdf) [PDF, 375 KB])
- SAC064: SSAC (Security and Stability Advisory Committee) Advisory on Search List Process  
(<https://www.icann.org/en/groups/ssac/documents/sac-064-en.pdf> (/en/groups/ssac/documents/sac-064-en.pdf) [PDF, 931 KB])
- SAC066: SSAC (Security and Stability Advisory Committee) Comment Concerning JAS Phase One Report on Mitigating the Risk of DNS (Domain Name System) Namespace Collisions  
(<https://www.icann.org/en/system/files/files/sac-066-en.pdf> (/en/system/files/files/sac-066-en.pdf) [PDF, 305 KB])
- Name Collision in the DNS (Domain Name System)  
(<https://www.icann.org/en/system/files/files/name-collision-02aug13-en.pdf> (/en/system/files/files/name-collision-02aug13-en.pdf) [PDF, 3.34 MB])
- New gTLD (generic Top Level Domain) Collision Risk Mitigation  
(<https://www.icann.org/en/system/files/files/new-gtld-collision-mitigation-05aug13-en.pdf> (/en/system/files/files/new-gtld-collision-mitigation-05aug13-en.pdf) [PDF, 165 KB])
- 26 February 2014 Report from JAS Global Advisors on "Mitigating the Risk of DNS (Domain Name System) Namespace Collisions"  
(<https://www.icann.org/en/system/files/files/name-collision-mitigation-26feb14-en.pdf> (/en/system/files/files/name-collision-mitigation-26feb14-en.pdf) [PDF, 322 KB])
- 10 June 2014 Report of Public Comments on "Mitigating the Risk of DNS (Domain Name System) Namespace Collisions"  
(<https://www.icann.org/en/system/files/files/report-comments->

[name-collision-10jun14-en.pdf \(/en/system/files/files/report-comments-name-collision-10jun14-en.pdf\)](#) [PDF, 229 KB]

- Name Collision Occurrence Management Framework ([https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf \(/en/system/files/files/name-collision-framework-30jul14-en.pdf\)](https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf (/en/system/files/files/name-collision-framework-30jul14-en.pdf))) [PDF, 634 KB]
- 24 August 2016 letter from applicants for .CORP, .HOME, and .MAIL ([https://www.icann.org/en/system/files/correspondence/home-registry-inc-et-al-to-icann-board-24aug16-en.pdf \(/en/system/files/correspondence/home-registry-inc-et-al-to-icann-board-24aug16-en.pdf\)](https://www.icann.org/en/system/files/correspondence/home-registry-inc-et-al-to-icann-board-24aug16-en.pdf (/en/system/files/correspondence/home-registry-inc-et-al-to-icann-board-24aug16-en.pdf))) [PDF, 104 KB]
- 6 March 2017 letter from Akram Atallah to the applicants for .CORP, .HOME, and .MAIL ([https://www.icann.org/en/system/files/correspondence/atallah-to-home-registry-inc-et-al-06mar17-en.pdf \(/en/system/files/correspondence/atallah-to-home-registry-inc-et-al-06mar17-en.pdf\)](https://www.icann.org/en/system/files/correspondence/atallah-to-home-registry-inc-et-al-06mar17-en.pdf (/en/system/files/correspondence/atallah-to-home-registry-inc-et-al-06mar17-en.pdf))) [PDF, 239 KB]
- Applicant Guidebook, Sections 1.5 and 2.2.1.3 (<https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>) (<https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>) [PDF, 5.9 MB]

***Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers)?***

The Board's action will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers). In reviewing the options described above, the Board considered the impact of providing a standard versus a full refund. The total estimated cost of providing all remaining 20 applicants the standard refund is \$1,300,000, whereas the cost associated with a full refund is \$3,700,000. The funds for a full refund would come from the New gTLD (generic Top Level Domain) Program funds, which are made up of the application fees collected in the 2012 round (from all applicants). While the full refund amount differs from the standard refund amounts provided for in the AGB, the ICANN (Internet Corporation for Assigned Names and Numbers) org anticipated that significant refunds might be issued for the remaining program

applicants. As such, the financial impact to ICANN (Internet Corporation for Assigned Names and Numbers) has been accounted for in the Operating Plan and Budget. The remaining funds as of the publication of the FY18 Operating Plan and Budget were \$95,800,000.

***Are there positive or negative community impacts?***

Taking this action will help support ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and is the public interest to ensure the stable and secure operation of the Internet's unique identifier systems. This action benefits the ICANN (Internet Corporation for Assigned Names and Numbers) community as it provides transparency and predictability to the applicants for .CORP, .HOME, and .MAIL.

This is an Organizational Administrative Function that is not subject to public comment.

d. GAC (Governmental Advisory Committee) Advice : Abu Dhabi Communiqué (November 2017)

Maarten Botterman introduced the agenda item. The proposed resolution asks that the Board adopt the scorecard setting forth the response to advice of the Governmental Advisory Committees (Advisory Committees) (GAC (Governmental Advisory Committee)) in the GAC (Governmental Advisory Committee) Abu Dhabi Communiqué. The scorecard focuses on topics of intergovernmental organization protection, enabling inclusive, meaningful participation in ICANN (Internet Corporation for Assigned Names and Numbers), questions about the General Data Protection Regulation and Whois, and the .AMAZON application.

Maarten noted that the process of bringing the advice of the Board to the GAC (Governmental Advisory Committee) forward has been very smooth. Other members of the Board acknowledged the improvements on the process and dialogue between the GAC (Governmental Advisory Committee) and Board relative to GAC (Governmental Advisory Committee) advice and the Board's response to the advice.

Maarten moved and Léon Sanchez seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) met during the ICANN60 meeting in Abu Dhabi, United Arab Emirates (UAE) and issued advice to the ICANN (Internet Corporation for Assigned Names and Numbers) Board in a communiqué (/en/system/files/correspondence/gac-to-icann-01nov17-en.pdf) [PDF, 596 KB] on 1 November 2017 (Abu Dhabi Communiqué).

Whereas, the Abu Dhabi Communiqué was the subject of an exchange (https://gac.icann.org/sessions/gac-and-icann-board-conference-call-regarding-icann60-communique) between the Board and the GAC (Governmental Advisory Committee) on 14 December 2017.

Whereas, in a 6 December 2017 letter (/en/system/files/correspondence/forrest-et-al-to-chalaby-06dec17-en.pdf) [PDF, 723 KB], the GNSO (Generic Names Supporting Organization) Council provided its feedback to the Board concerning advice in the Abu Dhabi Communiqué relevant to generic top-level domains to inform the Board and the community of gTLD (generic Top Level Domain) policy activities that may relate to advice provided by the GAC (Governmental Advisory Committee).

Whereas, the Board developed an iteration of the scorecard to respond to the GAC (Governmental Advisory Committee)'s advice in the Abu Dhabi Communiqué, taking into account the exchange between the Board and the GAC (Governmental Advisory Committee) and the information provided by the GNSO (Generic Names Supporting Organization) Council.

Resolved (2018.02.04.13), the Board adopts the scorecard titled "GAC (Governmental Advisory Committee) Advice – Abu Dhabi Communiqué: Actions and Updates (4 February 2018) (/en/system/files/resolutions-abudhabi60-gac-advice-scorecard-04feb18-en.pdf)" [PDF, 99 KB] in response to items of GAC (Governmental Advisory Committee) advice in the Abu Dhabi Communiqué.

**All members of the Board present voted in favor of Resolution 2018.02.04.13. The Resolution carried.**

### *Rationale for Resolution 2018.02.04.13*

Article 12, Section 12.2(a)(ix) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws permits the GAC (Governmental Advisory Committee) to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies."

In its Abu Dhabi Communiqué (1 November 2017), the GAC (Governmental Advisory Committee) issued advice to the Board on: protection of names and acronyms of Intergovernmental Organizations (IGOs) in gTLDs; enabling inclusive, informed and meaningful participation in ICANN (Internet Corporation for Assigned Names and Numbers); General Data Protection Regulation (GDPR) and WHOIS (WHOIS (pronounced "who is"; not an acronym)); and, applications for .AMAZON and related strings. The ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws require the Board to take into account the GAC (Governmental Advisory Committee)'s advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC (Governmental Advisory Committee) advice, it must inform the GAC (Governmental Advisory Committee) and state the reasons why it decided not to follow the advice. Any GAC (Governmental Advisory Committee) advice approved by a full consensus of the GAC (Governmental Advisory Committee) (as defined in the Bylaws) may only be rejected by a vote of no less than 60% of the Board, and the GAC (Governmental Advisory Committee) and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

At this time, the Board is taking action to address the advice from the GAC (Governmental Advisory Committee) in the Abu Dhabi Communiqué. The Board's actions are described in scorecard dated 4 February 2018 (/en/system/files/files/resolutions-abudhabi60-gac-advice-scorecard-04feb18-en.pdf) [PDF, 99 KB].

In adopting its response to the GAC (Governmental Advisory Committee) advice in the Abu Dhabi Communiqué, the Board

reviewed various materials, including, but not limited to, the following materials and documents:

- Abu Dhabi Communiqué (1 November 2017):  
<https://www.icann.org/en/system/files/correspondence/gac-to-icann-01nov17-en.pdf> ([/en/system/files/correspondence/gac-to-icann-01nov17-en.pdf](#)) [PDF, 596 KB]
- The GNSO (Generic Names Supporting Organization) Council's review of the advice in the Abu Dhabi Communiqué as presented in the 6 December 2017 letter to the Board:  
<https://www.icann.org/en/system/files/correspondence/forrest-et-al-to-chalaby-06dec17-en.pdf>  
([/en/system/files/correspondence/forrest-et-al-to-chalaby-06dec17-en.pdf](#)) [PDF, 723 KB]

The adoption of the GAC (Governmental Advisory Committee) advice as provided in the scorecard will have a positive impact on the community because it will assist with resolving the advice from the GAC (Governmental Advisory Committee) concerning gTLDs and other matters.

This action is in furtherance of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as the Board is obligated under the Bylaws to consider the GAC (Governmental Advisory Committee)'s advice on public policy matters. This is also in the public interest, as the Board is considering the views of the GAC (Governmental Advisory Committee) as well as other parts of the community in resolving these pending items of advice.

There are no foreseen fiscal impacts associated with the adoption of this resolution.

Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS (Domain Name System).

This is an Organizational Administrative function that does not require public comment.

#### e. Next Steps in Community Priority Evaluation Process Review – UPDATE ONLY

Chris Disspain, the Chair of the Board Accountability Mechanisms (BAMC), provided and update on the Community Priority

Evaluation (CPE) process review (CPE Process Review). Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. However, over the last couple of days, the Board has received letters from a number of applicants who filed Reconsideration Requests challenging the outcome to the CPE of their applications whose pending Reconsideration Requests were placed on hold pending completion of the CPE Process Review. The letters included lengthy reports that dealt mainly with the CPE of their applications rather than the CPE Process Review Reports. While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board's next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.

#### f. AOB

The Board engaged in a discussion regarding the rules of order relative to bringing forth motions and resolutions.

The Chair then called the meeting to a close.

Published on 13 February 2018



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[RSS Feeds \(/en/news/rss\)](https://en/news/rss)



[Community Wiki](https://community.icann.org)

(<https://community.icann.org>)



[ICANN Blog \(/news/blog\)](https://en/news/blog)

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<a href="#">Groups</a> (https://www.icann.org/resources/pages/groups/2012-02-06-en)	<a href="#">PGP Keys</a> (/en/contact/pgp-keys)	<a href="#">Request for Reconsideration</a> (/groups/board/governance/reconsideration)	<a href="#">Annual Report</a> (/about/annual-report)	<a href="#">Registrar Problems</a> (/en/news/announcements/announcements-mar07-en.htm)
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# **Exhibit 15**



[GET STARTED \(/GET-STARTED\)](/GET-STARTED)

[NEWS & MEDIA \(/NEWS\)](/NEWS)

[POLICY \(/POLICY\)](/POLICY)

[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](/PUBLIC-COMMENTS)

[RESOURCES \(/RESOURCES\)](/RESOURCES)

[COMMUNITY \(/COMMUNITY\)](/COMMUNITY)

[IANA STEWARDSHIP  
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](/STEWARDSHIP-ACCOUNTABILITY)

## ICANN (Internet Corporation for Assigned Names and Numbers) Documentary Information Disclosure Policy

*NOTE: With the exception of personal email addresses, phone numbers and mailing addresses, DIDP Requests are otherwise posted in full on [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s website, unless there are exceptional circumstances requiring further redaction.*

[ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s operational activities, and within [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.

A principal element of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s approach to transparency and information disclosure is the identification of a comprehensive set of materials that [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) makes available on its website as a matter of course.

Specifically, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) has:

- Identified many of the categories of documents that are already made public as a matter of due course
- Developed a time frame for responding to requests for information not already publicly available
- Identified specific conditions for nondisclosure of information
- Described the mechanism under which requestors may appeal a denial of disclosure

## Public Documents

ICANN (Internet Corporation for Assigned Names and Numbers) posts on its website at [www.icann.org](http://www.icann.org), numerous categories of documents in due course. A list of those categories follows:

- Annual Reports – <http://www.icann.org/en/about/annual-report>  
([/en/about/annual-report](http://www.icann.org/en/about/annual-report))
- Articles of Incorporation – <http://www.icann.org/en/about/governance/articles>  
([/en/about/governance/articles](http://www.icann.org/en/about/governance/articles))
- Board Meeting Transcripts, Minutes and Resolutions – <http://www.icann.org/en/groups/board/meetings>  
([/en/groups/board/meetings](http://www.icann.org/en/groups/board/meetings))
- Budget – <http://www.icann.org/en/about/financials> ([/en/about/financials](http://www.icann.org/en/about/financials))
- Bylaws (current) – <http://www.icann.org/en/about/governance/bylaws>  
([/en/about/governance/bylaws](http://www.icann.org/en/about/governance/bylaws))
- Bylaws (archives) – <http://www.icann.org/en/about/governance/bylaws/archive>  
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- Correspondence – <http://www.icann.org/correspondence/>  
([/correspondence/](http://www.icann.org/correspondence/))
- Financial Information – <http://www.icann.org/en/about/financials>  
([/en/about/financials](http://www.icann.org/en/about/financials))
- Litigation documents – <http://www.icann.org/en/news/litigation>  
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- Major agreements – <http://www.icann.org/en/about/agreements> ([/en/about/agreements](http://www.icann.org/en/about/agreements))
- Monthly Registry reports – <http://www.icann.org/en/resources/registries/reports> ([/en/resources/registries/reports](http://www.icann.org/en/resources/registries/reports))
- Operating Plan – <http://www.icann.org/en/about/planning> ([/en/about/planning](http://www.icann.org/en/about/planning))
- Policy documents – <http://www.icann.org/en/general/policy.html> ([/en/general/policy.html](http://www.icann.org/en/general/policy.html))
- Speeches, Presentations & Publications – <http://www.icann.org/presentations> ([/presentations](http://www.icann.org/presentations))
- Strategic Plan – <http://www.icann.org/en/about/planning> ([/en/about/planning](http://www.icann.org/en/about/planning))
- Material information relating to the Address Supporting Organization (Supporting Organization) (ASO (Address Supporting Organization)) – <http://aso.icann.org/docs> (<http://aso.icann.org/docs>) including ASO (Address Supporting Organization) policy documents, Regional Internet Registry (RIR (Regional Internet Registry)) policy documents, guidelines and procedures, meeting agendas and minutes, presentations, routing statistics, and information regarding the RIRs
- Material information relating to the Generic Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) – <http://gns0.icann.org> (<http://gns0.icann.org>) – including correspondence and presentations, council resolutions, requests for comments, draft documents, policies, reference documents (see <http://gns0.icann.org/reference-documents.htm> (<http://gns0.icann.org/reference-documents.htm>)), and council administration documents (see <http://gns0.icann.org/council/docs.shtml> (<http://gns0.icann.org/council/docs.shtml>)).
- Material information relating to the country code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) – <http://ccnso.icann.org> (<http://ccnso.icann.org>) – including meeting agendas, minutes, reports, and presentations
- Material information relating to the At Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee)) – <http://atlarge.icann.org> (<http://atlarge.icann.org>) – including correspondence, statements, and meeting minutes

- Material information relating to the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) – <http://gac.icann.org/web/index.shtml> (<http://gac.icann.org/web/index.shtml>) – including operating principles, gTLD (generic Top Level Domain) principles, ccTLD (Country Code Top Level Domain) principles, principles regarding gTLD (generic Top Level Domain) Whois issues, communiqués, and meeting transcripts, and agendas
- Material information relating to the Root Server Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) – <http://www.icann.org/en/groups/rssac> ([/en/groups/rssac](http://www.icann.org/en/groups/rssac)) – including meeting minutes and information surrounding ongoing projects
- Material information relating to the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) – <http://www.icann.org/en/groups/ssac> ([/en/groups/ssac](http://www.icann.org/en/groups/ssac)) – including its charter, various presentations, work plans, reports, and advisories

## Responding to Information Requests

If a member of the public requests information not already publicly available, ICANN (Internet Corporation for Assigned Names and Numbers) will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN (Internet Corporation for Assigned Names and Numbers) will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN (Internet Corporation for Assigned Names and Numbers) denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.

## Defined Conditions for Nondisclosure

ICANN (Internet Corporation for Assigned Names and Numbers) has identified the following set of conditions for the nondisclosure of information:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship with that party.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN (Internet Corporation for Assigned Names and Numbers)'s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN (Internet Corporation for Assigned Names and Numbers) Directors, ICANN (Internet Corporation for Assigned Names and Numbers) Directors' Advisors, ICANN (Internet Corporation for Assigned Names and Numbers) staff, ICANN (Internet Corporation for Assigned Names and Numbers) consultants, ICANN (Internet Corporation for Assigned Names and Numbers) contractors, and ICANN (Internet Corporation for Assigned Names and Numbers) agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates by inhibiting the candid exchange of ideas and communications.
- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.
- Information provided to ICANN (Internet Corporation for Assigned Names and Numbers) by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Confidential business information and/or internal policies and procedures.
- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.
- Trade secrets and commercial and financial information not publicly disclosed by ICANN (Internet Corporation for Assigned Names and Numbers).
- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Information that falls within any of the conditions set forth above may still be made public if ICANN (Internet Corporation for Assigned Names and Numbers) determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to deny disclosure of information under conditions not designated above if ICANN (Internet Corporation for Assigned Names and Numbers) determines that the harm in disclosing the information outweighs the public interest in disclosing the information.

ICANN (Internet Corporation for Assigned Names and Numbers) shall not be required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.

## Appeal of Denials

To the extent a requestor chooses to appeal a denial of information from ICANN (Internet Corporation for Assigned Names and Numbers), the requestor may follow the Reconsideration Request procedures or Independent Review procedures, to the extent either is applicable, as set forth in Article IV, Sections 2 and 3 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, which can be found at [http://www.icann.org/en/about/governance/bylaws \(/en/about/governance/bylaws\)](http://www.icann.org/en/about/governance/bylaws(/en/about/governance/bylaws)).

## DIDP Requests and Responses

Request submitted under the DIDP and [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) responses are available here:  
[http://www.icann.org/en/about/transparency\\_\(/en/about/transparency\)](http://www.icann.org/en/about/transparency_(/en/about/transparency))

## Guidelines for the Posting of Board Briefing Materials

The posting of Board Briefing Materials on the Board Meeting Minutes page (at [http://www.icann.org/en/groups/board/meetings\\_\(/en/groups/board/meetings\)](http://www.icann.org/en/groups/board/meetings_(/en/groups/board/meetings))) is guided by the application of the DIDP. The Guidelines for the Posting of Board Briefing Materials are available at [http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm\\_\(/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm\)](http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm_(/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm)).

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To submit a request, send an email to [didp@icann.org](mailto:didp@icann.org) (<mailto:didp@icann.org>).



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<a href="#">Learning</a> (/en/about/learning)	<a href="#">Global Support</a> (/resources/pages/customer-support-2015-06-22-en)	<a href="#">Mechanisms</a> (/en/news/in-focus/accountability/mechanisms)	<a href="#">Agreements</a> (/en/about/agreements)	<a href="#">Domain Name Dispute Resolution</a> (/en/help/dndr)
<a href="#">Participate</a> (/en/about/participate)	<a href="#">Security Team</a> (/about/staff/security)	<a href="#">Independent Review Process</a> (/resources/pages/irp-2012-02-25-en)	<a href="#">Specific Reviews</a> (/resources/reviews/aoc)	<a href="#">Name Collision</a> (/en/help/name-collision)
<a href="#">Groups</a> (https://www.icann.org/resources/pages/groups/2012-02-06-en)	<a href="#">PGP Keys</a> (/en/contact/pgp-keys)	<a href="#">Request for Reconsideration</a> (/groups/board/governance/reconsideration)	<a href="#">Annual Report</a> (/about/annual-report)	<a href="#">Registrar Problems</a> (/en/news/announcements/announcements-mar07-en.htm)
<a href="#">Board of Directors</a> (/resources/pages/board-of-directors-2014-03-19-en)	<a href="#">Certificate Authority</a> (/contact/certificate-authority)	<a href="#">Ombudsman</a> (/help/ombudsman)	<a href="#">Financials</a> (/en/about/financials)	<a href="#">WHOIS</a> (https://whois.icann.org/en)
<a href="#">President's Corner</a> (/presidents-corner)	<a href="#">Registry Liaison</a> (/resources/pages/contact-f2-2012-02-25-en)	<a href="#">Empowered Community</a> (/ec)	<a href="#">Document Disclosure</a> (/en/about/transparency)	<a href="#">Planning</a> (/en/about/planning)
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# **Exhibit 16**



**New gTLD Program**  
**Community Priority Evaluation Report**  
Report Date: 6 October 2014

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay llc

**Overall Community Priority Evaluation Summary**

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

**Panel Summary**

Overall Scoring	10 Point(s)	
	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
Total	10	16
<b>Minimum Required Total Score to Pass <u>14</u></b>		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p>	

The community defined in the application (“GAY<sup>1</sup>”) is drawn from:

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA<sup>2</sup>. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.

The application further elaborates the requirements of the above individuals to demonstrate membership in the community:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations. Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights.

This community definition shows a clear and straightforward membership and is therefore well defined. Membership is “determined through formal membership with any of dotgay LLC’s [the applicant’s] Authentication Partners (AP) from the community”, a transparent and verifiable membership structure that adequately meets the evaluation criteria of the AGB.

In addition, the community as defined in the application has awareness and recognition among its members. The application states:

As the foundation of the community, membership organizations are the single most visible entry point to the Gay Community around the world. They serve as “hubs” and are recognized as definitive qualifiers for those interested in affirming their membership in the community. The organizations range from serving health, social and economic needs to those more educational and political in nature; with each having due process around affirming status in the community. In keeping with standards currently acknowledged and used within the community, dotgay LLC will utilize membership organizations as APs to confirm eligibility. APs must meet and maintain the following requirements for approval by dotgay LLC:

1. Have an active and reputable presence in the Gay Community
2. Have a mission statement that incorporates a focus specific to the Gay Community
3. Have an established policy that affirms community status for member enrolment
4. Have a secure online member login area that requires a username & password, or other secure control mechanism.

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<sup>1</sup> In this report the community as defined by the application is referred to as the “GAY community” instead of the “gay community” or the “LGBTQIA community”. The “GAY community” is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD. “Gay community” or “LGBTQIA community” are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant’s defined community. This use is consistent with the references to these groups in the application.

<sup>2</sup> The Applicant notes with regard to its use of the term LGBTQIA that “LGBTQIA – Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Ally is the latest term used to indicate the inclusive regard for the extent of the Gay Community.” This report uses the term similarly.

Based on the Panel's research and materials provided in the application, there is sufficient evidence that the members as defined in the application would cohere as required for a clearly delineated community. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

#### Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic scope and the community as defined is a global one. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA's website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

#### Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization representative of the community defined by the applicant, as referred to above, has records of activity beginning before 2007. LGBTQIA individuals have been active outside of organizations as well, but the community as defined is comprised of members of [AP] organizations.

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

#### Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. While the application does cite global estimates of the self-identified gay/LGBTQIA (lesbian, gay, bisexual, transgender, queer, intersex, and ally) population (1.2% of world population), it does not rely on such figures to determine the size of its community. This is because the applicant requires that any such LGBTQIA individual also be a member of an AP organization in order to qualify for membership of the proposed community. According to the application:

Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members.

The size of the delineated community is therefore still considerable, despite the applicant's requirement that the proposed community members must be members of an AP.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community"<sup>3</sup>, and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

#### Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the .GAY community<sup>4</sup> are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of LGBTQIA individuals has accelerated since then, especially in recent decades and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater rates of visibility of LGBTQIA individuals, recognition of LGBTQIA rights and community organization, both in the US and other western nations as well as elsewhere.<sup>5</sup> While socio-political obstacles to community

<sup>3</sup> "Gay community" or "LGBTQIA community" are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant's defined community.

<sup>4</sup> The ".GAY community" is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD.

<sup>5</sup> Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

organization remain in some parts of the world,<sup>6</sup> the overall historical trend of LGBTQIA rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a “presence in the Gay Community”, and also “incorporate a focus specific to the Gay Community.” By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

**Criterion #2: Nexus between Proposed String and Community**

**0/4 Point(s)**

**2-A Nexus**

**0/3 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community. To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.”

The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus. As cited above:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).

The application, therefore, acknowledges that “the world at large” understands the Gay community to be an entity substantially different than the community the application defines. That is, the general population understands the “Gay community” to be both those individuals who have “come out” as well as those who are privately aware of their non-heterosexual sexual orientation. Similarly, the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part. That is, the community as defined by the applicant refers only to the sub-set of individuals who have registered with specific organizations, the Authenticating Partners.

As the application itself also indicates, the group of self-identified gay individuals globally is estimated to be 1.2% of the world population (more than 70 million), while the application states that the size of the community it has defined, based on membership with APs, is 7 million. This difference is substantial and is indicative of the degree to which the applied-for string substantially over-reaches beyond the community defined by the application.

<sup>6</sup> <http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>

Moreover, while the applied-for string refers to many individuals not included in the application’s definition of membership (i.e., it “substantially over-reaches” based on AGB criteria), the string also fails to identify certain members that the applicant has included in its definition of the .GAY community. Included in the application’s community definition are transgender and intersex individuals as well as “allies” (understood as heterosexual individuals supportive of the missions of the organizations that comprise the defined community)<sup>7</sup>. However, “gay” does not identify these individuals. Transgender people may identify as straight or gay, since gender identity and sexual orientation are not necessarily linked.<sup>8</sup> Likewise, intersex individuals are defined by having been born with atypical sexual reproductive anatomy<sup>9</sup>; such individuals are not necessarily “gay”<sup>10</sup>. Finally, allies, given the assumption that they are heterosexual supporters of LGBTQIA issues, are not identified by “gay” at all. Such individuals may be an active part of the .GAY community, even if they are heterosexual, but “gay” nevertheless does not describe these individuals as required for Nexus by the AGB. As such, there are significant subsets of the defined community that are not identified by the string “.GAY”.

The Community Priority Evaluation panel has determined that the applied-for string does not match nor does it identify without substantially over-reaching the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

**2-B Uniqueness** **0/1 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the “string has no other significant meaning *beyond identifying the community described in the application,*” according to the AGB (emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above.). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

**Criterion #3: Registration Policies** **4/4 Point(s)**

**3-A Eligibility** **1/1 Point(s)**

The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that:

.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC’s Authentication Partners (AP) from the community.

The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Eligibility.

<sup>7</sup> This prevailing understanding of “ally” is supported by GLAAD and others: <http://www.glaad.org/resources/ally>

<sup>8</sup> <http://www.glaad.org/reference/transgender>

<sup>9</sup> [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex)

<sup>10</sup> “Gay” is defined by the Oxford dictionaries as “A homosexual, especially a man.” The applicant defines the community as “individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society.”

<b>3-B Name Selection</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .Gay top-level domain, including rules barring “[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.” The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Name Selection.</p>	
<b>3-C Content and Use</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes “efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression.”</p> <p>The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Content and Use.</p>	
<b>3-D Enforcement</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.</p> <p>Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access. The Community Priority Evaluation panel has determined that the application satisfies both the conditions to fulfill the requirements for Enforcement.</p>	

<b>Criterion #4: Community Endorsement</b>	<b><i>2/4 Point(s)</i></b>
<b>4-A Support</b>	<b><i>1/2 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.</p> <p>To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.</p>	

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). (While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent it. There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

*1/2 Point(s)*

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from a group of non-negligible size, coming from an organization within the communities explicitly addressed by the application, making it relevant. The organization is a chartered 501(c)3 nonprofit organization with full-time staff members, as well as ongoing events and activities with a substantial following. The grounds of the objection do not fall under any of those excluded by the AGB (such as spurious or unsubstantiated claims), but rather relate to the establishment of the community and registration policies. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

**Disclaimer:** Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <[newgtlds.icann.org](http://newgtlds.icann.org)>.

# **Exhibit 17**



**New gTLD Program**  
**Community Priority Evaluation Report**  
Report Date: 8 October 2015

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay LLC

**Overall Community Priority Evaluation Summary**

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

**Panel Summary**

Overall Scoring	10 Point(s)	
	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
Total	10	16
<b>Minimum Required Total Score to Pass <u>14</u></b>		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	<b>2/2 Point(s)</b>
<p>The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p> <p>In its application, dotgay LLC defines its community as follows:</p>	

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships...

The membership criterion to join the Gay Community is the process of 'coming out'. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible...

Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights. (Application, section 20(a))

The applicant relies on the "process of coming out" to delineate its members, who are individuals with non-normative sexual orientation or gender identities, as well as their allies<sup>1</sup>. The process of "coming out" is by nature personal, and may vary from person to person. Some individuals within the proposed community may not come out publicly, reflecting real or feared persecution for doing so. Similarly, membership in a community organization may not be feasible for the same reason. Furthermore, organizations within the applicant's defined community recognize "coming out" as a defining characteristic of individuals within the defined community.<sup>2</sup> Many such organizations advocate on behalf of individuals even though they are not members, precisely because their coming out publicly may be illegal or otherwise harmful. Therefore, the Panel recognizes that the standard of "coming out" – whether publicly or privately – as homosexual, bisexual, transgender, queer, intersex, or ally is sufficiently clear and straightforward to meet the AGB's requirements.<sup>3</sup>

In addition, the community as defined in the application has awareness and recognition among its members. There is an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies. As cited by the applicant in supporting materials, for example, the American Psychological Association recognizes the process of coming out as a key part of entering the community.<sup>4</sup> For many individuals, this awareness and recognition of community is made more explicit, such as by membership in organizations, participation in events, and advocacy for the rights of individuals with non-normative sexual orientations and gender identities. As the applicant states, organizations and individuals within the community also often cohere around areas of discrimination, whether in the workplace, marketplace, the media, or other areas. Regardless of whether this awareness and recognition of shared community is explicit or rather an implicit consequence of one's coming

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<sup>1</sup> The Panel, following the applicant's reference to "individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society", uses the phrase "non-normative sexual orientations and/or gender identities" throughout this document. The term "non-normative" is used both by the applicant as well as organizations, academics, and publications discussing the topic; it is not the Panel's terminology, nor is it considered to be derogatory in this context. This phrase refers to the same individuals usually referred to with the acronyms "LGBT", "GLBT", "LGBTQ", and others. Because issues related to these acronyms are relevant later in this document, they are not used here.

<sup>2</sup> See as examples <http://www.hrc.org/campaigns/coming-out-center> and [http://www.lalgbtcenter.org/coming\\_out\\_support](http://www.lalgbtcenter.org/coming_out_support)

<sup>3</sup> For allies, the "coming out" process may differ from that of individuals who are acknowledging privately or sharing publicly their own non-normative sexual orientation or gender identity. Nevertheless, there are risks associated even with supporting non-heterosexual individuals; making this support explicit is how allies can mark their awareness and recognition of the wider community and their sense of belonging to it. For example, large international organizations within the applicant's defined community, such as GLAAD, HRC, and PFLAG offer concrete avenues for individuals to "come out" as allies. See <http://www.glaad.org/form/come-outas-ally-join-allynetwork-today>,

<http://www.hrc.org/resources/entry/straight-guide-to-lgbt-americans>, <http://community.pflag.org/page.aspx?pid=539>

<sup>4</sup> <http://www.apa.org/topics/lgbt/orientation.pdf>

out, the Panel has determined that the link among these individuals goes well beyond “a mere commonality of interest” and satisfies the AGB’s requirements for recognition and awareness.<sup>5</sup>

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

#### Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic area and/or segment of the proposed community. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), an umbrella organization whose organizational members also include those representing allies. According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA’s website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

#### Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization mainly dedicated to the community as defined by the applicant, as referred to above, has records of activity beginning before 2007. Individuals with non-normative sexual orientations and/or gender identities, as well as their supporters, have been increasingly active in many countries as they work to advance their acceptance and civil rights.<sup>6</sup>

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<sup>5</sup> Although the score on Delineation is unchanged since the first evaluation, the Panel’s analysis has changed due to the applicant’s response to a Clarifying Question regarding the role of Authentication Partners (APs). Previously, the Panel had understood the APs to be a mechanism of members’ awareness and recognition, but, as above, that is no longer the case and the role of APs is correctly understood to be relevant for the purposes of Section 3.

<sup>6</sup> See for example, advocacy in China, Guyana, and Argentina: <http://www.cnn.com/2013/06/27/world/asia/china-gay-lesbian-marriage/>, <http://www.gaystarnews.com/article/guyana-urged-to-end-ban-on-gay-sex-at-un-human-rights-commission/>, [http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage\\_n\\_1018536.html](http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage_n_1018536.html)

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

1-B Extension

**2/2 Point(s)**

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

#### Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. The application cites global estimates of the self-identified population of individuals with non-normative sexual orientations and/or gender identities, but relies on a more conservative size based on the number of such individuals who are affiliated with one or more of the applicant's community organizations:

Most studies place the global gay population at 1.2% (Williams 1996), higher in countries with existing gays rights protections projected at 4-6% (eg. Australia, Canada, United Kingdom, United States). Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members. This constitutes our base line estimate for projecting the size of the Gay Community and the minimum pool from which potential registrants will stem.

As the applicant also acknowledges, estimating the size of the defined community is difficult because, for example, of the risks of individuals self-identifying in many parts of the world. The applicant instead offers a "minimum" size based on the 7 million individuals who are members of one or more of its "Authentication Partners", organizations serving as entry points for domain registration. Regardless of the method used to produce these estimates, the Panel has determined that the size of the delineated community is considerable.<sup>7</sup>

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

#### Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the community defined in the application are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of individuals with non-normative sexual orientations and/or gender identities and their supporters has accelerated since then, especially in recent decades, and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater visibility of these individuals,

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<sup>7</sup> The Panel has verified the applicant's estimates of the defined community's size and compared it with other estimates. Even smaller estimates constitute a substantial number of individuals especially when considered globally.

recognition of their civil and human rights, and community organization, both in the US and elsewhere.<sup>8</sup> While socio-political obstacles to community organization remain in some parts of the world,<sup>9</sup> the overall historical trend of increasing rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

**Criterion #2: Nexus between Proposed String and Community**

**0/4 Point(s)**

**2-A Nexus**

**0/3 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.” In addition to meeting the criterion for “identify”, in order to receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.

In order to identify the community defined by the applicant as required for Nexus, the applied-for string must “closely describe the community or the community members”, i.e. the applied-for string is what “the typical community member would naturally be called” (AGB). The Panel has therefore considered the extent to which the string “gay” *describes* the members of the applicant’s defined community and has evaluated whether “gay” is what these individuals *would naturally be called*. The Panel has determined that more than a small part of the applicant’s defined community is not identified by the applied-for string, as described below, and that it therefore does not meet the requirements for Nexus.

The community as defined by the application consists of

individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.

The applicant’s assertion that the applied-for string (“gay”) is the “most common” term used by members of its defined community to refer to all gay, lesbian, bisexual, transgender, queer, intersex, and ally individuals is central to its demonstration of Nexus. In order to support this claim, the applicant, in its application and in supporting materials received both prior to and since its initial evaluation, has offered evidence that the Panel has evaluated. The Panel has also conducted its own research. The Panel has determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the

<sup>8</sup> Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

<sup>9</sup> <http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>

media<sup>10</sup> as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider “gay” to be their “most common” descriptor, as the applicant claims. These groups are most likely to use words such as “transgender,” “trans,” “intersex,” or “ally” because these words are neutral to sexual orientation, unlike “gay”. Both within the community and outside of it, such as in the media, acronyms such as “LGBT,” “GLBT,” “LGBTQ,” or “LGBTQIA”<sup>11</sup> are used to denote a group of individuals that includes those described above, i.e. transgender, intersex and ally individuals. In fact, organizations within the defined community, when they are referring to groups that specifically include transgender, intersex or ally individuals, are careful not to use only the descriptor “gay,” preferring one of the more inclusive terms<sup>12</sup>.

The first piece of evidence offered by the applicant to support the claim that “gay” is the “most common” term used to describe the defined community is the Oxford English Dictionary (OED) and its documentation of uses of the word “gay” over hundreds of years. It summarizes the shifting meaning of “gay” in order to show how the word has become embraced by at least a part of its defined community and to support its claim that it is the “most common” term for the entirety of its defined community. According to the applicant, the OED shows that “Gay by the early 20th century progressed to its current reference to a sexuality that was non-heterosexual” (application, 20(d)). The Panel agrees that the more derogatory uses of “gay” or uses unrelated to sexuality have largely fallen away, and that the word has come to refer to homosexual women as well as men, as the applicant asserts, citing the OED. However, the Panel’s review of the OED<sup>13</sup> as well as other sources (cited below) does not support the applicant’s claim that “gay” identifies or closely describes transgender, intersex, or ally individuals, or that “gay” is what these individuals “would naturally be called,” as the AGB requires. This is because “gay” refers to homosexuality (and to some extent non-heterosexuality more broadly), while transgender and intersex individuals may or may not identify as homosexual or gay, and allies are generally understood to be heterosexual.

The applicant acknowledges that its application attempts to represent several groups of people, namely lesbian, gay, bisexual, transgender, queer, intersex, and ally (LGBTQIA) individuals. It claims that all of these groups, or “sub-communities”, are identified by what it calls the “umbrella” term “gay”:

The term “gay” today is a term that has solidified around encompassing several sub-communities of individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. Within these sub-communities even further classifications and distinctions can be made that further classify its members but are equally comfortable identifying as gay, particularly to those outside their own sub-communities. As an example, it has become commonplace for celebrities to acknowledge their homosexuality with the now routine declaration of “Yup, I’m gay” on the cover of newsmagazines as the comedienne Ellen Degeneres did when she “came out” on the cover of TIME magazine.

Notably, “gay” is used to super-identify all these groups and circumstances. Whether homosexual, bisexual, transgender, intersex or ally, all members of the Gay Community march in the “gay pride parade” read the same “gay media” and fight for the same “gay rights.” Gay has become the prevalent term in how members of this community refer to themselves when speaking about themselves as demonstrated by the large number of organizations that use the term globally.

Despite the applicant’s assertions to the contrary, its own evidence here shows that “gay” is most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others. The applicant’s “umbrella term” argument does not accurately describe, for example, the many similar

<sup>10</sup> While a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the data in the applicant’s own analysis as well as on the Panel’s own representative samples of media.

<sup>11</sup> There is some variability to these acronyms but one or another of them is very commonly used throughout the community defined by the applicant to refer to Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Allies.

<sup>12</sup> While a survey of all LGBTQIA individuals and organizations globally would be impossible, the Panel has relied for its research on many of the same media organizations and community organizations that the applicant recognizes. Details of the Panel’s analysis follow.

<sup>13</sup> See “gay, adj., adv., and n.” *OED Online*. Oxford University Press, June 2015. Web. 19 August 2015.

transgender stories in the mass media where “gay” is not used to identify the subject.<sup>14</sup> In these cases, “transgender” is used because “gay” does not identify those individuals. With regard to the applicant’s argument that the various parts of its defined community are engaged in the same activities, such as “gay pride” events and “gay rights” advocacy, the Panel acknowledges that this is likely the case. However, transgender people’s participation in these activities no more identifies them as gay than allies’ participation in transgender rights advocacy identifies them as transgender. Indeed, there are many organizations focused on events and advocacy specific to the needs of transgender individuals<sup>15</sup> and they often take special care to separate labels of sexual orientation from those of gender identity/expression.<sup>16</sup> Similarly, the Panel has reviewed the literature of several organizations that advocate and provide services and support for intersex individuals and they clarify that sexual orientation is unrelated to being intersex.<sup>17</sup> That is, while such organizations would fall within the applicant’s defined community, they explicitly differ on the applicant’s assertion that the applied-for string “gay” identifies all LGBTQIA individuals. Thus, the applicant’s assertion that even the members of its so-called sub-communities “are equally comfortable identifying as gay” is in fact often not the case.

In materials provided in support of the application<sup>18</sup>, a survey of news media articles is analyzed in an effort to show that “gay” is the most common name used to refer to the community defined by the applicant. This analysis shows that indeed “gay” is used more frequently than terms such as “LGBT” or “LGBTQIA” in reference to both individuals and communities:

In the first random sample period (April 1-8, 2013), “gay” was used 2,342 times, “LGBT” 272 times, “lesbian” 1008 times, “queer” 76 times and “LGBTQ” 19 times. “LGBTQIAA” and “GLBTQ” were not used at all, demonstrating that “gay” remains a default generic term for the community. An overwhelming amount of the time these terms beyond gay were used in articles that also used gay. Said another way, “LGBT” was used in only 35 articles that did not also use the term “gay,” “lesbian” in 43 articles, “queer” in 55, and “LGBTQ” in 3. Data shows, thus, that “gay” is both the most frequently used term when referring to non-heterosexual gender identity and sexual orientation and is used as an umbrella term to cover the diversity.

Despite this claim, the analysis fails to show that when “gay” is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities. This is the key issue for the Panel’s consideration of Nexus. That is, the greater use of “gay” does not show that “gay” in those instances is used to identify all LGBTQIA individuals, as the applicant asserts and as would be required to receive credit on Nexus. Indeed, the Panel’s own review of news media<sup>19</sup> found that, while “gay” is more common than terms such as “LGBTQ” or “LGBTQIA”, these terms are now more widely used than ever, in large part due to their greater inclusivity and specificity than “gay”. Even several of the articles cited by the applicant in its reconsideration request<sup>20</sup> as evidence of its “umbrella term” argument do not show “gay” being used to identify the groups in question, nor is “gay” the most commonly used term to refer to the aggregate LGBTQIA community in these articles.<sup>21</sup> Furthermore, researching sources from the same periods as the

<sup>14</sup> As examples of cover stories that parallel the applicant’s own example from Time Magazine, see: <http://time.com/135480/transgender-tipping-point/> and <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>. In these two very prominent examples, the articles do not use “gay” to refer to their subjects.

<sup>15</sup> See for instance <http://transgenderlawcenter.org/>, <http://srtp.org/>, <http://transequality.org/>

<sup>16</sup> See National Center for Transgender Equality: <http://transequality.org/issues/resources/transgender-terminology>

<sup>17</sup> See for example the Organization International Intersex: <http://oii-usa.org/1144/ten-misconceptions-intersex>

<sup>18</sup> See <https://www.icann.org/en/system/files/correspondence/gudelunas-to-icann-eiu-evaluators-30apr14-en.pdf>, drafted and submitted by David Gudelunas a member of the dotGay LLC team according to its website, [http://dotgay.com/the-dotgay-team/#section=Jamie\\_Baxter](http://dotgay.com/the-dotgay-team/#section=Jamie_Baxter)

<sup>19</sup> As noted above, while a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the applicant’s own analysis, as discussed here, as well as on the Panel’s own representative samples of media.

<sup>20</sup> See dotGay’s Reconsideration Request: <https://www.icann.org/en/system/files/request-dotgay-annexes-redacted-29nov14-en.pdf>

<sup>21</sup> See <http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marchesor-clever-substitutes-pride-and-prejudice>, <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html>, <http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>

applicant’s analysis for the terms “transgender” or “intersex” shows again that these terms refer to individuals and communities not identified by “gay”.<sup>22</sup> In other words, “gay” is not used to refer to these individuals because it does not *closely describe* them and it is not *what they would naturally be called*, as the AGB requires for partial credit on Nexus.

Finally, the Panel reviewed in detail the many letters of support submitted on behalf of the applicant by many LGBTQIA organizations worldwide. In addition to evaluating these letters of support, as noted in Section 4, the Panel examined how these organizations refer to their members and those for whom they advocate, noting in particular the words used to identify them. In a minority of cases, these organizations included in their letters the view that “gay” is an “umbrella term” for the LGBTQIA community, as argued by the applicant. However, even the organizations that made this claim in their letters do not use the term “gay” to identify their transgender, intersex, and/or ally members in their own organizational materials. In fact, the names of many of these organizations usually include a term other than “gay” such as “LGBTQ” or, in the case of some, “transgender” or “intersex”.

GLAAD, as an example of one of the applicant’s supporters, writes on its own website, “Transgender people have a sexual orientation, just like everyone else. Transgender people may be straight, lesbian, gay, or bisexual.”<sup>23</sup> Indeed, it is for this reason that GLAAD, like other organizations active in the defined community, have revised their names and use of labels specifically to be more inclusive of the individuals in their communities whom “gay” does not identify by using instead terms like LGBTQ or LGBTQIA.<sup>24</sup> Similarly, ally organizations such as PFLAG (Parents, Families and Friends of Lesbians and Gays) support the applicant and reiterate the importance of allies in the struggles facing the LGBTQIA community. However, not even these organizations use “gay” to describe allies. The Panel’s research and review of the applicant’s materials has demonstrated that even the applicant’s supporters recognize that “gay” is insufficient to identify the diversity of the LGBTQIA community, especially with regard to transgender, intersex, and ally individuals.

The Community Priority Evaluation panel has determined that the applied-for string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness	<b>0/1 Point(s)</b>
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The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the “string has no other significant meaning *beyond identifying the community described in the application*,” (AGB, emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as it does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

<b>Criterion #3: Registration Policies</b>	<b>4/4 Point(s)</b>
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3-A Eligibility	<b>1/1 Point(s)</b>
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The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as

<sup>22</sup> While it is not possible for the Panel to review all the articles in the LexisNexis search results cited by the applicant, the Panel reviewed a representative sample of articles from the same time periods.

<sup>23</sup> See <http://www.glaad.org/transgender/transfaq>

<sup>24</sup> In 2013, to be more inclusive of transgender individuals by not including them in the label “gay” or “lesbian”, the organization’s name officially was changed to GLAAD, as opposed to being an acronym for Gay and Lesbian Alliance Against Defamation (<http://www.glaad.org/about/history>). This is reflective of the trend the Panel identified among organizations within the defined community towards greater inclusivity and away from names and labels that identified only gays and lesbians.

eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that registration in “.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC’s Authentication Partners (AP) from the community.”

According to the application, and as the applicant has confirmed in follow-up materials, in order to register a domain, the applicant requires

community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations.

As the application explains, these Authentication Partners (APs) include some of the largest organizations dedicated to members of the defined community and these organizations will provide “the most trusted entry points into .gay” while “reducing risk to unqualified registrations”.

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Eligibility.

**3-B Name Selection**

***1/1 Point(s)***

The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .gay top-level domain, including rules barring “[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.” The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application fulfills the requirements for Name Selection.

**3-C Content and Use**

***1/1 Point(s)***

The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes “efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression.”

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Content and Use.

**3-D Enforcement**

***1/1 Point(s)***

The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals

mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access.

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Enforcement.

**Criterion #4: Community Endorsement**

**2/4 Point(s)**

Support for or opposition to a CPE gTLD application may come in any of three ways: through an application comment on ICANN’s website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and, as applicable, attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>. The table below summarizes the review and verification of all support and opposition documents for the dotgay LLC application for the string “GAY”.

**Summary of Review & Verification of Support/Opposition Materials as of 5 September 2015<sup>25</sup>**

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	177	0	0	0
Attachments to 20(f)	128	128	128	51
Correspondence <sup>26</sup>	152	136	136	56
<b>Grand Total</b>	<b>457</b>	<b>264</b>	<b>264</b>	<b>107</b>

**4-A Support**

**1/2 Point(s)**

The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.

<sup>25</sup> The table below reflects all comments, attachments, and pieces of correspondence received by the Panel as of the date noted pertaining to the application both during the period of its previous evaluation and the present one. The Verification Attempted column includes efforts made by the Panel to contact those entities that did not include contact information.

<sup>26</sup> The Panel reviewed 41 pieces of correspondence that contained 152 individual letters.

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s).

While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent them. There is no single such organization recognized by all of the defined community's members as the representative of the defined community in its entirety. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

*1/2 Point(s)*

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received relevant opposition from one source. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from one group of non-negligible size.<sup>27</sup> The opposition comes from a local organization in the United States whose mission, membership, and activities make it relevant to the community as defined in the application. The organization is of non-negligible size, as required by the AGB. The grounds of opposition are related to how the applied-for string represents the diversity of the LGBTQ community and the opposition is not made for any reason forbidden by the AGB, such as competition or obstruction. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

**Disclaimer:** Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <[newgtlds.icann.org](http://newgtlds.icann.org)>.

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<sup>27</sup> The Panel has reviewed all letters of opposition and support, even when more than one letter has been received from the same organization. In those cases, as with all others, the Panel has reviewed each letter to determine the most current stance of each organization with respect to the application. In the case of this opposition, all letters have been reviewed.

# **Exhibit 18**

**RECOMMENDATION  
OF THE BOARD GOVERNANCE COMMITTEE (BGC)  
RECONSIDERATION REQUEST 16-3  
26 JUNE 2016**

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The Requester, Dotgay LLC, seeks reconsideration of the Board Governance Committee's (BGC's) denial of the Requester's previous reconsideration request, Request 15-21.

**I. Brief Summary.**

The Requester submitted a community application for .GAY (Application). Three other applicants submitted standard (meaning, not community-based) applications for .GAY. All four .GAY applications were placed into a contention set. As the Application was community-based, the Requester was invited to and did participate in CPE in October 2014 (First CPE). The Requester's Application did not prevail in the First CPE. The Requester filed a reconsideration request (Request 14-44) with respect to the CPE panel's report finding that the Requester had not prevailed in the First CPE (First CPE Report). The BGC granted reconsideration on Request 14-44 on the grounds that the Economic Intelligence Unit (EIU), the entity that administers the CPE process, had inadvertently failed to verify 54 letters of support for the Application. At the BGC's direction, the EIU then conducted a new CPE of the Application (Second CPE). The Application did not prevail in the Second CPE (Second CPE Report). As a result, the Application remains in contention with the other applications for .GAY. Just like all other contention sets, the .GAY contention set can be resolved by ICANN's last resort auction or by some other arrangement amongst the involved applicants.

The Requester sought reconsideration of the Second CPE Report and ICANN's acceptance of it (Request 15-21). After reviewing all of the relevant material, the BGC denied Request 15-21 (Determination on Request 15-21). The Requester has now submitted Reconsideration Request 16-3 (Request 16-3), challenging the Determination on Request 15-21

contending that the BGC erroneously determined that the EIU had adhered to all applicable policies and procedures in conducting the Second CPE. Request 16-3 is premised upon one, and only one, basis: the Requester argues that the EIU improperly permitted someone other than one of the “evaluators” to send verification emails to the authors of letters of support and opposition to the Application, which the Requester contends contravenes applicable policies and procedures.

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3. In response, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support. The Presentation, however, did not relate to the sole issue raised in Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application. Rather, the Presentation focused on the merits of the Second CPE Report, which is neither the subject of Request 16-3 nor a proper basis for reconsideration.

The Requester’s claims do not support reconsideration. The Requester does not identify any misapplication of policy or procedure by the EIU that materially or adversely affected the Requester, and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information. Instead, the Requester relies on a purely administrative step of the verification process that the EIU took in the course of administering the Second CPE. More specifically, the EIU delegated

the physical sending of verification emails for letters of support/opposition to a member of the EIU's core team to serve as a Verification Coordinator rather than one of the evaluators due to the large number of letters of support/opposition. That protocol did not affect the Requester, materially or adversely, as is required to support reconsideration. To the contrary, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation consistent with the Applicant Guidebook (Guidebook). Additionally, the substantive evaluation of the letters was performed by the evaluators in accordance with Module 4.2.3 of the Guidebook. As such, the BGC recommends that Request 16-3 be denied.

## **II. Facts.**

### **A. Background Facts.**

The Requester submitted a community application for .GAY.<sup>1</sup>

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings Limited each submitted standard applications for .GAY.<sup>2</sup> Those applications were placed into a contention set with the Requester's Application.

On 23 February 2014, the Requester's Application was invited to participate in CPE. CPE is a method of resolving string contention, described in Module 4.2 of the Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. The Requester elected to participate in CPE for .GAY (First CPE), and its Application was forwarded to the EIU, the CPE administrator, for evaluation.<sup>3</sup>

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<sup>1</sup> See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

<sup>2</sup> See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1460>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1115>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1519>.

<sup>3</sup> See Community Priority Evaluation (CPE), <http://newgtlds.icann.org/en/applicants/cpe#status>.

On 6 October 2014, the CPE panel (First CPE Panel) issued its report on the Requester's Application (First CPE Report).<sup>4</sup> The First CPE Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application had not prevailed in the First CPE.<sup>5</sup>

On 22 October 2014, the Requester submitted Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of that Report.<sup>6</sup>

Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP (First DIDP Request), seeking documents related to the First CPE Report.<sup>7</sup> On 31 October 2014, ICANN responded to the First DIDP Request (First DIDP Response).<sup>8</sup>

On 29 November 2014, the Requester submitted a revised Reconsideration Request 14-44 (Revised Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of it, and of the First DIDP Response.<sup>9</sup>

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.<sup>10</sup> The BGC directed that "the CPE Panel's Report shall be set aside, and that new [CPE] evaluators will be appointed to conduct a new CPE

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<sup>4</sup> *Id.*

<sup>5</sup> See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>6</sup> <https://www.icann.org/resources/pages/14-44-2014-10-22-en>.

<sup>7</sup> <https://www.icann.org/resources/pages/20141022-02-2014-10-31-en>.

<sup>8</sup> See <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

<sup>9</sup> See <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

<sup>10</sup> Determination of BGC, Reconsideration Request 14-44, *available at* <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf> at Pg. 31.

for the Application.”<sup>11</sup> In addition to directing that new evaluators conduct the second CPE of the Application, the BGC also recommended that the EIU consider including new members of the core team to assess the evaluation results.<sup>12</sup>

In furtherance of the BGC’s Determination on Request 14-44, the EIU administered the Second CPE, appointing two new evaluators as directed by the BGC, and one new core team member as the BGC suggested.

On 8 October 2015, the Second CPE Panel issued the Second CPE Report, finding that the Application did not prevail in the Second CPE.<sup>13</sup>

On 22 October 2015, the Requester submitted Reconsideration Request 15-21, seeking reconsideration of the Second CPE Report and ICANN’s acceptance of it.<sup>14</sup>

Also on 22 October 2015, the Requester submitted a request pursuant to ICANN’s DIDP (Second DIDP Request), seeking documents related to the Second CPE Report.<sup>15</sup> On 21 November 2015, ICANN responded to the DIDP Request (Second DIDP Response).<sup>16</sup>

On 4 December 2015, the Requester submitted a revised Reconsideration Request 15-21 (Request 15-21), which sought reconsideration of the Second CPE Report and ICANN’s acceptance of it, and of the Second DIDP Response.<sup>17</sup>

On 1 February 2016, the BGC issued the Determination on Request 15-21, finding that Request 15-21 should be denied.<sup>18</sup>

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

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

<sup>13</sup> See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>14</sup> <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

<sup>15</sup> See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

<sup>16</sup> See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

<sup>17</sup> See generally <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

The Requester submitted Request 16-3 on 17 February 2016.<sup>19</sup> Request 16-3 challenges the Determination on Request 15-21 on the sole basis that the person at the EIU who sent verification emails to the authors of letters of support and opposition to the Application was not a CPE “evaluator.”<sup>20</sup>

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3.<sup>21</sup> In response, Pursuant to Article IV, Section 2.12 of ICANN’s Bylaws, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support.<sup>22</sup> The Requester, however, did not address the sole issue that is the basis for Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application.<sup>23</sup> Instead, the

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(continued...)

<sup>18</sup> Determination on Request 15-21, *available at* <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>19</sup> *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>. ICANN has also reviewed and considered several letters sent in support of Request 16-3, including one from Transgender Equality Uganda and one from Trans-Fuzja. (*See* <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.) In addition, ICANN also reviewed and considered two letters from CenterLink that the Requester submitted along with its Presentation materials, indicating CenterLink’s support of the Requester’s Application. (*See id.*)

<sup>20</sup> *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>21</sup> Request, § 8.7, Pg. 8.

<sup>22</sup> *See* <https://www.icann.org/resources/board-material/agenda-oec-2016-05-15-en>.

<sup>23</sup> *See* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

Presentation addressed the merits of the Second CPE Report, which is not the subject of Request 16-3 and is not a proper basis for reconsideration.<sup>24</sup> <sup>25</sup>

**B. Relief Requested.**

The Requester asks that ICANN:

1. “[A]cknowledge receipt of this Reconsideration Request;”
2. “[D]etermine that the [Determination on Request 15-21] is to be set aside;”
3. “[I]nvite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;”  
and
4. “[D]etermine that, given the circumstances, any and all of its requests set out in § 9 of Requester’s Second Reconsideration Request be awarded, which are incorporated herein by reference.”<sup>26</sup>

**III. The Relevant Standards For Reconsideration Requests And CPE.**

**A. Reconsideration Requests.**

ICANN’s Bylaws provide for reconsideration of a staff or Board action or inaction in accordance with specified criteria, which include a requirement that the requester has been “materially [and] adversely affected” by the challenged action or inaction.<sup>27</sup> The Requester here

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<sup>24</sup> *Id.*

<sup>25</sup> The BGC also notes that it received and considered the 24 June 2016 letter from dotgay LLC, which can be found at <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dotgay-to-icann-bgc-24jun16-en.pdf>.

<sup>26</sup> Request, § 9, Pgs. 8-9.

<sup>27</sup> Bylaws, Art. IV, § 2. Article IV, §§ 2.1-2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been materially and adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or

challenges both staff and Board action.<sup>28</sup>

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it is asserted that a panel failed to follow established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.<sup>29</sup> In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports. Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the EIU violated any established policy or procedure.

A Board action may be subject to reconsideration where it was undertaken “without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act,” or, where it was “taken as a result of the Board’s reliance on false or inaccurate material information.”<sup>30</sup> Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and the Board agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.

## **B. Community Priority Evaluation.**

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(continued...)

(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.

<sup>28</sup> While the Requester indicated that it challenged staff action (see Request, § 2, Pg. 1), the crux of Reconsideration Request 16-3 is a challenge to the BGC’s Determination on Request 15-21, and as such, challenges both Board and staff action.

<sup>29</sup> See BGC Recommendation on Reconsideration Request 13-5, *available at*

<http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13- en.doc>.

<sup>30</sup> Bylaws, Art. IV, § 2.

The standards governing CPE are set forth in Module 4.2 of the Guidebook. The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook's CPE provisions<sup>31</sup> and summarizing those provisions.<sup>32</sup> In addition, the EIU has published supplementary guidelines (CPE Guidelines) that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.<sup>33</sup>

CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.<sup>34</sup> CPE is performed by an independent panel composed of two evaluators who are appointed by the EIU.<sup>35</sup> A CPE panel's role is to determine whether the community-based application fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points.

#### **IV. Analysis And Rationale.**

The Requester seeks reconsideration of the Determination on Request 15-21, arguing that the BGC should have "confirm[ed]" that the EIU did not follow applicable policies and

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<sup>31</sup> The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

<sup>32</sup> CPE Panel Process Document, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>33</sup> CPE Guidelines, available at <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

<sup>34</sup> Guidebook, § 4.2.

<sup>35</sup> *Id.* at § 4.2.2.

procedures in conducting the Second CPE.<sup>36</sup> Specifically, the Requester claims that the EIU violated the CPE Panel Process Document because the person who sent verification emails to the authors of letters of support and opposition to the Application was a member of the core team (serving as a Verification Coordinator) and was not one of the two “evaluators” assigned to conduct the CPE.<sup>37</sup> However, the Requester fails to identify any conduct by the EIU that contradicts an established policy or procedure in a manner that materially and adversely affected the Requester.<sup>38</sup> The process of verifying letters is an administrative task.<sup>39</sup> Regardless of which person physically sent the verification emails, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation in accordance with Module 4.2.3 of the Guidebook, which included an evaluator’s substantive evaluation of the letters in compliance with the CPE Panel Process Document.

Moreover, the Requester does not identify any material information the BGC did not consider in reaching the Determination on Request 15-21, or any reliance upon false or inaccurate information.<sup>40</sup> The act of sending a verification email is not material, so long as the evaluators performed their task of evaluating the letters of support and opposition. There is no claim that the evaluators did not conduct the actual evaluation. As such, the Determination on Request 15-21 properly confirmed that reconsideration was not warranted based on the EIU’s decision to delegate the sending of verification emails to a Verification Coordinator, and thus the Determination on Request 15-21 does not itself warrant reconsideration.<sup>41</sup>

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<sup>36</sup> Request, § 8.6, Pg. 7.

<sup>37</sup> *Id.*, § 8.4, Pgs. 5-6.

<sup>38</sup> See Bylaws, Art. IV, §§ 2.1-2.

<sup>39</sup> See <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 2.

<sup>40</sup> See Bylaws, Art. IV, § 2.

<sup>41</sup> While Request 16-3 generally is styled as a request for the BGC to reconsider the Determination on Request 15-21, the Requester also argues that the “EIU ha[s] not respected the policies and processes” governing CPE. Request, § 8.6, Pg. 7.

**A. The EIU’s Letter Verification Process Did Not Violate Applicable Policies And Procedures In A Manner That Materially Or Adversely Affected The Requester.**

The Requester’s claims arise entirely out the CPE Panel Process Document’s provisions that an “evaluator” verifies letters of support and opposition to an application undergoing CPE, which the Requester claims did not occur here.<sup>42</sup> In other words, the Requester argues that reconsideration is warranted because the EIU did not adhere to the CPE Panel Process Document insofar as the person who physically sent the emails verifying the letters of support and opposition was not an “evaluator” but, instead, was another EIU employee.<sup>43</sup> However, the EIU’s decision to delegate this administrative task to an employee cannot support reconsideration, because it did not affect the substance of the Second CPE in any fashion and did not change the fact that the evaluators conducted the actual evaluation of the letters.

To start, the Determination on Request 15-21 already addressed this argument.<sup>44</sup> The Determination on Request 15-21 acknowledged that the verification emails were sent by a person “responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU.”<sup>45</sup> The Determination on Request 15-21 also explained that the CPE Panel Process Document mandates that one of the two evaluators

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<sup>42</sup> CPE Panel Process Document at Pg. 5; Request, § 8.4, Pg. 5-6. Request 16-3 also contains a sentence arguing that the EIU appointed one of the same evaluators to conduct the Second CPE as performed the First CPE. Request, § 8.1, Pg. 3. The powerpoint to which the Requester referred during its Presentation also fleetingly touched upon this issue. (See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>, at Pg. 13.) However, other than in passing reference, Request 16-3 does not argue that reconsideration is warranted because the same evaluator conducted the Second CPE. Instead, that argument appears to be a vestige from the Requester’s Request 15-21, which raised that argument. (See Request 15-21, § 8.2, Pg. 5, *available at* <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.) As explained in the Determination on Request 15-21, that argument fails to support reconsideration because it is factually inaccurate; ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and added a new core team member for the administration of the Second CPE. (Determination on Request 15-21 at Pgs. 28-29.)

<sup>43</sup> See Request, § 8.1, Pg. 3.

<sup>44</sup> Determination on Request 15-21 at Pg. 29, fn. 102.

<sup>45</sup> *Id.*, Pgs. 28-29.

be “responsible for the letter verification process.”<sup>46</sup> Here, the CPE Panel members delegated the physical sending of the verification emails to a Verification Coordinator.<sup>47</sup> This procedure is in accord with the CPE Panel Process Document’s provision that a letter is verified when its author “send[s] an email *to the EIU* acknowledging that the letter is authentic.”<sup>48</sup> While the CPE Panel Process Document indicates that an “evaluator” will contact letter authors,<sup>49</sup> there is no policy or procedure that forbids the EIU from delegating the administrative task of sending the verification email to someone other than the actual “evaluator,” as the Determination on Request 15-21 correctly noted.

Moreover, the Requester has not demonstrated how it was materially or adversely affected by the EIU’s decision to delegate this administrative function to an administrative employee. On that ground alone, no reconsideration is warranted.<sup>50</sup> The identity of the person physically sending the verification emails did not have any impact upon the results of the verification or the results of the Second CPE as a whole; the verification results were communicated to both of the evaluators and the entire core team to permit a full and complete evaluation in accordance with the Guidebook, which included an evaluator’s substantive evaluation of the verified letters in compliance with the CPE Panel Process Document.<sup>51</sup> Nor is there anything inherently nefarious to the EIU’s decision in this regard; much as a company executive might delegate to her assistant the physical sending of emails sent on her behalf, the EIU evaluators assign the Verification Coordinator the task of physically sending the verification emails. In short, the Requester has not indicated how it was affected by the decision to delegate

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<sup>46</sup> See CPE Panel Process Document at Pg. 5; Determination on Request 15-21 at Pg. 29, fn. 102.

<sup>47</sup> Determination on Request 15-21 at Pg. 29, fn. 102.

<sup>48</sup> CPE Panel Process Document at Pg. 5 (emphasis added).

<sup>49</sup> *Id.*

<sup>50</sup> Bylaws, Art. IV, §§ 2.1-2

<sup>51</sup> Guidebook § 4.2.3; CPE Panel Process Document at Pg. 5.

the sending of the verification emails to a Verification Coordinator, much less how it was materially or adversely affected, as is required to support a reconsideration request.<sup>52</sup>

Nonetheless, “[i]n an effort to provide greater transparency on an administrative aspect of the Community Priority Evaluation (CPE) process,” the EIU has provided “additional information regarding verification of letters of support and opposition” (EIU Correspondence).<sup>53</sup> The EIU Correspondence confirms that “the two evaluators assigned to assess a specific application review the letter(s) of support and opposition. For every letter of support/opposition received, both of the evaluators assess the letter(s) as described in the Guidebook, section 4.2.3 Criterion 4: Community Endorsement.”<sup>54</sup> As such, the EIU Correspondence confirms that the EIU complied with the CPE Panel Process Document’s instruction that an evaluator “assesses both the relevance of the organization and the validity of the documentation.”<sup>55</sup> The EIU Correspondence further explains that:

[t]he process of verification of letter(s) is an administrative task. . . . [F]or evaluations involving large numbers of letters of support or opposition, the EIU assigned its Project Coordinator, a senior member of the core team, to serve as Verification Coordinator and to take the purely administrative step of ensuring that the large volume of verification emails, as well as follow-up emails and phone calls, were managed efficiently.<sup>56</sup>

The need for a Verification Coordinator arose when an “administrative issue[] related to the verification of letters of support” occurred, namely certain entities submitted letters of support or opposition to multiple applications.<sup>57</sup> Because different evaluators were assigned to conduct CPE with respect to the various applications, those entities began to receive verification

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<sup>52</sup> See Bylaws, Art. IV, §§ 2.1-2.

<sup>53</sup> EIU Correspondence, *available at* <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 1.

<sup>54</sup> *Id.*

<sup>55</sup> CPE Panel Process Document at Pg. 5.

<sup>56</sup> EIU Correspondence at Pg. 2.

<sup>57</sup> *Id.*

emails from different people within the EIU.<sup>58</sup> The EIU “received complaints from the authors of the letters, who requested that they be contacted by a single individual,” thus the EIU assigned the Verification Coordinator the administrative task of sending all verification emails.<sup>59</sup> As the EIU Correspondence emphasizes, “the results of the verification [a]re communicated to both of the evaluators” and it is the evaluators who score the applications.<sup>60</sup>

In sum, the EIU Correspondence confirms that the Verification Coordinator sends the verification emails purely for administrative ease, and that the Requester was not affected (let alone materially or adversely) by the delegation of this administrative task from the evaluator to the Verification Coordinator. As such, the Requester has not identified any conduct on the part of the EIU that warrants reconsideration.

**B. The Requester Has Not Shown That The Determination on Request 15-21 Was The Result Of The BGC Failing To Consider Material Information, Or Considering False Or Inaccurate Information.**

The Requester argues that reconsideration of the Determination on Request 15-21 is warranted because *either*: (1) “the BGC should . . . have confirmed[] that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator”; *or* (2) the CPE Panel Process Document sets forth “a process that is more stringent than the one set forth in the Applicant Guidebook, which does not require the independent evaluator [to] perform such verification of support and objection.”<sup>61</sup> Reconsideration is not warranted on either ground, because the Requester has not shown that the BGC failed to consider material information or

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at Pg. 1.

<sup>61</sup> Request, § 8.6, Pg. 8.

relied on false or inaccurate information with respect to either issue. The Requester has not shown that either basis for reconsideration it poses actually took place.

First, as explained *supra*, the EIU substantively adhered to the CPE Panel Process Document and the Guidebook in administering the Second CPE, including with respect to the letter verification process. The Requester has not identified any material information the BGC failed to consider, or any false or inaccurate information it relied upon in reaching the Determination on Request 15-21 that no reconsideration was warranted with respect to the fact that an EIU administrative employee sent the verification emails during the Second CPE. As such, no reconsideration of the Determination on Request 15-21 is warranted.<sup>62</sup>

Second, the Requester argues that the BGC “erred in confirming that ‘none of the CPE Materials comprise an addition or change to the terms of the Guidebook.’”<sup>63</sup> As an initial matter, as the Determination on Request 15-21 explained, any challenge to the CPE materials (including the CPE Panel Process Document) is time-barred.<sup>64</sup> The Requester argues that through its reconsideration requests and the Determination on Request 15-21, it has discovered that the CPE Panel Process Document “introduces a concept that has not been included in the . . . Guidebook, which only refers to ‘evaluators’.”<sup>65</sup> However, the CPE Panel Process Document does not in fact comprise an addition or change to the terms of the Guidebook. The Guidebook provides that “[c]ommunity priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications.”<sup>66</sup> The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to

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<sup>62</sup> See Bylaws, Art. IV, § 2.

<sup>63</sup> Request, § 8.6, Pg. 8 (quoting Determination on Request 15-21 at Pg. 12).

<sup>64</sup> Determination on Request 15-21 at Pgs. 11-12.

<sup>65</sup> Request, § 8.5, Pg. 7.

<sup>66</sup> Guidebook § 4.2.2.

implement the Guidebook's CPE provisions<sup>67</sup> and summarizing those provisions.<sup>68</sup> The fact that someone other than an evaluator physically sends verification emails to authors of letters of support or opposition does not mean anyone other than a "community priority panel" has "review[ed]" the Application, as the Guidebook instructs.<sup>69</sup>

In sum, the Requester has not demonstrated that the Determination on Request 15-21 reflects a failure on the part of the BGC to consider material information, or that the BGC considered false or inaccurate information, in concluding either that the EIU substantively complied with the CPE Panel Process Document, or that the CPE Panel Process Document adheres to the Guidebook. Therefore, the BGC thinks that no reconsideration of the Determination on Request 15-21 is warranted.

#### **V. Recommendation.**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration. The BGC therefore recommends that Request 16-3 be denied. If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 18 March 2016. However, the Requester sought, was

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<sup>67</sup> The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

<sup>68</sup> CPE Panel Process Document.

<sup>69</sup> Guidebook, § 4.2.2.

invited to, and did make a Presentation to the BGC regarding Request 16-3 on 15 May 2016.<sup>70</sup>

The timing of the Presentation delayed the BGC's consideration of Request 16-3. The first practical opportunity to address Request 16-3 after receiving the Presentation was 26 June 2016.

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<sup>70</sup> See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

# **Exhibit 19**

ARIF HYDER ALI

Contact Information Redacted  
Contact Information Redacted Direct  
Fax

25 August 2016

**Via E-Mail**

Mr Göran Marby  
President and Chief Executive Officer  
Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: ICANN Ombudsman Report dated 27 July 2016**

Dear Mr. Marby:

I am writing on behalf of my client, dotgay LLC (“dotgay”), to request that ICANN: (1) promptly, and by no later than Monday, August 29, 2016, post the Ombudsman’s investigative reports for Case No. 16-00177 issued on 15 July 2016 and 27 July 2016, regarding ICANN and the Economist Intelligence Unit’s treatment of dotgay’s application for .GAY (the “Report” or the “Ombudsman’s Report”); and (2) include the Report amongst the briefing materials that will be provided to the ICANN Board.

Dotgay notes that the Ombudsman’s conclusion that ICANN’s Board grant community priority status to dotgay, on the basis that such a step was required under ICANN’s own Articles and Bylaws, already has been broadly publicized within the ICANN community and in media outlets.<sup>1</sup> The posting of the Report by ICANN, however, is crucial to promote an understanding of the issues raised by the Ombudsman regarding the treatment of dotgay’s application in the ICANN community.<sup>2</sup>

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<sup>1</sup> See, e.g., [http://www.theregister.co.uk/2016/07/29/give\\_gays\\_dot\\_gay/](http://www.theregister.co.uk/2016/07/29/give_gays_dot_gay/).

<sup>2</sup> See, ICANN Ombudsman Framework.

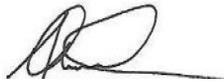
In addition, we note with concern that the Ombudsman's Report was not amongst the board briefing materials provided to ICANN's Board for consideration at its Special Meeting of 9 August 2016.

In the Recommendation to the Board issued by the Board Governance Committee ("BGC") on 26 June 2016, the BGC dismissed the request on technical grounds (improperly, in our view) and *specifically* encouraged dotgay to approach the Ombudsman with any complaints of unfairness:

*"If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter"* (Recommendation of 26 June 2016, § V, p.16).

Dotgay subsequently followed the BGC's Recommendation and cooperated with the Ombudsman's Investigation. The Ombudsman issued his report after completing his investigation, which included seeking comments from ICANN staff and dotgay. His conclusions vindicated dotgay's complaints about being treated unfairly and in a discriminatory manner. Accordingly, the ICANN Board must thoroughly and properly consider the Ombudsman Report during its future deliberations regarding dotgay's Reconsideration Request No. 16-3.<sup>3</sup>

We look forward to seeing the Ombudsman's Report posted on ICANN's website and included amongst the briefing materials provided to the ICANN Board when dotgay's application is tabled for consideration.



Arif Hyder Ali

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<sup>3</sup> See Reconsideration Request No. 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

cc: Steve Crocker, Chairman of the ICANN Board (steve.crocker@icann.org)  
John Jeffrey, General Counsel and Company Secretary (john.jeffrey@icann.org)  
Scott Seitz, Chief Executive Officer, dotgay LLC Contact Information Redacted

# **Exhibit 20**

**ARIF HYDER ALI**

Contact Information Redacted  
Contact Information Redacted Direct  
Fax

November 15, 2016

**VIA E-MAIL**

ICANN Board of Directors  
c/o Mr. Steve Crocker, Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Council of Europe Report DGI (2016)17 - .GAY TLD**

Dear Chairman Crocker and Board of Directors,

dotgay LLC (“**dotgay**”) writes to request that the ICANN Board (“**Board**”) add to the materials it is reviewing in connection with dotgay’s application the Council of Europe’s 4 November 2016 Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (“**CoE Report**”).<sup>1</sup> The CoE is Europe’s leading human rights organization, with 47 member states (28 of which are also members of the European Union),<sup>2</sup> all of which are members of the European Convention on Human Rights. The CoE has observer status within ICANN’s Governmental Advisory Committee (GAC).

The CoE Report, standing alone, and certainly when taken together with the following materials, makes it abundantly clear that the EIU erred in its evaluation of dotgay’s application and that the Board is obligated to grant community priority status to dotgay’s application for the .GAY TLD:

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<sup>1</sup> See Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>2</sup> See <http://www.coe.int/en/>.

- (i) the former ICANN Ombudsman Chris LaHatte's Report;<sup>3</sup>
- (ii) the ICC Expert's Determination regarding .LGBT;<sup>4</sup>
- (iii) the Expert Opinion of Professor William N. Eskridge of Yale Law School;<sup>5</sup>
- (iv) the Expert Opinion of Professor M.V. Lee Badgett, Professor of Economics and Director of the School of Public Policy at the University of Massachusetts;<sup>6</sup> and
- (v) the Dot Registry IRP Decision.<sup>7</sup>

The CoE Report identifies a long list of human rights principles, which the Board cannot avoid giving effect in evaluating dotgay's application. The Report amply supports the conclusions reached by the ICANN Ombudsman and the two independent expert reports submitted to ICANN on 13 September and 17 October 2016.

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<sup>3</sup> Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html> (determining that “[t]he board should grant the community application status to the applicant . . . [and] comply [ ] with its own policies and well established human rights principles”).

<sup>4</sup> *The International Lesbian Gay Bisexual Trans and Intersex Association v. Afiliads Limited*, ICC Case No. EXP/390/ICANN/7, Expert Determination (16 Nov. 2013), ¶ 22, <https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf> (finding that the .GAY application “is designed to serve the gay community”).

<sup>5</sup> Letter to ICANN Board from A. Ali, enclosing the Eskridge Report (13 Sept. 2016), pp. 2-3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf> (explaining how Prof. Eskridge shows that “the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement”).

<sup>6</sup> Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), pp. 1-2, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf> (explaining how Prof. Badgett demonstrates that “withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community”).

<sup>7</sup> *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> (holding that the Board Governance Committee (“BGC”) “must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination”).

## The CoE Report Applies Human Rights Principles to .GAY

The CoE Report affirms that human rights principles apply to ICANN.<sup>8</sup> The Report's discussion of human rights and community applications shows that the Board should independently approve dotgay's .GAY application. To assist the Board with its analysis of the CoE Report, we attach particularly relevant excerpts of it, the import of which should be self-evident:

### ICANN Must Protect Public Interest Values through Community TLDs

- Community TLDs should protect “vulnerable groups or minorities. Community-based TLDs should take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They should also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.”<sup>9</sup>
- Community TLDs should protect “[p]luralism, diversity and inclusion. ICANN and the GAC should ensure that ICANN’s mechanisms include and embrace a diversity of values, opinions, and social groups and avoids the predominance of particular deep-pocketed organisations that function as gatekeepers for online content.”<sup>10</sup>

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<sup>8</sup> Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>9</sup> *Id.*, p. 34.

<sup>10</sup> *Id.* (emphasis added).

### **ICANN's Commitment to Human Rights Requires that It Support Community gTLDs**

- The Right to Freedom of Expression: “For Internet users at large, domain names represent an important way to find and access information on the Internet. . . . A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. *A community TLD could help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members.* Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas.”<sup>11</sup>
- The Right to Freedom of Assembly and Association: “Community TLDs create space to collectively act, express, promote, pursue or defend a field of common interests. As a voluntary grouping for a common goal, community TLDs facilitate freedom of expression and association and has the potential to strengthen pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.”<sup>12</sup>

### **ICANN's gTLD Program Improperly Fails to Conform with Human Rights Principles**

- The Right to Procedural Due Process: “ICANN's gTLD program, including community-based applications, needs to be based on procedural due process. . . . Clause 6 of the Terms and Conditions sets out that applicants may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to the application. As such, the agreement limits access to court and thus

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<sup>11</sup> *Id.*, p. 19 (emphasis added).

<sup>12</sup> *Id.*, p. 22.

access to justice, which is generally considered a human right or at least a right at the constitutional level.”<sup>13</sup>

- The Right to Non-Discrimination: “The general principle of equality and non-discrimination is a fundamental element of international human rights law. . . . ICANN has been plagued with allegations that its procedures and mechanisms for CBAs that could prioritise their applications over standard applicants have an inherent bias against communities. Allegedly, the standard has been set so high that practically almost no community is able to be awarded priority.”<sup>14</sup>

Through its discussion of these human rights, the CoE Report confirms the ICANN Ombudsman’s determination that ICANN has a commitment to human rights and that dotgay represents a community that “is real, does need protection and should be supported” by awarding dotgay community priority status.<sup>15</sup> It further supports the Expert Opinion of Prof. M.V. Lee Badgett, which states that ICANN should provide a safe space on the Internet for the gay community to engage in economic activity and social change.<sup>16</sup>

The BGC and the EIU failed to uphold these basic human rights when it considered dotgay’s application for the .GAY TLD. In light of the CoE Report’s recent findings, the ICANN Ombudsman’s determination, the expert opinions submitted to ICANN, and the clearly incorrect determination by the EIU, the Board should correct this error by individually considering the .GAY application in accordance with Article 5.1 of the AGB and awarding the .GAY TLD to dotgay.

### **The CoE Report Further Recognizes Problems with the EIU and the CPE Process**

In addition to human rights considerations, the CoE Report confirms the significant problems with the EIU’s CPE of the .GAY gTLD, corroborating the Expert Opinion of

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<sup>13</sup> *Id.*, p. 25.

<sup>14</sup> *Id.*, p. 26.

<sup>15</sup> Ombudsman Report, <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

<sup>16</sup> See Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

Prof. Eskridge of Yale Law School.<sup>17</sup> The EIU clearly made fundamental errors of inconsistency and discrimination in following and applying its guidelines. The CoE Report criticizes the EIU for these inconsistencies, specifically highlighting the following issues with the EIU's consideration of .GAY:

**The EIU's Inconsistent Acts during the CPE Process Raises Issues of Human Rights Violations, Unfairness, and Discrimination<sup>18</sup>**

- “*First*, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. . . . The Guidebook says utmost care has been taken to avoid any ‘double-counting’. . . . However, the EIU appears to double count ‘awareness and recognition of the community amongst its member’ twice.”<sup>19</sup>
- “*Second*, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others. The EIU appears to have been inconsistent in its interpretation of ‘Nexus’ Under Criterion 2 of the CPE process. *The EUI awarded 0 points for nexus to the dotgay LLC application for .GAY on the grounds that more than a small part of the community identified by the applicant (namely transgender, intersex, and ally individuals) is not identified by the applied for string. However, the EIU awarded 2 points to the EBU for nexus for their application for .RADIO, having identified a small part of the constituent community (as identified), for example network interface equipment and software providers to the industry who would not likely be associated with the word RADIO.* There is no evidence provided of the relative small and ‘more than small’ segments of the identified communities

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<sup>17</sup> See Letter to ICANN Board from A. Ali enclosing the Eskridge Report (13 Sept. 2016), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf>.

<sup>18</sup> Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), pp. 9, 45, 49, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>19</sup> *Id.*, p. 49 (emphasis added).

which justified giving a score of 0 to one applicant and 2 to another.”<sup>20</sup>

- “The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a *majority* of the community. . . . ***By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.***”<sup>21</sup>
- “***Another example of inconsistency occurred in the case of the dotgay LLC application for .GAY, where the applicants were penalised because of lack of global support. Global support would be very hard to satisfy by a community that is fighting to obtain the recognition of its rights around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime.***”<sup>22</sup>
- “***Third***, the EIU changed its own process as it went along.”<sup>23</sup>
- “***Fourth***, various parts of the evaluation of the gTLDs are administered by different independent bodies that could have diverging evaluation of what a community is and whether they deserve special protection or not. Such inconsistencies are for example observed between the assessment of community objections and CPE Panels, leading to unfairness. ***An example***

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<sup>20</sup> *Id.*, pp. 49-50 (emphasis added).

<sup>21</sup> *Id.*, p. 51 (emphasis added).

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> *Id.* (emphasis added).

*that was presented concerned the deliberations on the community objection by the International Lesbian Gay Bisexual Trans and Intersex Association to .LBGT which rejected the objection on the grounds that the interests of the community would be protected through the separate community application for the .GAY string. In fact the CPE panel rejected the community application for .GAY largely on the grounds that transsexuals did not necessarily identify as gay. There is therefore an inconsistency between the objections panel and the CPE panel on whether or not transsexuals are or are not part of the wider gay community.”<sup>24</sup>*

- *Fifth*, “[t]here are four sets of criteria that are considered during the CPE process: community establishment, nexus between the proposed string and the community, registration policies and community endorsement. . . . It would seem that the EIU prefers to award full points on 4A[, the Support prong of ‘Community Endorsement,’] for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community.”<sup>25</sup>

### **ICANN Improperly Accepts EIU Determinations without Question and without Possibility of Appeal**

- “The Independent Review Panel decided in the IRP between Dot Registry and ICANN that the ICANN Board (acting through the BGC that decides on Reconsideration Requests) ‘failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfil its

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<sup>24</sup> *Id.*, pp. 51-52 (emphasis added).

<sup>25</sup> *Id.*, p. 57.

transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publicly available the ICANN staff work on which the BGC relied).’ The Panel majority further concluded that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions. By doing so, the Board did not act consistently with its Articles of Incorporation and Bylaws.”<sup>26</sup>

- “ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. Yet the terms of its contract with applicants suggest that the availability of its accountability mechanisms provides an opportunity to challenge any final decision made by ICANN. This is complex in terms of the CPE process as ICANN has avoided any admission that CPE is anything other than an evaluation taken by a third party (the EIU) and asserts that no decision has been taken by ICANN itself. And yet, ICANN relies on that evaluation as a ‘decision’ which it will not question. Therefore, as seen above, the accountability mechanisms which are available to CBAs who have gone through the CPE process are limited to looking only at the EIU’s processes insofar as they comply with the AGB. The lack of transparency around the way in which the EIU works serves merely to compound the impression that these mechanisms do not serve the interests of challengers.”<sup>27</sup>

**The CPE Process does not Conform with ICANN’s Core Principles, including Human Rights Principles**

- “*In his final report dated 27 July 2016, the outgoing Ombudsman Chris LaHatte looked at a complaint about the Reconsideration Process from dotgay LLC.* Here, he took to task the fact that the BGC has ‘a very narrow view of its own jurisdiction in considering reconsideration requests.’ He points out that ‘it has always been open to ICANN to reject an EIU

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<sup>26</sup> *Id.*, p. 60 (quoting *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016)).

<sup>27</sup> *Id.*, p. 64.

recommendation, especially when public interest considerations are involved.’ *As identified by us in this report, Chris LaHatte raises issues of inconsistency in the way the EIU has applied the CPE criteria, and reminds ICANN that it ‘has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency’. We endorse his view and hope that our report will strengthen the argument behind his words and result in ICANN reviewing and overhauling its processes for community-based applicants to better support diversity and plurality on the Internet.*”<sup>28</sup>

- “As with legal texts, one can interpret the documented proof of the alleged validity of CBAs literally or purposively. The EIU Panel has used the method of literal interpretation: the words provided for by the applicants to prove their community status were given their natural or ordinary meaning and were applied without the Panel seeking to put a gloss on the words or seek to make sense of it. When the Panel was unsure, they went for a restrictive interpretation, to make sure they did not go beyond their mandate. However, such a literal interpretation does not appear to fit the role of the Panel nor ICANN’s mandate to promote the global public interest in the operational stability of the Internet. The concept of community was intentionally left open and left for the Panel to fill in.”<sup>29</sup>

As evidenced by these inconsistencies, the EIU clearly failed to “respect[ ] the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB.”<sup>30</sup> The BGC’s own failure to exercise its independent judgment when evaluating the EIU’s CPE in light of these principles, which it must do according to the Dot Registry Declaration, “must be corrected.”<sup>31</sup>

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<sup>28</sup> *Id.*, pp. 69-70 (quoting Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>) (emphasis added).

<sup>29</sup> *Id.*, p. 31.

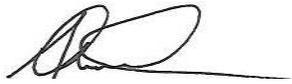
<sup>30</sup> *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34.

<sup>31</sup> Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 60.

**ICANN Must Proceed to Contracting with dotgay for .GAY**

In light of the above considerations, we believe that there are more than sufficient grounds for the Board to act under Article 5.1 of the AGB and award the .GAY TLD to dotgay. The Board should grant dotgay's community priority application without any further delay and proceed to enter into a registry agreement with dotgay, which remains dedicated and enthusiastic about operating the .GAY registry.

Sincerely,



Arif Hyder Ali  
Partner

# **Exhibit 21**

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ARIF HYDER ALI



12 March 2017

**VIA E-MAIL**

Mr. Göran Marby President and Chief Executive Officer ICANN 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094	ICANN Board of Directors c/o Steve Crocker, Chair 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094
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Dear President Marby and Members of the Board:

We write on behalf of our client, dotgay LLC (“dotgay”), to inquire when the ICANN Board (the “Board”) will issue its final decision on the 26 June 2016 Recommendation of the Board Governance Committee (“BGC”) on dotgay’s Reconsideration Request 16-3 regarding the .GAY top-level domain (the “Reconsideration Request”).<sup>1</sup> We further write to protest ICANN’s lack of transparency in its treatment of dotgay’s application and ICANN’s failure to provide any sort of response to dotgay’s various inquiries about that status of its application. ICANN’s actions and inaction continues to cause harm to the gay community, which today more than ever is need of a safe space on the Internet to protect and promote the ideals, principles and interests of the community.

Dotgay submitted its Reconsideration Request *more than one year ago* and *nearly nine months* have passed since the BGC issued its Recommendation. As we noted in our most recent correspondence of 30 January 2017, we find ICANN’s protracted delays in reaching a decision on dotgay’s Reconsideration Request and ICANN’s continued lack of

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<sup>1</sup> Reconsideration Request 16-3 (17 February 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

responsiveness to dotgay's inquiries about the status of its request troubling, particularly in light of ICANN's commitments to transparency enshrined in its governing documents.<sup>2</sup>

Although we understand that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"<sup>3</sup> and that the BGC may have requested from the CPE provider "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports,"<sup>4</sup> ICANN cannot indefinitely delay resolving dotgay's Reconsideration Request. ICANN owes affected parties, like dotgay, a response to their inquiries regarding the nature and status of the independent review and information request. Again, we find ICANN's lack of communication disappointing and inconsistent with its duties of transparency.

With this letter, we renew our request that ICANN extend dotgay, and the global community that dotgay represents through its application, the common courtesy of a response to its inquiries regarding the anticipated resolution of dotgay's Reconsideration Request and disclosure of information about the nature of the independent review ICANN apparently has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. We are unaware of any rule of law, administrative procedure or corporate governance that would justify ICANN's silence and delays.

We look forward to your prompt response.

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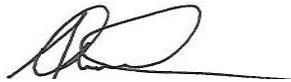
<sup>2</sup> See letter from Arif H. Ali, to Göran Marby, ICANN President and CEO, and the ICANN Board of Directors (30 January 2017).

<sup>3</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures (17 September 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>4</sup> Minutes of the Board Governance Committee (18 October 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

Dotgay reserves all of its rights at law or in equity before any court, tribunal, or forum of competent jurisdiction.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written over a horizontal line.

Arif Hyder Ali

cc: Krista Papac, ICANN Complaints Officer ([krista.papac@icann.org](mailto:krista.papac@icann.org))

# **Exhibit 22**



The Internet Corporation for Assigned Names and Numbers

26 April 2017

Re: Update on the Review of the New gTLD Community Priority Evaluation Process

Dear All Concerned:

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the Community Priority Evaluation (CPE) process. Recently, we discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board decided it would like to have some additional information related to how ICANN interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, we asked that the President and CEO, or his designee(s), undertake a review of the process by which ICANN has interacted with the CPE provider. ([Resolution 2016.09.17.01](#))

Further, during our 18 October 2016 meeting, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course.

The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests.

Los Angeles    12025 Waterfront Drive, Suite 300    Los Angeles, CA 90094    USA    T +1 310 301 5800    F +1 310 823 8649  
Offices:    Beijing    •    Brussels    •    Geneva    •    Istanbul    •    Montevideo    •    Seoul    •    Singapore    •    Washington

<http://icann.org>



Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: [14-30](#) (.LLC), [14-32](#) (.INC), [14-33](#) (.LLP), [16-3](#) (.GAY), [16-5](#) (.MUSIC), [16-8](#) (.CPA), [16-11](#) (.HOTEL), and [16-12](#) (.MERCK).

For more information about CPE criteria, please see ICANN's [Applicant Guidebook](#), which serves as basis for how all applications in the New gTLD Program have been evaluated. For more information regarding Reconsideration Requests, please see ICANN's [Bylaws](#).

Sincerely,

A handwritten signature in black ink, which appears to read "Chris Disspain". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Chris Disspain  
Chair, ICANN Board Governance Committee

# **Exhibit 23**

ARIF HYDER ALI

Contact Information  
Redacted

18 May 2017

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning  
Community Priority Evaluation for .GAY Application ID 1-1713-23699**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by dotgay LLC ("dotgay") in relation to ICANN's .GAY Community Priority Evaluation ("CPE"). The .GAY CPE Report<sup>1</sup> found that dotgay's community-based Application should not prevail. Dotgay has provided ICANN with numerous independent reports identifying dotgay's compliance with the CPE criteria, as well as the human rights concerns with ICANN's denial of dotgay's application.<sup>2</sup>

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.<sup>3</sup> In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's*

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<sup>1</sup> .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>

<sup>2</sup> See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>

<sup>3</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

*Documentary Information Disclosure Policy (DIDP) Requests.*<sup>4</sup> According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>5</sup> We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

### A. Context and Background

Dotgay submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly a year has passed since dotgay delivered a presentation to the Board Governance Committee (the "BGC").<sup>6</sup> Dotgay has sent several letters to ICANN noting that ICANN's protracted delays in reaching a decision and ICANN's continued lack of responsiveness to dotgay's inquiries about the status of dotgay's request represent a violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"<sup>7</sup> and that the BGC may have requested from the CPE provider "the materials and research

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<sup>4</sup> Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>5</sup> *Id.*

<sup>6</sup> <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf>; See also *dotgay's* powerpoint presentation:

<sup>7</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>8</sup>

However, ICANN has not provided *any* details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Other community applicants have specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.<sup>9</sup> Dotgay endorses and shares those concerns which equally affect dotgay, and has already requested a full explanation.<sup>10</sup>

Dotgay has received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:<sup>11</sup>

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but

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<sup>8</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>9</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

<sup>10</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, 12 March 2017, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>

<sup>11</sup> Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Similarly, we received a letter from ICANN's attorney, Jeffrey A. LeVee, on 15 May 2017 purporting to provide a "status update on Reconsideration Request 16-3. . . ." <sup>12</sup> According to Mr. LeVee's letter:

As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials.

Accordingly, both the BGC Letter and Mr. LeVee's letter fail to provide *any* meaningful information besides that there is a review underway and that the RR is on hold.

## **B. Documentation Requested**

The documentation requested by dotgay in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway."<sup>13</sup> Further, dotgay requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

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<sup>12</sup> Letter to Arif H. Ali from Jeffrey A. LeVee, dated May 15, 2017

<sup>13</sup> Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

1. All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”<sup>14</sup>
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm (“the evaluator”) undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

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<sup>14</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>15</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

12. The most recent estimates provided by the evaluator for the completion of the investigation; and

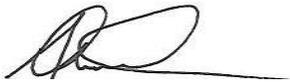
13. All materials provided to ICANN by the evaluator concerning the Review

dotgay reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

### **C. Conclusion**

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,



Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

# **Exhibit 24**



## **Community Priority Evaluation Process Review Update**

*2 June 2017*

The following is an update on the ongoing Community Priority Evaluation (CPE) process review.

### **Background on CPE Process Review**

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of CPE process, including certain concerns that some applicants have raised regarding the process. On [17 September 2016](#), the ICANN Board directed the President and CEO, or his designees, to undertake a review of the process by which ICANN has interacted with the CPE provider. In his [letter of 26 April 2017 to concerned parties](#), Chris Disspain, the Chair of the Board Governance Committee, provided additional information about the scope and status of the review. Below is additional information about the review, as well as the current status of the CPE process review.

### **CPE Process Review and Current Status**

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending [Requests for Reconsideration](#).

The review is being conducted in two parallel tracks by [FTI Consulting Inc.'s \(FTI\)](#) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists.

For more information about the CPE process, please visit <https://newgtlds.icann.org/en/applicants/cpe>.

# **Exhibit 25**

To: Arif Ali on behalf of dotgay LLC

Date: 18 June 2017

Re: Request No. 20170518-1

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Thank you for your request for documentary information dated 18 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (dotgay). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the Review):

1. All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports," and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm ("the evaluator") undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
12. The most recent estimates provided by the evaluator for the completion of the investigation; and

13. All materials provided to ICANN by the evaluator concerning the Review

## Response

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (See Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. (See Letter from Chris Disspain to Concerned Parties, 26 April 2017,

<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; see also, Minutes of BGC 18 October 2016 Meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en.>)

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, ICANN undertook the process to find the most qualified evaluator for the review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

#### Items 1, 2, 3, 8, and 13

Items 1, 2, 3, 8, 9, and 13 seek the disclosure of overlapping categories of documents relating to the Review. Specifically, these items request the following:

- Documents relating to "ICANN's request to the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports" (Item 1);
- "[D]ocuments from the EIU provider to ICANN including but not limited to: (a) ICANN's request for 'the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,' and

(b) all communications between the EIU and ICANN regarding the request” (Item 2);

- “[D]ocuments relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation” (Item 3);
- Materials provided to the evaluator by the EIU (Item 8); and
- Materials provided to ICANN by the evaluator concerning the Review (Item 13).

As stated in ICANN’s [Response to DIDP Request 20170505-1](#) that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

#### Items 4, 5, 6, 7

Items 4 through 7 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 4), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 5), the date of appointment (Item 6), and the terms of instructions provided to the evaluator (Item 7). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive

conflicts check related to the ICANN organization, the CPE provider, ICANN's outside counsel, and all the parties that underwent CPE.

#### Item 9

Item 9 seeks the disclosure of "materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board." As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>
- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previously submitted by dotguy. Rather than repeating those here, see Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>. The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing.

#### Item 10

Item 10 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application.

#### Items 11

Item 11 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 7 and 9. The information responsive to the overlapping items has been provided in response to Items 7 and 9 above.

#### Item 12

Item 12 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

#### **About DIDP**

ICANN’s DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# **Exhibit 26**

## **dotgay LLC Reconsideration Request (“RR”)**

### **1. Requester Information**

Requester:

**Name:** dotgay LLC (“dotgay”)

**Address:** Contact Information Redacted

**Email:** Jamie Baxter, Contact Information Redacted

Requester is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, Contact Information Redacted

**Email:** Contact Information Redacted

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

dotgay LLC (the “Requester”) seeks reconsideration of ICANN’s response to its DIDP Request, which denied the disclosure of certain categories of documents requested pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

On May 18, 2017, the Requester submitted a DIDP request seeking disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”)

review of the Community Priority Evaluation (“CPE”) process (the “DIDP Request”).<sup>1</sup>  
Specifically, the Requester submitted 13 document requests as follows:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

Request No. 4: The identity of the individual or firm (“the evaluator”) undertaking the Review;

Request No. 5: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

Request No. 7: The terms of instructions provided to the evaluator;

Request No. 8: The materials provided to the evaluator by the EIU;

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

Request No. 10: The materials submitted by affected parties provided to the evaluator;

Request No. 11: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

Request No. 12: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the

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<sup>1</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

Review.<sup>2</sup>

Subsequently, on June 18, 2017, ICANN responded to the Requester's DIDP Request by denying the Requester's (1) five document requests (Request Nos. 1-3, 8 and 13) in whole, and (2) one document request (Request No. 9) in part. ICANN reasoned that (1) the documents under Request Nos. 1-3, 8 and 13 are not appropriate for disclosure "based on . . . [the] DIDP Defined Conditions of Non-Disclosure;" and (2) the documents under Request No. 9 concerning "the correspondence between the ICANN organization and the CPE provider regarding the evaluations" are not appropriate for disclosure for "the same reasons identified in ICANN's response to the DIDP previous[ly] submitted by dotgay."<sup>3</sup>

**4. Date of action/inaction:**

ICANN acted on June 18, 2017 by issuing its response to the DIDP Request.

**5. On what date did you become aware of action or that action would not be taken?**

The Requester became aware of the action on June 18, 2017, when it received ICANN's response to the DIDP Request.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requester is materially affected by ICANN's refusal to disclose certain categories of documents concerning the BGC's review of the CPE process at issue in the DIDP Request.

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<sup>2</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>3</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>; *see* Exhibit 3, Request No. 20151022-1, ICANN DIDP Response (Oct. 21, 2015), <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

By way of background, the Requester filed a community-based generic Top-Level Domain (“gTLD”) application for the string “.GAY.” However, the CPE report, authored by the Economist Intelligence Unit (the “EIU”), recommended that ICANN reject the Requester’s application for the .GAY gTLD. As evident from the Requester’s submissions, including an independent expert report by Prof. William Eskridge of Yale Law School, the CPE report is fundamentally erroneous based on (1) interpretive errors created by misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (2) errors of inconsistency derived from the EIU’s failure to follow its own guidelines; (3) errors of discrimination, namely the EIU’s discriminatory treatment of dotgay’s application compared with other applications; and (4) errors of fact, as the EIU made several misstatements of the empirical evidence and demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States.<sup>4</sup>

In January 2017, ICANN retained an independent reviewer, FTI Consulting, Inc. (“FTI”), to review the CPE process and “the consistency in which the CPE criteria were applied” by the CPE provider. As part of the review, FTI is collecting information and materials from ICANN and the CPE provider. FTI will submit its findings to ICANN based on this underlying information.

FTI’s findings relating to “the consistency in which the CPE criteria were applied” will directly affect the outcome of the Requester’s Reconsideration Request 16-3 (“Request 16-3”), which is currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain’s April 26, 2017 letter to the Requester, which stated that FTI’s review “will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration

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<sup>4</sup> Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>

Requests related to CPE.” Thus, the Requester filed the DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process. In submitting this DIDP Request, the Requester expected ICANN to “operate in a manner consistent with [its] Bylaws” and “through open and transparent processes.”<sup>5</sup> ICANN failed to do so.

Specifically, according to Article 4 of ICANN’s Bylaws, “[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor.”<sup>6</sup> The Bylaws require that ICANN (1) “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;”<sup>7</sup> (2) “employ[ ] open and transparent policy development mechanisms;”<sup>8</sup> (3) “apply[ ] documented policies neutrally and objectively, with integrity and fairness;”<sup>9</sup> and (4) “[r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”<sup>10</sup>

The Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.<sup>11</sup> ICANN’s failure to provide complete responses to the Requester’s DIDP Request and failure to adhere to its own Bylaws raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for the Requester’s .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.<sup>12</sup>

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<sup>5</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>6</sup> *Id.*, Art. 4, § 4.2(o).

<sup>7</sup> *Id.*, Art. 1, § 1.2(a).

<sup>8</sup> *Id.*, Art. 3, § 3.1.

<sup>9</sup> *Id.*, Art. 1, § 1.2(v).

<sup>10</sup> *Id.*, Art. 1, § 1.2(vi).

<sup>11</sup> *See id.*, Arts. 1, 3-4.

<sup>12</sup> Exhibit 4, CPE Reconsideration Request 16-3 (Feb. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain categories of documents in the DIDP Request. Indeed, ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.<sup>13</sup> It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI’s findings and conclusions.

To prevent serious questions from arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to the Requester and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by the Requester that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure, and conflict check processes (Request No. 2) but also the underlying documents that substantiate ICANN’s claims.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN’s action materially affects the global gay community represented by the Requester. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and insecure operation of the identifiers managed by ICANN. Accountability, transparency, and

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<sup>13</sup> ICANN’s Documentary Information Disclosure Policy (last visited June 29, 2017) (“If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.”), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed and opaque ICANN damages the credibility, accountability, and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the Requester's BGC presentation and accompanying materials.<sup>14</sup> In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requester's community-based application for the .GAY string, in order to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.<sup>15</sup> This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>16</sup> ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that

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<sup>14</sup> See Exhibit 18, dotgay's Presentation to the Board Governance Committee (May 15, 2016), pp.2-3 <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

<sup>15</sup> See Exhibit 6, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>16</sup> ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. "), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including Request 16-3. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

## **8. Detail of Staff/Board Action/Inaction – Required Information**

### **8.1 Background**

The Requester elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant later that year – having only received 10 points.<sup>17</sup> In response, the Requester, supported by multiple community organizations, filed a Reconsideration Request with the BGC. The BGC granted the request, determining that the EIU did not follow procedure during the CPE process. As a result, the Requester’s application was sent to be re-evaluated by the EIU. However, the second CPE process produced the exact same results based on the same arguments.<sup>18</sup>

When this issue was brought before the BGC via another Reconsideration Request, though, the BGC excused the discriminatory conduct and the EIU’s policy and process violations. It refused to reconsider the CPE a second time. The Requester therefore filed a third Reconsideration Request, Request 16-3, on February 17, 2016 in response to the BGC’s non-response on many of

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<sup>17</sup> Exhibit 7, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>18</sup> See Exhibit 8, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

the issues highlighted in the second Reconsideration Request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.<sup>19</sup>

Almost a year later, and after numerous letters to ICANN,<sup>20</sup> on April 26, 2017, ICANN finally updated the Requester on the status of Request 16-3. The Requester received a letter from ICANN BGC Chair Chris Disspain indicating that Request 16-3 was “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>21</sup>

## 8.2 The DIDP Request

In response to this new information regarding the delay, on May 18, 2017, Arif Ali, on behalf of the Requester, filed the DIDP Request, in relation to the .GAY CPE.<sup>22</sup> The reason for

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<sup>19</sup> See Exhibit 9, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>20</sup> See Exhibit 10, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; Exhibit 12, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 14, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 13, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

<sup>21</sup> See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>22</sup> Exhibit 15, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

this request is twofold. *First*, the Requester sought to “ensure that information contained in documents concerning ICANN’s operational activities, within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>23</sup> *Second*, the Requester, like other gTLD applications, sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”<sup>24</sup> The Requester sought this information because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”<sup>25</sup>

As a result of this dearth of information from ICANN, the Requester made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, which are identified in **Question 3** above. The Requester concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”<sup>26</sup>

Prior to issuing its response to the DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to the DIDP Request.<sup>27</sup> ICANN explained that:

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

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

<sup>27</sup> Exhibit 16, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.<sup>28</sup>

No other information was provided to the Requester regarding the CPE Review Process at issue in its Request until ICANN issued its formal response to the DIDP Request on June 18, 2017.<sup>29</sup>

In response to ICANN's update on the CPE Review Process, and the lack of any additional information, the Requester sent ICANN a joint letter with DotMusic on June 10, 2017. The letter stated, *inter alia*, that:<sup>30</sup>

ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection." This is troubling for several reasons.

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<sup>28</sup> *Id.*

<sup>29</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>30</sup> Exhibit 17, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-leeve-10jun17-en.pdf>.

*First*, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

*Second*, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”

Accordingly, to ensure the integrity of FTI’s review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017.

### **8.3 ICANN’s Response to the Request**

However, on June 18, 2017, ICANN responded to the DIDP Request. ICANN issued a

response that provided the same information that had already been given to the Requester regarding the BGC's decision to review the CPE Process and to hire FTI in order to conduct an independent review.<sup>31</sup> ICANN further denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN's responses to these requests are as follows:

Request No. 1: All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"

*As stated in ICANN's Response to DIDP Request 20170505-1 that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:*

- *Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.*
- *Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.*
- *Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.*

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<sup>31</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

- *Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.*<sup>32</sup>

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

*ICANN provided the same response as for Item 1.*<sup>33</sup>

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

*ICANN provided the same response as for Item 1.*<sup>34</sup>

Request No. 8: The materials provided to the evaluator by the EIU;

*ICANN provided the same response as for Item 1.*<sup>35</sup>

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

*While ICANN provided a list of materials that it provided FTI, but also determined that the internal “documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previous submitted by dotgay.”*<sup>36</sup>

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.<sup>37</sup>

*ICANN provided the same response as for Item 1.*<sup>38</sup>

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

<sup>33</sup> *Id.*

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

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>38</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy as described in **Question 6** above.

**9. What are you asking ICANN to do now?**

The Requester asks ICANN to disclose the documents requested under Request Nos. 1-3, 8, 9, and 13.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, the Requester is a community applicant for .GAY and the organization that issued the DIDP Request to ICANN. It is materially affected by ICANN's decision to deny its Request for documents, especially since its gTLD application is at issue in the underling Request. And, further, the community it represents – the gay community – is materially affected by ICANN's failure to disclose the requested documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

This is not applicable.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



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Arif Hyder Ali

June 30, 2017

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Date

# **Exhibit 27**

10 June 2017

**VIA E-MAIL**

Chris Disspain  
Chair, ICANN Board Governance  
Committee  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

Jeffrey A. LeVee, Esq.  
Jones Day  
555 South Flower Street  
Los Angeles, CA 90071 2300

**Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update**

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited (“DotMusic”) and dotgay LLC (“dotgay”), regarding ICANN’s 2 June 2017 Community Priority Evaluation Process Review Update (“CPE Process Review Update”).

Our review of ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.<sup>1</sup> As you are aware, after the ICANN Board announced in September 2016 that it is conducting “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider,”<sup>2</sup> we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization’s remit, the information it had been provided,

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<sup>1</sup> See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 (“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”); Art. I, Section 2 (8) (“Make decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

<sup>2</sup> Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

whether the evaluator will seek to consult with the affected parties, etc.<sup>3</sup> In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.<sup>4</sup> At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Waye. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic's formal complaint with the Ombudsman that, *inter alia*, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain's 28 April 2017 letter and Mr. LeVee's 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—*after* DotMusic and dotgay filed their requests for documentary information<sup>5</sup> and *two weeks* before the investigator's final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection."<sup>6</sup>

This is troubling for several reasons. *First*, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

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<sup>3</sup> See *e.g.*, Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

<sup>4</sup> ICANN Madrid GDD Summit, May 9, 2017.

<sup>5</sup> See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

<sup>6</sup> 2 June 2017 CPE Process Review Update.

Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. **Second**, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in *very deeply* and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process," and that (ii) "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a *full look* at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."<sup>7</sup>

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

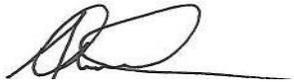
1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

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<sup>7</sup> ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. [http://schr.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%20-en.pdf](http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf), pp. 10 – 14.

We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', with a long horizontal stroke extending to the right.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Wayne, ICANN Ombudsman (ombudsman@icann.org)

# **Annex A**

## **DotMusic Limited**

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### **Key Documents**

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	<b>Description</b>
<b>1.</b>	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
<b>2.</b>	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
<b>3.</b>	Joint Organisation Experts’ Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
<b>4.</b>	Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 November 2016)

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### **Other Relevant Documents**

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	<b>Description</b>
<b>1.</b>	Letter from Constantine Roussos to Christine Willet (12 July 2013)
<b>2.</b>	Letter from Christine Willet to Constantine Roussos (14 August 2013)
<b>3.</b>	Letter from Constantine Roussos to Christine Willet (8 October 2013)
<b>4.</b>	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	<b>Description</b>
<b>5.</b>	Reconsideration Request 14-8 (4 March 2014)
<b>6.</b>	Revised Reconsideration Request 14-8 (5 March 2014)
<b>7.</b>	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
<b>8.</b>	Reconsideration Request 14-28 (7 June 2014)
<b>9.</b>	Letter from Constantine Roussos to ICANN (13 June 2014)
<b>10.</b>	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
<b>11.</b>	Letter from Constantine Roussos to ICANN (1 July 2014)
<b>12.</b>	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
<b>13.</b>	Letter from Rich Bengloff to ICANN (7 March 2015)
<b>14.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
<b>15.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
<b>16.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
<b>17.</b>	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
<b>18.</b>	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	<b>Description</b>
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	<b>Description</b>
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	<b>Description</b>
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	<b>Description</b>
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	<b>Description</b>
<b>77.</b>	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
<b>78.</b>	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
<b>79.</b>	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
<b>80.</b>	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
<b>81.</b>	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
<b>82.</b>	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
<b>83.</b>	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
<b>84.</b>	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
<b>85.</b>	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
<b>86.</b>	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	<b>Description</b>
<b>87.</b>	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
<b>88.</b>	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
<b>89.</b>	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
<b>90.</b>	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

# **Annex B**

## **dotgay LLC**

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### **Key Documents**

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<b>Tab</b>	<b>Description</b>
1.	Chris LaHatte, former ICANN Ombudsman, Dot Gay Report (27 July 2016)
2.	Expert Opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
3.	Expert Opinion of Prof. M.V. Lee Badgett (17 October 2016)
4.	Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 November 2016)

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### **Other Relevant Documents**

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<b>Tab</b>	<b>Description</b>
1.	Letter from Centrelink to ICANN Board regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) (24 March 2011)
2.	Letter from Jamie Baxter to ICANN (10 October 2013)
3.	Letter from Centrelink to ICANN regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) under the community model submitted by dotgay LLC (7 March 2014)
4.	Letter from David Gudelunas to ICANN and the EIU Evaluators (30 April 2014)

Tab	Description
5.	Letter from Scott Seitz to ICANN regarding Background on Community gTLDs (5 May 2014)
6.	Letter from Scott Seitz to ICANN regarding Shared Concerns of the Gay Community (5 May 2014)
7.	Letter from Jamie Baxter to ICANN regarding Supporting Evidence (5 May 2014)
8.	Letter from Jamie Baxter to ICANN regarding Additional Endorsements (5 May 2014)
9.	Letter from Jamie Baxter to ICANN regarding Updated Endorsements (5 May 2014)
10.	Letter from Jamie Baxter to ICANN (7 May 2014)
11.	Letter from Jamie Baxter to ICANN (27 May 2014)
12.	Original Request 14-44, along with Annexes (22 October 2014)
13.	Letter from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (17 November 2014)
14.	Letter from National Gay & Lesbian Chamber of Commerce (NGLCC) (17 November 2014)
15.	Letter from Federation of Gay Games to ICANN and Board Governance Committee (28 November 2014)
16.	Revised Request 14-44 (29 November 2014) • Annexes (29 November 2014)
17.	Letter from David Gudelunas to ICANN and Board Governance Committee (15 December 2014)

Tab	Description
18.	Letter from International Gay & Lesbian Travel Association (IGLTA) to ICANN and Board Governance Committee (18 December 2014)
19.	Letter from COC Nederland to ICANN and Board Governance Committee (14 January 2015)
20.	Letter from Durban Gay & Lesbian Film Festival (DGLFF) to ICANN and Board Governance Committee (15 January 2015)
21.	Letter from KwaZulu-Natal Gay and Lesbian Tourism Association (KZNGALTA) to ICANN and Board Governance Committee (18 January 2015)
22.	Letter from Gay Business Association (GBA) to ICANN and Board Governance Committee (18 January 2015)
23.	BGC Determination on Reconsideration Request 14-44 (20 January 2015)
24.	Letter from Kelley Daniel Mukwano to ICANN And the EIU (1 February 2015)
25.	Letter from Anne Stockwell to ICANN and the EIU (1 February 2015)
26.	Letter from Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings, Ltd. to ICANN Board Governance Committee (3 February 2015)
27.	Letter from Peter Prokopik to ICANN and the EIU (5 February 2015)
28.	Letter from Jamie Baxter to ICANN regarding Update on Expressed Opposition to dotgay LLC (5 February 2015)
29.	Letter from Jamie Baxter to ICANN regarding Comments for CPE Panel (5 February 2015)
30.	Letter from Jamie Baxter to ICANN regarding Contention Set Recognition of Nexus between GAY and LGBTQIA (5 February 2015)

Tab	Description
31.	Letter from Jamie Baxter to ICANN regarding Expert Opinion on GAY Community .GAY (5 February 2015)
32.	Letter from Jamie Baxter to ICANN regarding Clarifications for CPE Panel (5 February 2015)
33.	Letter from Jamie Baxter to ICANN (6 February 2015)
34.	Letter from Jamie Baxter to ICANN (14 April 2015)
35.	Letter from Jamie Baxter to ICANN (29 May 2015)
36.	Letter from Jamie Baxter to ICANN (22 June 2015)
37.	Letter from Jamie Baxter to ICANN (23 June 2015)
38.	Letter from Jamie Baxter to ICANN (24 June 2015)
39.	Letter from Jamie Baxter to ICANN (29 June 2015)
40.	Letter from Jamie Baxter to ICANN (18 August 2015)
41.	Letter from Jamie Baxter to ICANN (3 September 2015)
42.	Reconsideration Request 15-21 (22 October 2015)
43.	Letter from dotgay LLC to Board Governance Committee (28 October 2015)
44.	Letter from UN-GLOBE to ICANN and the Board Governance Committee (12 January 2016)

Tab	Description
45.	Letter from dotgay LLC to ICANN and the Board Governance Committee (13 January 2016)
46.	Board Governance Committee Determination on Reconsideration Request 15-21 (1 February 2016)
47.	Letter from Jay Boucher to Akram Atallah and Chris Disspain (3 February 2016)
48.	Reconsideration Request 16-3 (17 February 2016)
49.	Letter from Transgender Equality Uganda to ICANN Board Governance committee regarding outcome of community scoring evaluation (24 February 2016)
50.	Letter from Trans-Fuzja to ICANN and Board Governance Committee regarding concerns about dotgay application (6 March 2016)
51.	Dotgay's Presentation to the Board Governance Committee (15 May 2016)
52.	DotGay's Written Summary of Its Oral Presentation to the BGC (17 May 2016)
53.	DotGay's Written Summary of Renato Sabbadini's Statement to the BGC (17 May 2016)
54.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
55.	Letter from dotgay LLC to ICANN and Board Governance Committee Re: Reconsideration Request 16-3 (24 June 2016)
56.	Board Governance Committee Recommendation on Reconsideration Request 16-3 (26 June 2016)
57.	Letter from Renato Sabbadini to the ICANN Board (8 August 2016)

Tab	Description
58.	Letter from Michael Bach to the ICANN Board (8 August 2016)
59.	Letter from Michael Rogers to the ICANN Board (16 August 2016)
60.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN President & CEO Göran Marby (25 August 2016)
61.	Letter from Scott Seitz to Steve Crocker regarding Letter from United TLD Holdco Ltd., Top Level Domain Holdings, Ltd., and Top Level Design, LLC to ICANN dated August 24, 2016 (8 September 2016)
62.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
63.	Letter from Statton Hammock to the ICANN Board (12 October 2016)
64.	Letter from Arif Ali to Chairman Crocker and Members of the ICANN Board regarding Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699 (17 October 2016)
65.	Letter from Arif Ali to Chairman Crocker and Board of Directors re: Council of Europe Report DGI(2016) 17 - .GAY TLD (15 November 2016)
66.	ICANN Webinar moderated by Terri Agnew (18 January 2017)
67.	Letter from Arif Ali to President Marby and BGC regarding ICANN Board's failure to issue its final decision on the Board Governance Committee's Recommendation on Reconsideration Request 16-3 (30 January 2017)
68.	Letter from LGBT Denmark to ICANN Board Members regarding support to correct discriminatory treatment of .GAY (14 February 2017)
69.	Letter from Mario Paez to the ICANN Board (8 March 2017)

Tab	Description
70.	Letter from Arif Ali to President Marby and Members of the Board regarding inquiry about final decision on 26 June 2016 recommendation (12 March 2017)
71.	Email from Jamie Baxter to Steve Crocker regarding the Blog Post on the CPE Investigation (17 April 2017)
72.	Letter from Chris Disspain regarding update on the review of the new gTLD CPE process (26 April 2017)
73.	Letter from Jeffrey Levee to Arif Ali regarding Application of dotgay LLC (15 May 2017)
74.	Letter from Christine Willett to Scott Seitz and Jamie Baxter regarding Reconsideration Request 16-3 (16 May 2017)
75.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of dotgay (18 May 2017)

# **Exhibit 28**

To: Arif Ali on behalf of dotgay LLC and DotMusic Limited

Date: 10 July 2017

Re: Request No. 20170610-1

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Thank you for your request for documentary information dated 10 June 2017 (Request), which was submitted to the Internet Corporation for Assigned Names and Number's (ICANN) outside counsel on behalf of dotgay LLC (dotgay) and DotMusic Limited (DotMusic) (collectively Requestors). As the Request seeks the disclosure of documentary information, it is being addressed through ICANN's Documentary Information Disclosure Policy (DIDP). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

### **Response**

Your Request seeks information relating to the review of the CPE process initiated by the ICANN Board (the Review). ICANN's DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. As such, requests for information are not appropriate DIDP requests.

ICANN notes that it previously provided documentary information regarding the Review in response to the DIDP Requests submitted by DotMusic and dotgay. (See [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).) Rather than repeating the information here, ICANN refers to those DIDP Responses, which are incorporated into this Response.

#### Items 1 and 3

Item 1 seeks confirmation that FTI will review the materials submitted by DotMusic and dotgay in the course of their reconsideration requests, including all the documents identified in Annexes A and B to the Request. Item 3 seeks the disclosure of information regarding FTI's selection process and "the terms under which FTI currently operates for ICANN." The information responsive to Items 1 and 3 were previously provided in [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).

#### Items 2 and 4

Item 2 seeks the disclosure of the identities of "ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review." Item 4 requests "[c]onfirm[ation] that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review." As noted above, the DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the [26 April 2017 update from the Chair of the Board of the Governance Committee](#) and [2 June 2017 Community Priority Evaluation Process Review Update](#). This request for information is not an appropriate DIDP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# **Exhibit 29**

## **DotMusic Limited and dotgay LLC Reconsideration Request (“RR”)**

### **1. Requestor Information**

Requestors:

**Name:** DotMusic Limited (“DotMusic”)

**Address:** Contact Information Redacted

**Email:** Constantinos Roussos, Contact Information Redacted

**Name:** dotgay LLC (“dotgay”)

**Address:** Contact Information Redacted

**Email:** Jamie Baxter, Contact Information Redacted

Requestors are represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, Contact Information Redacted

**Email:** Contact Information Redacted

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

DotMusic Limited and dotgay LLC (the “Requestors”) seek reconsideration of ICANN’s response to their joint DIDP Request, which denied the disclosure of certain information requested

pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

On June 10, 2017, the Requestors sought disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”) review of the Community Priority Evaluation (“CPE”) process through an independent review process by FTI Consulting, Inc. (“FTI”) (the “DIDP Request”).<sup>1</sup> Specifically, the Requestors submitted four requests as follows:

Request No. 1: “Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;”

Request No. 2: “Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its ‘first track’ review;”

Request No. 3: “Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and”

Request No. 4: “Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.”<sup>2</sup>

Subsequently, on July 10, 2017, ICANN responded to the DIDP Request by asserting that the “information responsive to Items 1 and 3 were previously provided” to the Requestors, and the information requested in Items 2 and 4 (1) “is not an appropriate DIDP request” because it does not concern documentary information and (2) “is subject to the [ ] DIDP Conditions of Non-Disclosure.”<sup>3</sup>

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<sup>1</sup> Exhibit 1, Request No. 20170610-1, dotgay LLC and DotMusic Limited DIDP Request (June 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>2</sup> Exhibit 2, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>3</sup> *Id.*

**4. Date of action/inaction:**

ICANN acted on July 10, 2017 by issuing its response to the DIDP Request (the “DIDP Response”).

**5. On what date did you become aware of action or that action would not be taken?**

The Requestors became aware of the action on July 10, 2017, when they received the DIDP Response.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requestors are materially affected by ICANN’s refusal to disclose certain information concerning FTI’s independent review of the CPE process, as requested in the DIDP Request.

By way of background, the Requestors filed separate community-based generic Top-Level Domain (“gTLD”) applications: DotMusic applied for the “.MUSIC” string and dotgay applied for the “.GAY” string. However, the Economist Intelligence Unit (the “EIU”) recommended that ICANN reject the Requestors’ community applications.<sup>4</sup> Since the Requestors received the EIU’s decision, they made various submissions, including independent expert reports in support of their separate community applications,<sup>5</sup> that show the EIU’s decision is fundamentally erroneous. These submissions explain how the EIU Panel disparately treated DotMusic’s application by misapplying the CPE criteria, applying the CPE criteria differently than in other gTLD community

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<sup>4</sup> Exhibit 3, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>; Exhibit 4, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>5</sup> Request 16-5: DotMusic Limited, <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en> (listing documents submitted in support of DotMusic’s Reconsideration Request 16-5); Request 16-3: dotgay LLC, <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en> (listing documents submitted in support of dotgay’s Reconsideration Request 16-3).

applications, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria. dotgay’s submissions show that the EIU, in evaluating dotgay’s community application, misapplied the CPE criteria, failed to follow its own guidelines, discriminatorily treated the application, and made several factual errors that demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities.

In January 2017, ICANN retained an independent reviewer, FTI, to review the CPE process and “the consistency in which the CPE criteria were applied.” FTI is collecting information and materials from ICANN and the CPE provider as part of its review process and will then submit its findings to ICANN based on this underlying information. FTI’s findings relating to “the consistency in which the CPE criteria were applied” will directly affect the outcome of the Requestors’ Reconsideration Requests—DotMusic submitted Reconsideration Request 16-5 (“Request 16-5”) and dotgay submitted Reconsideration Request 16-3 (“Request 16-3”). Both reconsideration requests are currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain’s April 26, 2017 letter to the Requestors, which stated that FTI’s review “will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.”<sup>6</sup>

Thus, on May 5, 2017, DotMusic filed a DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process (the “DotMusic DIDP Request”).<sup>7</sup> Subsequently, dotgay filed a DIDP Request also seeking documents concerning the BGC’s review of the CPE process on May 18, 2017 (the “dotgay DIDIP Request”).<sup>8</sup> In submitting these two

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<sup>6</sup> Exhibit 5, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>7</sup> Exhibit 6, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

<sup>8</sup> Exhibit 7, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

requests, the Requestors expected ICANN to “operate in a manner consistent with [its] Bylaws . . . through open and transparent processes.”<sup>9</sup> ICANN failed to do so when it denied certain requests made in both DotMusic’s DIDP Request on June 4, 2017 and dotgay’s DIDP Request on June 18, 2017.<sup>10</sup>

The Requestors had also filed the DIDP Request in pursuit of supplemental information regarding FTI’s independent review process. Once again, ICANN failed to adhere to its Bylaws by acting “through open and transparent processes” when it issued the DIDP Response on July 10, 2017 and did not produce the requested information.<sup>11</sup>

Specifically, ICANN must “operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities . . . through open and transparent processes that enable competition and open entry in Internet-related markets.”<sup>12</sup> According to Article 4 of ICANN’s Bylaws, “[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor.”<sup>13</sup> The Bylaws require that ICANN “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;”<sup>14</sup> “employ[ ] open and transparent policy development mechanisms;”<sup>15</sup> “apply[ ] documented policies neutrally and objectively, with integrity and

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<sup>9</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>10</sup> Exhibit 8, ICANN’s Response to DotMusic Limited’s DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>; Exhibit 9, Request No. 20170518-1, ICANN’s Response to dotgay’s DIDP Request (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>11</sup> Exhibit 10, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>12</sup> Amended and Restated Articles of Incorporation, § 2(III).

<sup>13</sup> ICANN Bylaws, Art. 4, § 4.2(o).

<sup>14</sup> *Id.*, Art. 1, § 1.2(a).

<sup>15</sup> *Id.*, Art. 3, § 3.1.

fairness;”<sup>16</sup> and “[r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.”<sup>17</sup>

ICANN’s Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.<sup>18</sup> ICANN’s failure to provide complete responses to the DIDP Request raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE process for the .MUSIC gTLD application (Application ID: 1-1115-14110), which is the subject of Request 16-5, and the .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.<sup>19</sup>

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain information. It is surprising that ICANN maintains that it can hire FTI to undertake such a review without providing all the materials that will be used to inform FTI’s findings and conclusions to affected parties and without confirming that FTI would even consider documents submitted by the affected parties.

It is of critical importance that ICANN confirm the scope of the material provided to FTI in the course of its review and the details of the review proves in order to ensure full transparency, openness, and fairness. This includes the names of the ICANN employees, officials, executives, board members, agents, etc. that were interviewed by FTI during its independent review process. By providing this information to applicants, ICANN will prevent serious questions from arising concerning the independence and credibility of FTI’s investigation. For similar reasons of

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<sup>16</sup> *Id.*, Art. 1, § 1.2(v).

<sup>17</sup> *Id.*, Art. 1, § 1.2(vi).

<sup>18</sup> *See id.*, Arts. 1, 3-4.

<sup>19</sup> Exhibit 11, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

transparency and independence, ICANN must disclose not only the details of FTI's selection process but also the underlying documents.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN's action through the DIDP Response materially affects the two global communities supporting the DotMusic and dotgay applications: the global music community and the global gay community. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .MUSIC and the .GAY gTLDs, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and openness are professed to be the key components of ICANN's identity and are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed ICANN damages its credibility, accountability, and trustworthiness. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to understand the process that the EIU followed in evaluating community applications, especially the parts relevant to the EIU's improper application of CPE criteria as described in Requestor's submissions.<sup>20</sup> This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to

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<sup>20</sup> See Exhibit 12, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>; see also Exhibit 13, dotgay's Presentation to the Board Governance Committee (May 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

safeguard the interests of their separate community members, which have supported DotMusic's .MUSIC application<sup>21</sup> and dotgay's .GAY application, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in disclosing the identities of individuals interviewed by FTI during its independent review process and in confirming that FTI will disclose its final report to the public is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.<sup>22</sup> This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>23</sup> ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the requested items will undermine both the integrity and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining reconsideration requests related to the CPE process, including Request 16-5 and Request 16-3. In conclusion, failure to disclose the requested items does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

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<sup>21</sup> See Exhibit 14, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf> (identifying co-requestors for reconsideration of DotMusic's CPE Evaluation).

<sup>22</sup> See Exhibit 15, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>23</sup> ICANN's Documentary Information Disclosure Policy (last visited Jun. 29, 2017) ("Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. "), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

## **8. Detail of Staff/Board Action/Inaction – Required Information**

### **8.1 The Community Applications Serving as the Bases for the DIDP Request**

The Requestors elected to obtain their respective gTLDs by undergoing the CPE process as community applicants. However, both Requestors discovered that the CPE process, as implemented by the EIU, discriminatorily treated community applicants and are now contesting the EIU's final determinations on their applications.

#### **8.1.1 DotMusic's community application for .MUSIC**

The .MUSIC CPE process for DotMusic's application was initiated in mid-2015. Nearly a year later, DotMusic discovered that it did not prevail as a community applicant.<sup>24</sup> In response to this denial, DotMusic, supported by multiple community organizations, filed Request 16-5 on Feb. 24, 2016.<sup>25</sup> Now, over a year later, and after numerous submissions to ICANN<sup>26</sup> and a presentation before the BGC,<sup>27</sup> DotMusic still has not received a determination from the BGC regarding Request 16-5.

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<sup>24</sup> Exhibit 16, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>25</sup> Exhibit 17, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>26</sup> *See, e.g.*, Exhibit 18, Letter from DotMusic Limited to the BGC (Mar. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>; Exhibit 19, Letter from DotMusic Limited to the BGC (Mar. 28, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>; Exhibit 20, Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (Jun. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>; Exhibit 21, Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>; Exhibit 22, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>; Exhibit 23, DotMusic's Additional Responses to a Question by the Board Governance Committee during the 17 September 2016 Presentation (Sep. 19, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-19sep16-en.pdf>; Exhibit 24, Supplement to DotMusic's Additional Responses to a Question by the BGX during the 17 Sep. 2016 Presentation (Dec. 6, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf>; Exhibit 25, Letter from Dechert LLP on behalf of DotMusic Limited to the BGC (Dec. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>.

<sup>27</sup> *See* Exhibit 26, DotMusic's Presentation to the Board Governance Committee (12 Sep. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

### 8.1.2 dotgay's community application for .GAY

Similar to DotMusic, dotgay's CPE evaluation of the .GAY gTLD was initiated in early 2014. dotgay discovered that it did not prevail as a community applicant later that year.<sup>28</sup> In response, dotgay filed a reconsideration request with the BGC, which was granted because the BGC determined that the EIU did not follow procedure during the CPE process. As a result, the BGC sent dotgay's community application to the EIU for re-evaluation. However, the second CPE produced the same results based on the same arguments—the EIU rejected dotgay's application.<sup>29</sup>

When dotgay submitted another reconsideration request to the BGC in regards to this rejection, though, the BGC excused the discriminatory conduct and the EIU's policy and process violations. It refused to reconsider the CPE a second time. Therefore, dotgay filed a third reconsideration request, Request 16-3, on February 17, 2016 in response to the BGC's non-response on many of the issues highlighted in the second reconsideration request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.<sup>30</sup> For nearly a year afterwards, despite numerous letters to ICANN,<sup>31</sup> dotgay had still not received a final determination by the ICANN Board.

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<sup>28</sup> Exhibit 27, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>29</sup> See Exhibit 28, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>30</sup> See Exhibit 29, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>31</sup> See Exhibit 30, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 31, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; Exhibit 32, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 33, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 34, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board

### **8.1.3 The BGC’s Decision to Place the Requestors’ Reconsideration Requests on Hold**

Then, on April 26, 2017, ICANN finally updated both Requestors on the status of Request 16-5 and Request 16-3 through a general update to several gTLD applicants with pending reconsideration requests. The Requestors received a letter from ICANN BGC Chair Chris Disspain indicating that their reconsideration requests were “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>32</sup>

This update on the status of their reconsideration requests failed to provide the Requestors with any significant information on the BGC’s review of the CPE process, despite the fact that their requests had been pending for over a year.

### **8.2 The Requestors’ Prior DIDP Requests**

As a result of this dearth of information, the Requestors submitted separate DIDP requests to ICANN.<sup>33</sup> ICANN’s DIDP “is intended to ensure that information contained in documents

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(March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

<sup>32</sup> Exhibit 35, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>33</sup> Exhibit 36, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>34</sup> It serves as a principle element of ICANN’s approach to transparency and information disclosure.”<sup>35</sup> In accordance with this principle and policy, ICANN has provided past requestors with documents and information derived from documents when responding to DIDP Requests.<sup>36</sup> While the “DIDP procedures do not require ICANN to create or compile summaries of any documented information[,] . . . as part of its commitment to transparency and accountability, ICANN has undertaken [ ] effort[s] to do so” in the past.<sup>37</sup>

### 8.2.1 DotMusic’s DIDP Request

Acting in accordance with ICANN’s DIDP process, DotMusic submitted the DotMusic DIDP Request on May 5, 2017. DotMusic sought information to further its investigation of the “numerous CPE process violations and the contravention of established procedures,” as described in Request 16-5,<sup>38</sup> *and* information regarding the CPE process as it concerned its Request 16-5 because “the BGC Letter does not transparently provide any meaningful information besides that

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<sup>34</sup> Exhibit 37, ICANN Documentary Information Disclosure Policy (lasted visited Jul. 17, 2017), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>35</sup> *Id.*

<sup>36</sup> See Exhibit 38, ICANN Response to Request No. 20080924-1 (Oct. 24, 2008), <https://www.icann.org/en/about/transparency/20080924-1/younger-response-24oct08-en.pdf> (providing information to applicant not contained in a specifically-identified document); Exhibit 39, ICANN Response to Request No. 20161024-2 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-2-cis-response-23nov16-en.pdf> (same); Exhibit 40, ICANN Response to Request No. 20161024-8 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-8-cis-response-23nov16-en.pdf> (same); Exhibit 41, ICANN Response to Request No. 20160211-1 (Mar. 12, 2016), <https://www.icann.org/en/system/files/files/didp-20160211-1-rrsg-response-12mar16-en.pdf> (same).

<sup>37</sup> Exhibit 42, ICANN Response to Request No. 20161024-2 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-2-cis-response-23nov16-en.pdf>. In responding to any request submitted pursuant to the DIDP, ICANN staff first identifies all documents responsive to the DIDP request and then reviews those documents to determine whether they call under any of the DIDP’s Nondisclosure conditions. And, if they do, ICANN staff determined whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure. Exhibit 43, Process for Responding to DIDP Requests (Oct. 29, 2013), <http://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>38</sup> Exhibit 44, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

there is a review underway and that the RR is on hold.”<sup>39</sup>

DotMusic made ten separate requests to ICANN in the DotMusic DIDP Request. These requests were as follows:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;”
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions, or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review.<sup>40</sup>

DotMusic concluded in its request that “[t]here are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence

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

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

and credibility of such an independent review.”<sup>41</sup>

### 8.2.2 dotgay’s DIDP Request

dotgay also filed a DIDP request, which is related to the .GAY CPE.<sup>42</sup> It sought to “ensure that information contained in documents concerning ICANN’s operational activities, with within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>43</sup> Further, like other gTLD applicants, dotgay sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”<sup>44</sup> because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”<sup>45</sup>

As a result of this dearth of information from ICANN, the Requestor made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, as follows:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

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

<sup>42</sup> Exhibit 45, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Request No. 4: The identity of the individual or firm (“the evaluator”) undertaking the Review;

Request No. 5: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

Request No. 7: The terms of instructions provided to the evaluator;

Request No. 8: The materials provided to the evaluator by the EIU;

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

Request No. 10: The materials submitted by affected parties provided to the evaluator;

Request No. 11: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

Request No. 12: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.<sup>46</sup>

Like DotMusic, dotgay concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”<sup>47</sup>

### **8.3 ICANN’s Response to the Prior DIDP Requests**

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<sup>46</sup> *Id.*

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

Prior to responding to the DotMusic DIDP Request and the dotgay DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to both requests.<sup>48</sup> ICANN explained that:

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.<sup>49</sup>

No other information was provided to the Requestors regarding the CPE review at issue in its Request until ICANN issued its formal responses to their prior DIDP Requests.

### **8.3.1 ICANN's Response to the DotMusic DIDP Request**

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<sup>48</sup> Exhibit 46, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

<sup>49</sup> *Id.*

ICANN first responded to the DotMusic DIDP Request on June 4, 2017.<sup>50</sup> ICANN's response provided the same information that had already been given to DotMusic on June 2, 2017 regarding the ICANN's decision to review the CPE process and to hire FTI to conduct an independent review of the CPE process.<sup>51</sup> ICANN further denied Requests Nos. 1-6, 8 and 10. ICANN's responses to these requests were as follows:

Items 1-4: . . . With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publically available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

Items 5-6: . . . With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publically available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDIP previous submitted by DotMusic Limited. . . .

Item 8: . . . This item overlaps with Items 4 and 5. . . .

Item 10: . . . These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure.<sup>52</sup>

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<sup>50</sup> Exhibit 47, ICANN's Response to DotMusic Limited's First DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

ICANN, in providing such responses to the DotMusic DIDP Request, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and DIDP Policy. DotMusic thus submitted Reconsideration Request 17-2 (“Request 17-2”) in response.<sup>53</sup>

### **8.3.2 ICANN’s Response to the dotgay DIDP Request**

ICANN finally responded to the dotgay DIDP Request on June 18, 2017. It provided the same basic information that had already been given on June 2, 2017 to dotgay, and on June 4, 2017 to DotMusic.<sup>54</sup> ICANN denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN’s responses to these requests were as follows:

Items 1, 2, 3, 8, and 13 . . .

As stated in ICANN’s Response to DIDP Request 20170505-1 that you submitted on behalf of DotMusic Limited, these documents are not appropriate for disclosure based on the [ ] applicable DIDP Defined Conditions of Non-Disclosure. . . .

Item 9 . . .

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previous submitted by dotgay.<sup>55</sup>

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<sup>53</sup> Exhibit 48, Reconsideration Request 17-2 (Jun. 18, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

<sup>54</sup> Exhibit 49, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>55</sup> *Id.*

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy. dotgay thus submitted Reconsideration Request 17-3 (“Request 17-3”) in response.<sup>56</sup>

#### 8.4 The DIDP Request

In response to ICANN’s insufficient documentary disclosures on June 2 and 4, 2017, the Requestors sent ICANN a joint letter on June 10, 2017. The letter stated, *inter alia*, that:

ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.” This is troubling for several reasons.

**First**, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

**Second**, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very

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<sup>56</sup> Exhibit 50, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

limited approach of how staff was involved.”<sup>57</sup>

Furthermore, the Requestors made an additional DIDP Request in the joint letter for additional information. The Requestors asked ICANN to provide the following information:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.<sup>58</sup>

## **8.5 ICANN’s Response to the DIDP Request**

On July 10, 2017, ICANN’s responded to the DIDP Request by denying all four information requests.<sup>59</sup> According to ICANN, its DIDP is only intended to provide “documentary information already in existence within ICANN that is not publically available.”<sup>60</sup> And, as such, it refused the four requests for the following reasons:

### Items 1 and 3

. . . The information responsive to Items 1 and 3 were previously provided in Response to DIDIP Request 20170505-1 and Response to DIDIP Request 20170518-1.

### Items 2 and 4

. . . As noted above, the DIDP is limited to requests for documentary

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<sup>57</sup> Exhibit 51, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> Exhibit 52, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>60</sup> *Id.*

information already in existence within ICANN that is not publically available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the 26 April 2017 update from the Chair of the Board of the Governance Committee and 2 June 2017 Community Priority Evaluation Process Review Update. This request for information is not an appropriate DIDIP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure. . . .

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.<sup>61</sup>

Regarding ICANN’s denial of Items 1 and 3, this information was not previously provided to Requestors. ICANN has not confirmed “that FTI will review all of the documents submitted by DotMusic . . . in the court of their reconsideration requests.”<sup>62</sup> The documents referenced in ICANN’s response—ICANN’s prior responses to the DotMusic DIDP Request and the dotgay DIDP Request—simply claim that ICANN provided FTI with materials relevant to the Reconsideration Requests at issue, and does not in any way confirm that FTI will review the documents.<sup>63</sup> Further, ICANN clearly did not disclose “the details of FTI’s selection process . . . and the terms under which FTI currently operates for ICANN”<sup>64</sup> to the Requestors in its prior responses to the Requestors’ information

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Exhibit 53, ICANN’s Response to Request No. 20170505-1 (Jun. 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>64</sup> Exhibit 54, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

requests.<sup>65</sup> The Requestors and other gTLD applicants have not yet received any details regarding ICANN's contract with FTI, even though the contract itself is a document in ICANN's possession.

Further, regarding ICANN's denial of Items 2 and 4, both items request information that is more than likely contained in ICANN documents and that is in the public's interest to disclose. The Requestors seek simply the identity of individuals interviewed by FTI and not the substance of those interviews and seeks confirmation that FTI's final report will be available to the gTLD applicants. Disclosure of such information to the gTLD applicants is necessary to ensure that the independent review remains a fair, transparent, and independent process, as discussed in **Sections 6 and 7** above.

**9. What are you asking ICANN to do now?**

The Requestors ask ICANN to disclose the documents requested in the DIDP Request.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, the Requestors are community applicants for gTLD strings and the organizations that issued the DIDP Request to ICANN. They are materially affected by ICANN's decision to deny the DIDP Request, especially since its gTLD application is at issue in the underlying request. Further, the communities supporting their applications—the music community and the gay community—are materially affected by ICANN's failure to disclose the requested

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<sup>65</sup> See Exhibit 55, ICANN's Response to Request No. 20170505-1 (Jun. 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes, this Reconsideration Request is being brought on behalf of DotMusic and dotgay.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

Yes, there is a causal connection between the circumstances and the harm for both DotMusic and dotgay, as explained above in **Sections 6 through 8**.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*

# **Exhibit 30**

**COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSES  
STATUS UPDATE – 31 JANUARY 2018**

**ACTIVE COOPERATIVE ENGAGEMENT PROCESS (CEP) PROCEEDINGS<sup>1</sup>**

<b>Request Date</b>	<b>Requestor</b>	<b>Subject Matter</b>
17-Feb-2014	GCCIX, W.L.L.	.GCC
20-Jan-2015	Asia Green IT System Ltd.	.PERSIANGULF
20-Jan-2016	Donuts Inc.	.SPA
11-Jul-2016	American Institute of Certified Public Accountants (AICPA)	.CPA
17-Jul-2016	CPA Australia Ltd.	.CPA
14-Sep-2016 6-Oct-2017 7-Nov-2017	DotMusic Limited	.MUSIC
6-Oct-2017 7-Nov-2017	dotgay LLC	.GAY

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<sup>1</sup> The Cooperative Engagement Process (CEP) is a process voluntarily invoked by a complainant prior to the filing of an Independent Review Process (IRP) for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. (See Bylaws, Art. 4 § 4.3(e).) The requesting party may invoke the CEP by providing written notice to ICANN, noting the invocation of the process, identifying the Board action(s) at issue, identifying the provisions of the ICANN Bylaws or Articles of Incorporation that are alleged to be violated, and designating a single point of contact for the resolution of the issue. Further information regarding the CEP is available at: <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>.

**COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSES  
STATUS UPDATE – 31 JANUARY 2018**

**RECENTLY CLOSED COOPERATIVE ENGAGEMENT PROCESS (CEP) PROCEEDINGS**

<b>Request Date</b>	<b>Requestor</b>	<b>Subject Matter</b>	<b>IRP Filing Deadline<sup>2</sup></b>
2-Aug-2016	Donuts Inc. and Ruby Glen, LLC	.WEB	14-Feb-2018

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<sup>2</sup> The CEP process provides that “[i]f ICANN and the requestor have not agreed to a resolution of the issues upon the conclusion of the cooperative engagement process, or if issues remain for a request for independent review, the requestor’s time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.” (<https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>)

**COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSES  
STATUS UPDATE – 31 JANUARY 2018**

**ACTIVE INDEPENDENT REVIEW PROCESS (IRP) PROCEEDINGS<sup>3</sup>**

Date ICANN Received Notice of IRP	Date IRP Commenced by ICDR	Requestor	Subject Matter	Status
There are no active IRPs				

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<sup>3</sup> IRP proceedings initiated before 1 October 2016 are subject to the Bylaws in effect before 1 October 2016: The Independent Review Process (IRP) is a process by which any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. (*See* Bylaws, Art. IV, § 3.) In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action. Further information regarding the IRP is available at: <https://www.icann.org/resources/pages/mechanisms-2014-03-20-en>.

IRP proceedings initiated on or after 1 October 2016 are subject to the Bylaws in effect as of 1 October 2016: The IRP is intended to hear and resolve Disputes for the following purposes: (i) ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws; (ii) empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in § 4.3(b)(i)); (iii) ensure that ICANN is accountable to the global Internet community and Claimants; (iv) address claims that ICANN has failed to enforce its rights under the IANA Naming Function Contract (as defined in Section 16.3(a)); (v) provide a mechanism by which direct customers of the IANA naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation; (vi) reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation; (vii) secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes; (viii) lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction; and (ix) provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions. (*See* Bylaws, Art. 4, § 4.3)

**COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSES  
STATUS UPDATE – 31 JANUARY 2018**

**RECENTLY CLOSED INDEPENDENT REVIEW PROCESS (IRP) PROCEEDINGS**

<b>Date ICANN Received Notice of IRP</b>	<b>Date IRP Commenced by ICDR</b>	<b>Requestor</b>	<b>Subject Matter</b>	<b>Date IRP Closed</b>	<b>Date of Board Consideration of IRP Panel’s Final Declaration<sup>4</sup></b>
5-Dec-2014	8-Dec-2014	Gulf Cooperation Council <a href="https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en">https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en</a>	.PERSIANGULF	24-Oct-2016	16-Mar-2017 (See <a href="#">here</a> ) 23-Sep-2017 (See <a href="#">here</a> )
1-Mar-2016	2-Mar-2016	Amazon EU S.à.r.l. <a href="https://www.icann.org/resources/pages/irp-amazon-v-icann-2016-03-04-en">https://www.icann.org/resources/pages/irp-amazon-v-icann-2016-03-04-en</a>	.AMAZON	11-Jul-2017	23-Sep-2017 (See <a href="#">here</a> ) 29-Oct-2017 (See <a href="#">here</a> )
15-Dec-2016	16-Dec-2016	Asia Green IT Systems Bilgisayar San. ve Tic. Ltd. Sti. <a href="https://www.icann.org/resources/pages/irp-agit-v-icann-2015-12-23-en">https://www.icann.org/resources/pages/irp-agit-v-icann-2015-12-23-en</a>	.ISLAM .HALAL	30-Nov-2017	TBD

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<sup>4</sup> IRP proceedings initiated before 1 October 2016 are subject to the Bylaws in effect before 1 October 2016: Pursuant to Article IV, Section 3.21 of the ICANN Bylaws, “[w]here feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.” (<https://www.icann.org/resources/pages/governance/bylaws-en#IV>)

IRP proceedings initiated on or after 1 October 2016 are subject to the Bylaws as of 1 October 2016: IRP proceedings initiated Pursuant to Article 4, § 4.3(x)(iii)(A) of the ICANN Bylaws, “[w]here feasible, the Board shall consider its response to IRP Panel decisions at the Board’s next meeting, and shall affirm or reject compliance with the decision of the public record based on an expressed rationale. The decision by the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law. (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>)

# **Exhibit 31**

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

ICDR Case No. 01 – 14 - 0001 – 5004

In the matter of an Independent Review  
Concerning ICANN Board Action re  
Determination of the Board Governance Committee  
Reconsideration Requests 14-30, 14-32, 14-33 (24 July 2014)

DOT REGISTRY, LLC, for itself and on behalf of The NATIONAL ASSOCIATION OF  
SECRETARIES OF STATE

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

**DECLARATION OF THE INDEPENDENT REVIEW PANEL**

29 July 2016

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

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## I. INTRODUCTION

### A. Internet Corporation for Assigned Names and Numbers (ICANN)

1. ICANN is a nonprofit public-benefit corporation organized under the laws of the State of California. ICANN was incorporated on September 30, 1998. Jon Postel, a computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network ("ARPANET"), which morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations when normal means of communication were unavailable or deemed insecure.

2. Prior to ICANN's creation, there existed seven generic Top Level Domains (gTLDs), which were intended for specific uses on the Internet: *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use; *.org*, intended for the use of non-commercial organizations; *.net*, intended for the use of network related entities; *.edu*, intended for United States higher education institutions; *.int*, established for international organizations; *.gov*, intended for domain name registrations for arms of the United States federal

government and for state governmental entities; and, finally, *.mil*, designed for the use of the United States military.

3. ICANN's "mission," as set out in its bylaws, is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." Bylaws, Art. 1, § 1. ICANN has fulfilled this function under a contract with the United States Department of Commerce.

4. The original ICANN Board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. VI, § 1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VII of the Bylaws.

5. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN Board of Directors began considering the invitation to the general public to operate new gTLDs of its own creation. In 2008, the Board of Directors adopted 19 specific Generic Name Supporting Organization (GNSO) recommendations for the implementation of a new gTLD programs. In 2011 the Board approved the Applicant Guidebook and the launch of a new gTLD program. The application window opened on January 12, 2012, and ICANN immediately began receiving applications.

B. Board Governance Committee (BGC)

6. The Board Governance Committee was created by Charter, approved by the ICANN Board of Directors on October 13, 2012. Among its responsibilities is to consider and respond to reconsideration requests submitted to the Board pursuant to ICANN's Bylaws and to work closely with the Chair and Vice Chair of the Board and with ICANN's CEO. Charter, Sections 1.6 and 2.6, and 2.1.3. At the hearing of this matter, and consistent with the position taken by ICANN before other Independent Review Panels, counsel for ICANN confirmed that the conduct of the BGC was the conduct of the Board for purposes of these proceedings.

7. The BGC is composed of at least three, but not more than 6 voting Board Directors and not more than 2 Liaison Directors, as determined and appointed annually by the Board. Only the voting Board of Directors members shall be voting members of the BGC. Charter, Section 3.

8. A preliminary report with respect to actions taken at each BGC meeting, whether telephonic or in-person, shall be recorded and distributed to BGC members within two working days, and meeting minutes are to be posted promptly following their approval by the BGC. Charter, Section 6. No such preliminary report was produced to the Panel in these proceedings.

C. Dot Registry LLC (Dot Registry)

9. Dot Registry is a limited liability company registered under the laws of the State of Kansas. Dot Registry was formed in 2011 in order to apply to ICANN for the rights to operate five new gTLD strings: *.corp*, *.inc*, *.llc*, *.llp*, and *.ltd*. Dot Registry applied to be the only community applicant for the new gTLD strings *.inc*, *.llc*, and *.llp*. Dot Registry submitted each of its three applications for listed strings on 13 June 2012. Dot Registry submitted these applications for itself and on behalf of the National Association of Secretaries of State (NASS). Dot Registry is an affiliate of the NASS, which is “an organization which acts as a medium for the exchange of information between states and fosters cooperation in the development of public policy, and is working to develop individual relationships with each Secretary of State’s office in order to ensure our continued commitment to honor and respect the authorities of each state.” New gTLD Application Submitted to ICANN by: Dot Registry LLC, String: INC, Originally Posted: 13 June 2012, Application ID: 1-880-35979, Exhibit C-007, Para. 20(b), p. 14 Of 66. For ease of reading, this Declaration shall refer to “Dot Registry” as the disputing party, but the Panel recognizes that Dot Registry and the NASS jointly made the Reconsideration Requests at issue in these proceedings.

10. The mission/purpose stated in its respective applications for the three strings was “to build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically

serve the respective communities of “registered corporations,” “registered limited liability companies,” and/or “registered limited liability partnerships.” Under Dot Registry’s proposal, a registrant would have to demonstrate that it has registered to do business with the Secretary of State of one of the United States in the form corresponding to the gTLD (corporation for *.inc*, limited liability company for *.llc*, and limited liability partnership for *.llp*.)

11. With each of its community applications, Dot Registry deposited an additional \$22,000, so as to be given the opportunity to participate in a Community Priority Evaluation (“CPE”). A community application that passes a CPE is given priority for the gTLD string that has successfully passed, and that gTLD string is removed from the string contention set into which all applications that are identical or confusingly similar for that string are placed. The successful community CPE applicant is awarded that string, unless there are more than one successful community applicant for the same string, in which case the successful applicants would be placed into a contention set.

D. The Economist Intelligence Unit (EIU)

12. The EIU describes itself as “the business information arm of the Economist Group, publisher of the Economist.” “The EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world’s leading provider of country intelligence, the EIU

helps executives, governments and institutions by providing timely, reliable and impartial analysis.” Community Priority Evaluation Panel and Its Processes, at 1.

13. The EIU responded to a request for proposals received from ICANN to undertake to act as a Community Priority Panel. The task of a Community Priority Panel is to review and score community based applications which have elected the community priority evaluation based on information provided in the application plus other relevant information available (such as public information regarding the community represented).” Applicant Guidebook (“AGB”), § 4.2.3. The AGB sets out specific Criteria and Guidelines which a Community Priority Panel is to follow in performing its evaluation. *Id.*

14. Upon its selection by ICANN, the EIU negotiated a services contract with ICANN whereby the EIU undertook to perform Community Priority Evaluations (CPEs) for new gTLD applicants. Declaration of <sup>EIU Contact Information Redacted</sup>  
EIU Contact Information Redacted of the EIU  
(hereinafter <sup>EIU Contact Information Redacted</sup> Declaration”), ¶¶ 1 and 4, at 1 and 2.

15. <sup>EIU Contact Information Redacted</sup> declared that EIU was “not a gTLD decision-maker but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.” <sup>EIU Contact Information Redacted</sup> Declaration, ¶ 3,

at 2. Further, ICANN confirmed at the hearing that ICANN “accepts” the CPE recommendations from the EIU, a statement reiterated in the Minutes for the BGC meeting considering the subject Reconsideration Requests: “Staff briefed the BGC regarding Dot Registry, LLC’s (‘Requestor’s’) request seeking reconsideration of the Community Priority Evaluation (‘CPE’) Panel’s Reports, and ICANN’s acceptance of those Reports.” (Emphasis added.)

16. Under its contract with ICANN, the EIU agreed to a Statement of Work. Statement of Work No:[2], ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names, March 12<sup>th</sup> 2012 (“EIU SoW”). Under Section 10, Terms and Conditions, supplemental terms were added to the Master Agreement between the parties. Among those terms are the following:

“(ii) ICANN will be free in its complete discretion to decide whether to follow [EIU’s] determination and to issue a decision on that basis or not;

(iii) ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue and the [EIU] shall have no responsibility nor liability to ICANN for any decision issued by ICANN except to the extent the [EIU’s] evaluation and recommendation of a relevant application constitutes willful misconduct or is fraudulent, negligent or in breach of any of {EIU’s} obligations under this SoW;

(iv) each decision and all associated materials must be issued by ICANN in its own name only, without any reference to the [EIU] unless agreed in writing in advance.” EIU SoW, at 14.

17. In order to qualify to provide dedicated services to a defined community, an applicant must undergo an evaluation of its qualifications to serve such community, the criteria for which are set out in the Community Priority Evaluation Guidelines (“CPE Guidelines”). The CPE Guidelines were developed by the Economist Intelligence Unit (“EIU”) under contract with ICANN. According to the EIU, “[t]he CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.” CPE Guidelines Prepared by the EIU, Version 2.0 (“CPE Guidelines”), at 2. In the CPE Guidelines, the EIU states that “the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.” CPE Guidelines, at 22.

18. This message was reiterated in the EIU Community Priority Evaluation Panel and its Processes, where it states that the CPE process “respects the principles of fairness, transparency avoidance of potential conflicts of interest, and non-discrimination. Consistency in approach in scoring applications is of particular importance.” Community Priority Evaluation Panel and its Processes, at 1.

## II. PROCEDURAL HISTORY

### A. Community Priority Evaluation and Reconsideration

19. On June 11, 2014, the EIU issued three Community Priority Evaluation Reports, one for each of the three new gTLDs that are the subject of this

proceeding. In order to prevail on each of its applications, Dot Registry would have to have been awarded 14 out of a possible 16 points per application. In the evaluation of each of its three applications, Dot Registry was awarded a total per application of 5 points. Thus, each of the applications submitted did not prevail.

20. The practical result of this failure to prevail is that Dot Registry would be placed in a contention set for each of the proposed gTLDs with other applicants who had applied for one or more of the proposed gTLDs.

21. On April 11, 2013, Dot Registry submitted three Requests for Reconsideration to the BGC, requesting that the BGC reconsider the denial of Dot Registry's applications for Community Priority.

22. The bases for Dot Registry's requests for reconsideration were the following:

- a. The CPE Panel failed to validate all letters of support of and in opposition to its application for Community Priority status;
- b. The CPE Panel failed to disclose the sources, the substance, the methods, or the scope of its independent research;
- c. The CPE Panel engaged in "double counting," which practice is contrary to the criteria established in the AGB;
- d. The Panel failed to evaluate each of Dot Registry's applications independently;
- e. The Panel failed to properly apply the CPE criteria set out in the guidebook for community establishment, community organization, pre-existence, size, and longevity;
- f. The Panel used the incorrect standard in its evaluation of the nexus criterion;

- g. The failure in determining Nexus, led to a failure in determining “uniqueness.”
- h. The Panel erroneously found that Dot Registry had failed to provide for an appropriate appeals process in its applications;
- i. The Panel applied an erroneous standard to determine community support, a standard not contained in the CPE;
- j. The Panel misstated that the European Commission and the Secretary of State of Delaware opposed Dot Registry’s applications and failed to note that the Secretary of State of Delaware had clarified the comment submitted and that the European Commission had withdrawn its comment.

23. In response to Dot Registry’s Requests for Reconsideration of its applications, on July 24, 2014, The Board Governance Committee (“BGC”) issued its Determination that “[Dot Registry] has not stated grounds for reconsideration.” The BGC’s Determination was based on the failure of Dot Registry to show “that either the Panels or ICANN violated any ICANN policy or procedure with respect to the Reports, or ICANN acceptance of those Reports.” Determination of the Board Governance Committee (BGC) Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014.

B. History of Independent Review Process

24. As all of the party’s substantive submissions and the IRP Panel’s procedural orders are posted on the ICANN web site covering IRP Proceedings (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>), this section will serve only to highlight those that contain significant procedural or substantive rulings.

25. On September 22, 2014, Dot Registry requested Independent Review of the denial of reconsideration of each of its three applications. On October 27, 2014, ICANN filed its Response to Dot Registry's request for Independent Review.

26. On November 19, 2014, Dot Registry requested the appointment of an Emergency Panelist and for interim measures of protection. On November 26, 2014, the emergency panelist, having been appointed, issued Procedural Order No. 1, setting out a schedule for the hearing and resolution of the request for interim measures of protection.

27. On December 8, 2014, ICANN filed a Response to Dot Registry's request for emergency relief.

28. On December 23, 2014, the Emergency Independent Review Panelist issued the Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection. The Order made the following rulings:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP, and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.

4. This Order renders a final decision on [Dot Registry's] Request for emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied

29. The Independent Review Process Panel (the "IRP Panel"), having been duly constituted, issued a total of thirteen procedural orders, in addition to that issued by the Emergency Independent Review Panelist.

All of the orders were issued by the unanimous IRP Panel. The following are descriptions of portions of those orders particularly germane to the present Declaration.

30. On March 26, 2015, the Independent Review Process Panel [the "IRP Panel"] having been duly constituted, the IRP Panel issued an Amended Procedural Order No. 2. Among other matters covered therein, pursuant to its powers under ICDR Rules of Arbitration, Art. 20, 4 ("At any time during the proceedings, the [panel] may order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate") the IRP Panel ordered ICANN to produce to the Panel certain documents and gave each party the opportunity to request of the other additional documents.

31. The order which required production of certain documents to the Panel read as follows:

Pursuant to the Articles of Incorporation and Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") and the International Arbitration Rules and Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process of the International Centre for Dispute

Resolution (“ICDR”), the Panel hereby requires ICANN to produce to the Panel and Dot Registry, LLC (“Dot Registry”) no later than April 3, 2015, all non-privileged communications and other documents within its possession, custody or control referring to or describing (a) the engagement by ICANN of the Economist Intelligence Unit (“EIU”) to perform Community Priority Evaluations, including without limitation any Board and staff records, contracts and agreements between ICANN and EIU evidencing that engagement and/or describing the scope of EIU’s responsibilities thereunder, and (b) the work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry’s Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014, including work done by the EIU at the request, directly or indirectly, of the Board of Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry’s applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board of Governance Committee.

32. In Procedural Order No. 3, issued May 24, 2015, the Panel’s order to ICANN to produce documents was clarified as follows:

The Panel notes that the Panel sought *inter alia* all non-privileged communications and other documents within ICANN’s possession, custody or control referring or describing:

- (a) The engagement by ICANN of the EIU to perform Community Priority Evaluations. That request covers internal ICANN documents and communications, not just communications with the EIU, referring to or describing the subject of the Panel’s request (the engagement to perform Community Priority Evaluations).
- (b) The work done and to be done by the EIU with respect to the Determination of the ICANN board of governance Committee on Dot Registry’s Reconsideration Request. That request again covers internal ICANN documents and communications, not solely communications with EIU, referring to or describing the subject of the Panel’s request (the work done and to be done by the EIU with

- respect to the Determination). As well as the work-product itself in its various draft and final iterations.
- (c) Consideration by ICANN of the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU referring to or describing the subject of the Panel's request (consideration by ICANN of the work performed by the EIU).
  - (d) Acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel's request (both acts done and decisions taken by ICANN with respect to the EIU work).

The Panel notes that in Section 2 of its amended Procedural Order No. 2, material provided by ICANN to the Panel, but not yet to Dot Registry, appears not to include, among other matters, internal ICANN documents and communications referring to or describing the above subject matters that the Panel would have expected to be created in the ordinary course of ICANN in connection with these matters. It may be that the Panel was less than clear in its requests. The Panel requests that ICANN consider again whether the production was fully responsive to the foregoing requests.

The production shall include names of EIU personnel involved in the work contemplated and the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP with respect to Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC), and 14-33 (.LLP), dated July 24, 2024, in that such information may be relevant to the requirements of Sections 2.4.2, 2.4.3, 2.4.3.1, and 2.4.3.2 of Module 2 of the Applicant Guidebook. The Panel expects strict compliance by Dot Registry and its counsel with Paragraph 8 of this Order and the Confidentiality and Non-Disclosure Undertaking procedure set forth therein and in Annex 1 attached hereto.

Procedural Order No. 3 included, among other provisions, a confidentiality provision, which provided in pertinent part:

"Documents exchanged by the parties or produced to the Panel at the Panel's directive which contain confidential information:

- i. May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;
- ii. May not be referenced in any, and any information contained therein must be redacted from any, written submissions prior to posting.

33. In Procedural Order No. 6, issued June 12, 2015, the Panel reiterated its document production order, made express that the BGC was covered by the reference to the "Board," and required that documents withheld on the basis of privilege be identified in a privilege log. On June 19, 2015, Counsel for ICANN submitted a confirming attestation, the required privilege log, and an additional responsive email. *See. also*, Procedural Order No. 8, issued August 26, 2015, paragraph 3, first sentence.

34. On July 6, 2015, the IRP Panel issued Procedural Order No. 7. That order memorialized the parties' stipulations that the term "local law" as used in Article 4 of ICANN's Articles of Incorporation was a reference to California law and that under California law, in the event of a conflict between a corporation's Bylaws and Articles, the Articles of Incorporation would prevail.

35. In Procedural Order No. 8, "[t]he Panel designate[d] the place of these proceedings as New York, New York."

36. In Procedural Order No. 12, issued February 26, 2016, the Panel ordered that the hearing would be by video conference and would be limited to seven hours. No live percipient or expert witness testimony would be permitted, and only the witness statements and documents

previously submitted by the parties and accepted by the panel would be admitted. (ICANN had previously submitted one witness declaration, that of <sup>EIU Contact Information Redacted</sup> of the EIU. Dot Registry had previously submitted four witness declarations and one expert witness declaration.) The hearing would consist of arguments by counsel and questions from the Panel. A stenographic transcript of the proceedings would be prepared.

37. On March 29, 2016, a one-day hearing by video conference was held with party representatives and counsel and the Panel present in either Washington, D.C. or Los Angeles, California. Each party presented arguments in support of its case, and the Panel had the opportunity to ask questions of counsel. A stenographic transcript of the proceedings was made. During the hearing, Dot Registry attempted to introduce live testimony from a fact witness. The Panel declined to hear testimony from the proffered witness. Hearing Tr., at p. 42, ll. 11-15. At the conclusion of the hearing, the Panel requested that the parties address specific questions in a post-hearing memorial.

38. On April 8, 2016, the parties filed post-hearing memorials addressing the questions posed by the Panel.

39. On May 5, 2016, the parties stipulated to the correction of limited inaccuracies in the stenographic transcript, which changes were duly noted by the Panel.

### III. SUBMISSIONS OF THE PARTIES

#### A. Dot Registry

40. Dot Registry states that the applicable law(s) to be applied in this proceeding are ICANN's Articles of Incorporation ("Articles") and Bylaws, relevant principles of international law (such as good faith) and the doctrine of legitimate expectations, applicable international conventions, the laws of the State of California ("California law"), the Applicant Guidebook ("AGB"), the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules"), and the Supplementary Procedures for the Independent Review Process (the "Supplemental Rules"). Prior declarations of IRP panels have "precedential value." Additional Submission of Dot Registry, LLC ("DR Additional Submissions"), ¶¶3, at 2-3, and notes 11, 12, and 15. Request of Dot Registry LLC for Independent Review Process ("DR IRP Request"), ¶ 55, at 20. The Standard of Review should be de novo. DR Additional Submission, ¶¶ 4-7, at 3-5.

41. Dot Registry effectively argues that actions of the ICANN staff and the EIU constitute actions of the ICANN board, because, under California law and ICANN's Bylaws, ICANN's board of directors is "ultimately responsible" for the conduct of the new gTLD program. Since ICANN is a California nonprofit public-benefit corporation, all of its activities must be undertaken by or under the direction of its Board of Directors. DR

Additional Submission, ¶¶ 12-14, at 7-8 and notes 37-40; IRP Request, ¶ 62.

42. Dot Registry asserts that ICANN's staff and the EIU are "ICANN affiliated parties," and as such ICANN is responsible for their actions. AGB, Module 6.5.

43. In any event, Dot Registry takes the position that ICANN is responsible for the acts of EIU and the ICANN staff, since EIU can only recommend to ICANN for ICANN's ultimate approval, and ICANN has complete discretion as to whether to follow EIU's recommendations. DR Additional Submission, ¶18, at 11 (citing EIU SoW, §10(b)(ii) – (iv), (vii), at 6.

44. Dot Registry asserts that the EIU also has the understanding that ICANN bears the responsibility for the actions of the EIU in its role as ICANN's evaluator. DR Additional Submission, ¶19, at 11, citing Declaration of EIU Contact Information Redacted

of the EIU, § 3, at 2. In addition, the CPEs were issued on ICANN letterhead, not EIU letterhead. Indeed, on the final page of the CPEs generated by the EIU, there is a disclaimer, which states in pertinent part that "these Community Priority Evaluation results do not necessarily determine the final result of the application." *See, e.g.*, CPE Report 1-990-35979, Report Date: 11 June 2014.

45. Dot Registry contends that under California law the business judgment rule protects the individual corporate directors from complaints by shareholders and other specifically defined persons who are analogous to

shareholders, but does not protect a corporation or a corporate board from actions by third parties. DR Post-Hearing Brief, at 4 – 7.

46. Even assuming *arguendo* that the business judgment rule applies to the present proceeding, Dot Registry argues that it would not protect ICANN, since the ICANN Board and BGC failed to comply with the Articles, Bylaws, and the AGB, performed the acts at issue without making a reasonable inquiry, and failed to exercise proper care, skill and diligence. DR Post Hearing Brief, at 7 – 8.

47. Dot Registry alleges that EIU altered the AGB requirements only as to Dot Registry's applications in the following respects, and thus engaged in unjustified discrimination (disparate treatment) and non-transparent conduct:

- a) Added a requirement in its evaluation that the community must "act" as a community, and that a community must "associate as a community;"
- b) Added the requirement that the organization must have no other function but to represent the community;
- c) Utilized the increased requirement for "association" to abstain from evaluating the requirements of "size" or "longevity;"
- d) Misread Dot Registry's applications in order to find that Dot Registry's registration policies failed to provide "an appropriate appeals mechanism;"

- e) Altered the AGB criteria that the majority of community institutions support the application to require that every institution express “consistent” support;
- f) Altered the requirement that an application must have no relevant opposition to require that an application have no opposition.

See, e.g., Dot Registry Reconsideration Request re *.llc*, Version of 11 April 2013, at 4 -17 (Exhibit C-017).

48. Dot Registry asserts that the EIU applied different standards to other CPE applications, applying those standards inconsistently across all applicants.

49. While EIU required Dot Registry to demonstrate that its communities “act” and “associated” as communities, it did not require that other communities do so.

50. EIU also required that *.llc*, and *.llp* community members be participants in a clearly defined-industry and that the “members” have an awareness and recognition of their inclusion in the industry community.

51. While noting that “research” supported its conclusions, the EIU failed to identify the research conducted, what the results of the research were, or how such results supported its conclusions.

52. Dot Registry also argued that the Board of Governance Committee (“BGC”) breached its obligations to ensure fair and equitable, reasonable and non-discriminatory treatment.

53. In response to a request for reconsideration, the BGC has the authority to:

- a) conduct a factual investigation (Bylaws, Art. 11, § 3, d);
- b) request additional written submissions from the affected party or other parties (Bylaws, Art. IV, § 3, e);
- c) ask ICANN staff for its views on the matter (Bylaws, Art. IV, § 11);
- d) request additional information or clarification from the requestor (Bylaws, Art. IV, §12);
- e) conduct a meeting with requestor by telephone, email, or in person (*Id.*);
- f) request information relevant to the request from third parties (Bylaws, Art. IV, § 13.

The BCG did none of these.

54. Dot Registry requested that the IRP Panel make a final and binding declaration:

- a) that the Board breached its Articles, its Bylaws and the AGB including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry's applications;
- b) that ICANN and the EIU breached the articles, Bylaws and the AGB, including by erring in scoring Dot Registry's CPE applications for *.inc*, *.llc*, and *.llp* and by treating Dot Registry's applications discriminatorily;

- c) that Dot Registry's CPE applications for the *.inc*, *.llc*, and *.llp* strings satisfy the CPE criteria set forth in the AGB and that Dot Registry's applications are entitled to community priority status;
- d) recommending that the Board issue a resolution confirming the foregoing;
- e) awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
- f) awarding such other relief as the Panel may find appropriate in the circumstances.

Claimant's Post-Hearing Brief, April 8, 2016 ("DR Post-Hearing Brief"), at 9.

55. Finally, Dot Registry stated that it "does not believe that a declaration recommending that the Board should send Dot Registry's CPE applications to a new evaluation by the EIU would be proper." DR Post-Hearing Brief, at 9.

## B. ICANN

56. ICANN asserts that ICANN's Articles and Bylaws and the Supplementary Procedures apply to an IRP proceeding. ICANN's Response to Claimant Dot Registry LLC's Request for Independent Review Process, October 27, 2014 ("ICANN Response"), ¶21, at 8, and ¶

29, at 9. ICANN's Response to Claimant Dot Registry LLC's Additional Submission ("Response to Additional Submission"), ¶2, at 1; ¶ 8, at 3.

57. ICANN argues that "there is only one Board action at issue in this IRP, the BGC's review of the reconsideration requests Dot Registry filed challenging the CPE Reports." Response to Additional Submission, ¶ 8, at 3.

58. ICANN contends that this standard only applies as to the BGC's actions (or inactions) in its reconsideration of the EIU or ICANN staff actions. Response to Additional Submission, ¶ 10, at 4; ¶13, at 5

59. ICANN argues that the Bylaws make clear that the IRP review does not extend to actions of ICANN staff or of third parties acting on behalf of ICANN staff, such as the EIU.

60. ICANN contends that, when the BGC responds to a Reconsideration Request, the standard applicable to the BGC's review looks to whether or not the CPE Panel violated "any established policy or procedure." ICANN Response, ¶45, at 20, ¶¶ 46 and 47, at 21. Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10; ¶ 19, at 8.

61. ICANN argues that Dot Registry failed to show that the EIU violated any established policies and procedures, on one occasion referring to "rules and procedures," in another to "established ICANN policy(ies)," and in another to "appropriate policies and procedures." Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10, and ¶19, at 8

62. ICANN contends that Dot Registry failed to show that the BGC actions in its reconsideration were not in accordance with ICANN's Articles and Bylaws. Response to Additional Submission, ¶¶ 21, at 9, and ¶¶ 23 at 10. However, ICASNN has never argued in these proceedings that Dot Registry failed timely or properly to raise claims of *inter alia* disparate treatment/unjustified discrimination, lack of transparency or other alleged breaches of Articles, Bylaws, or AGB by the BGC, only that Dot Registry failed to prove its case on those matters.

63. ICANN agrees that "the 'rules' at issue when assessing the Board's conduct with respect to the New gTLD Program include relevant provisions of the Guidebook." Letter of Jeffrey A. LeVee, Jones Day LLP, to the Panel, dated October 12, 2015, at 6.

64. In response to a question from the Panel, ICANN asserts that, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel (R-12), ICANN did not require the ICANN staff and EIU to adhere to ICANN's Bylaws. ICANN denied that the reference therein that "the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination" and its request "that candidates include a 'statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency" obligated the EIU and the ICANN staff to adhere to any of ICANN's Articles or Bylaws. ICANN's Post-Hearing Brief, ¶¶ 6, 7, and 8, at 4.

65. In response to the Panel’s question as to whether the Call for Expressions of Interest called for EIU to comply with other ICANN policies and procedures, ICANN stated that the Call for Expressions of Interest required applicants to “respect the principles of fairness, transparency and . . . non-discrimination.” ICANN’s Post-Hearing Submission, dated April 8, 2016, at ¶ 5.

66. ICANN asserts that California’s business judgment rule applies to ICANN and “requires deference to actions of a corporate board of directors so long as the board acted ‘upon reasonable investigation, in good faith and with regard for the best interests of’ the corporation, and ‘exercised discretion clearly within the scope of its authority.’” Post—Hearing Brief, ¶ 1, at 1, and *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4<sup>th</sup> 249, 265 (1999).

#### IV. DECLARATION OF PANEL

##### A. Applicable Principles of Law

67. The Panel declares that the principles of law applicable to the present proceeding are ICANN’s Articles of Incorporation, its Bylaws, the laws of the State of California, the Supplemental Rules, and the ICDR Rules of Arbitration. The Panel does not find that there are “relevant principles of international law and applicable international conventions” that would assist it in the task now before it.

68. The review undertaken by the Panel is based on an objective and independent standard, neither deferring to the views of the Board (or the

BGC), nor substituting its judgment for that of the Board. As the IRP in the *Vistaprint v. ICANN* Final Declaration stated (ICDR Case No. 01-14-0000-6505, 9 October 2015:

123. The Bylaws state the IRP Panel is 'charged' with 'comparing' contested actions of the board to the Articles and Bylaws and 'declaring' whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgement in taking a decision believed to be in the best interests of ICANN. In the IRP Panel's view this more detailed listing of a defined standard cannot be read to remove from the Panel's remit the fundamental task of comparing actions or inactions of the Board with the articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstance may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard the ICANN Board's discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.

124. The Panel agrees with ICANN's statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As *Vistaprint* has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.

125. The IRP Panel is aware that three other IRP Panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of the have reached the same conclusion: the

board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard without any presumption of correctness. (Footnote omitted).

69. In this regard, the Panel concludes that neither the California business judgment rule nor any other applicable provision of law or charter documents compels the Panel to defer to the BGC's decisions. The Bylaws expressly charge the Panel with the task of testing whether the Board has complied with the Articles and Bylaws (and, as agreed by ICANN, with the AGB). Bylaws, Article IV, Section 3.11, c provides that an "IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." Additionally, the business judgment rule does not in any event extend under California law to breaches of obligation as contrasted with its application to the exercise of discretionary board judgment within the scope of such an obligation.

70. An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed. Thus, the Dissent's focus on whether Dot Registry should have succeeded in its application for community priority is entirely misplaced. As counsel for ICANN explained:

Mr. LeVee: \*\*\*

. . . the singular purpose of an independent review proceeding, as confirmed time and again by other independent review panels, is to test whether the conduct of the board of ICANN and only of the

board of ICANN was consistent with ICANN's articles and with ICANN's bylaws.

Hearing Tr., p. 75, l. 24 – p. 76, l. 5.

B. Nature of Declaration

71. The question has arisen in some prior Declarations of IRP Panels whether Panel declarations are “binding” or “non-binding.” While this question is an interesting one, it is clear beyond cavil that this or any Panel’s decision on that question is not binding on any court of law that might be called upon to decide this issue.

72. In order of precedence from Bylaws to Applicant Guidebook, there have been statements in the documents which the Panel, or a reviewing court, might consider in its determination as to the finality of an IRP Panel Declaration.

73. As noted, above, Bylaws, Article IV, Section 3.11, c specifies that an “IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws. Bylaws, Article IV, Section 3.11, d provides that the IRP Panel may “recommend that the Board stay any action or decision . . . until such time as the Board reviews and acts upon the opinion of the IRP. Article IV, Section 3.21 provides that “[t]he declarations of the IRP Panel . . . are final and have precedential value.”

74. The ICDR Rules contains a provision that “[a]wards . . . shall be final and binding on the parties.” ICDR Rules, Art. 27(1).

75. The Applicant Guidebook requires that any applicant “AGREE NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.” AGB, Module 6, Section 6 (all caps as in original).

Assuming *arguendo* this waiver would be found to be effective, it would not appear to reach the question of finality of a Panel Declaration.

76. One Panel has declared that its declaration is non-binding (*ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, at ¶134), while another has declared that its declaration is binding. *DCA Trust v. ICANN*, ICDR Case No. 50-2013-001083, Declaration on IRP Procedures, August 14, 2014, at ¶¶ 98, 100-107, 110-111, and 115.

77. Other panels have either expressed no opinion on this issue, or have found some portion of the declaration binding, and another portion non-binding. Further, the Panel understands that this issue may have arisen before one or more courts of law, but that no final decisions have yet been rendered.

78. Since any declaration we might make on this issue would not be binding on any reviewing court, the Panel does not purport to determine whether its declaration is binding or non-binding.

C. The Merits

1) The EIU, ICANN Staff, and the BGC Were Obligated to Follow ICANN's Articles and Bylaws in Performing Their Work in this Matter

79. Whether the BGC is evaluating a Reconsideration Request or the IRP Panel is reviewing a Reconsideration Determination, the standard to be applied is the same: Is the action taken consistent with the Articles, the Bylaws, and the AGB?

80. The BGC's determination that the standard for its evaluation is that a requestor must demonstrate that the ICANN staff and/or the EIU acted in contravention of established policy or procedure is without basis.

81. In response to the three reconsideration requests at issue, the BGC states that "ICANN has previously determined that the reconsideration process can be properly invoked for challenges to determinations rendered by third party service providers, such as EIU, where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination." Reconsideration Determination of Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014, Section IV, at 7-8.

82. For this proposition, the BGC cites its own decision in the *Booking.com B.V. v. ICANN* Reconsideration Request Determination 13-5,

1 August 2013. In that case the BGC references a previous section of the Bylaws, that contains language currently in Section IV, 2, a, which states in pertinent part, that a requestor may show it has been “adversely affected by one or more staff actions or inactions that contradict ICANN policy(ies).”

83. Curiously, the BGC ignores Article IV, Section 1, entitled ‘PURPOSE,’ which sets out the purpose of the Accountability and Review provisions. Article IV, Section 1 applies to both reconsiderations by the BGC, as well as to the IRP process. It states: “In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article 1 of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. . . .” (Emphasis added).

84. Indeed, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel, including from the EIU, ICANN insisted that the evaluation process employed by prospective community priority panels “respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.” As discussed, *infra*, at ¶¶ 101 – 106, all of these principles are embodied in ICANN’s Bylaws, and

are applicable to conduct of the BGC, ICANN staff and the authority exercised by the EIU pursuant to contractual delegation from ICANN.

85. ICANN further required all applicants for evaluative panels, including the EIU, to include in their applications a statement of the applicants' plan for ensuring that the above delineated principles are applied. ICANN Call for Expressions of Interest (Exhibit R-12), Section 5.5 at 6.

86. Subsequent to its engagement by ICANN, the EIU prepared the Community Priority Evaluation Guidelines, Version 2.0 (27 September 2013 (Exhibit R-1), under supervision from ICANN, incorporating the same principles. At page 22 of the Guidelines, it states: "The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest and non-discrimination. Consistency of approach in scoring Applications will be of particular importance." (Emphasis added). These CPE Guidelines "are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB."

87. Even if one were to accept the BGC's contention that it only need look to whether ICANN staff or the EIU violated "established policies and procedures," nowhere has ICANN argued that fairness, transparency, avoiding potential conflicts of interest, and non-discrimination are **not** established policies and procedures of ICANN. Indeed, given that all of these criteria are called out in provisions of ICANN's Articles and Bylaws

as quoted elsewhere in this declaration, it would be shocking if ICANN were to make such an argument.

88. Accordingly, the Panel majority declares that in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB. These matters were clearly raised in Dot Registry's submissions. The Panel majority declares that the BGC failed to make the proper determinations as to compliance by ICANN staff and the EIU with the Articles, Bylaws, and AGB, let alone to undertake the requisite due diligence or to conduct itself with the transparency mandated by the Articles and Bylaws in the conduct of the reconsideration process.

89. The Panel majority further declares that the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations. It is the responsibility of the BGC in its reconsideration to insure such compliance. Indeed, the CPEs themselves were issued on the letterhead of ICANN, not that of the EIU, and Module 5 of the Applicant Guidebook states that "ICANN's Board of Directors has

ultimate responsibility for the New gTLD Program.” AGB, Module 5, at 5-4.

90. Moreover, ICANN tacitly acknowledged as much by submitting the Declaration of EIU Contact Information Redacted

of the Economist Intelligence Unit, the person who negotiated the services agreement with ICANN. EIU Contact Information Redacted also served as Project Director for EIU’s work on behalf of ICANN.

91. In his declaration, EIU Contact Information Redacted states that the EIU is “not a gTLD decision-maker, but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process.”

92. Further, as noted above in paragraph 8 of EIU Contact Information Redacted Declaration, Section 10 of the EIU SoW provides that “ICANN will be free in its complete discretion to decide whether or not to follow [EIU’s] determination,” that “ICANN will be solely responsible to applicants . . . for the decisions it decides to issue,” and that “each decision must be issued by ICANN in its own name only.”

93. Moreover, EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports, See, documents produced to the Panel in response to the Panel’s Document Production Order, ICANN \_DR-00461-466. DR00182-

194, DR 00261—267, DR00228-234, DR00349-355, DR-00547-553, DR00467- 473 and DR00116-122.

94. One example is particularly instructive. In its Request for Reconsideration for *.inc*, Dot Registry complained that “the Panel repeatedly relies on its ‘research.’ For example, the Panel states that its decision not to award any points to the **.INC** Community Application for 1-A Delineation is based on ‘[r]esearch [that] showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an *.inc*’ and also that ‘[b]ased on the Panel’s research there is no evidence of incs from different sectors acting as a community as defined by the Applicant Guidebook.” “Thus, the Panel’s ‘research’ was a key factor in its decision not to award at least four (but possibly more) points to the *.inc* Community Application. However, despite the significance of this ‘research,’ the Panel never cites any sources or gives any information about its substance or the methods or scope of the ‘research.’” Dot Registry Request for Reconsideration re *.inc*, § 8, B at 5-6.

95. The BGC made short shrift of this argument. “The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to ‘cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” (Citations omitted.) “As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to ‘perform independent

research, if deemed necessary to reach informed scoring decisions.”

(Citations omitted). “The Requestor cites no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope or methods of its independent research.” Reconsideration Response, § V.B at 11.

96. A review of the documents produced and the ongoing exchange between the EIU and the ICANN staff reveal the origin of the “research” language found in the final version of the CPEs.

97. The original draft CPEs prepared by the EIU, dated 19 May 2014 at page 2, paragraph beginning “However . . .” contain no reference to any “research.” See DR00229, 00262, and 00548.

98. The first references to the use of “research” comes from ICANN staff. “Can we add a bit more to express the research and reasoning that went into this statement? . . .Possibly something like, ‘based on the Panel’s research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00468. “While I agree, I’d like to see some substantiation, something like . . . ‘based on our research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00548.

99. The CPEs as issued read in pertinent part at page 2, in paragraph beginning “However . . .,” “Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC. Based on the Panel’s research, there

is no evidence of LLCs from different sectors acting as a community as defined in the Applicant Guidebook.”

100. Counsel for ICANN at the hearing acknowledged that ICANN staff is bound to conduct itself in accordance with ICANN's Articles and Bylaws.

Panelist Donahey: So when you hear the word “ICANN” or see the word “ICANN in the bylaws or articles you believe that that is a , is a reference to ICANN’s board and its constituent bodies?

Mr. LeVee: Including its staff, yes

Panelist Kantor: My chair anticipated a question I was going to ask, but he combined it with a question about constituent bodies. I believe I heard, Mr. LeVee, that you said that while the CPE panel is not bound by the provisions I identified, ICANN staff is. Is that correct?

[Mr. LeVee:] Yes. ICANN views its staff as being obligated to conform to the various article and bylaw provisions that you cite.

Hearing Tr., p. 197, l. 20 – p. 198, l.1; p. 199, l. 17 - p. 200, l. 2 (emphasis added).

101. The facts that ICANN staff was intimately involved in the production of the CPE and that ICANN staff was obligated to follow the Articles and Bylaws, further support the Panel majority's finding that ICANN staff and the EIU were obligated to comply with ICANN's Articles and Bylaws. Moreover, when the issues were posed in the Reconsideration Requests, in the course of determining whether or not ICANN staff and the EIU had acted in compliance with the Articles, Bylaws, and the AGB, the BGC was obligated under the Bylaws to exercise due diligence and care in having a reasonable amount of facts in front of them and exercise independent

judgment in taking the decision believed to be in the best interests of ICANN.

## 2) The Relevant Provisions of the Articles and Bylaws and Their Application

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. Articles of Incorporation, Art. 4

In performing its mission, the following core values should guide the decisions and actions of ICANN:

\*\*\*\*

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

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

These core values are deliberately expressed in very general terms so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. Bylaws, Art. I, § 2. CORE VALUES.

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. Bylaws, Art. II, § 3. Non-Discriminatory Treatment.

The Board shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Bylaws, Art. III, §1.

In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of these bylaws. Art. IV, § 1.

103. In addition, the BGC failed several transparency obligations. As well as failing to enforce the transparency obligations in the Articles, Bylaws, and AGB with respect to the research purportedly undertaken by the EIU, the BGC is also subject to certain requirements that it make public the staff work on which it relies. Bylaws, Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the

matter, which comments shall be made publicly available on the Website.”  
Bylaws, Art. IV.2.14 provides that “The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.”

104. The Panel is tasked with determining whether the ICANN Board acted consistently with the provisions of the Articles and Bylaws. Bylaws Article IV, Section 3.11, c states that “[t]he IRP Panel shall have the authority to declare whether an action of inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” As accepted by ICANN, the Panel is also tasked with determining whether the ICANN Board acted consistently with the AGB. Moreover, the Bylaws provide:

Requests for [] independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision believed to be in the best interests of the company?

Bylaws. Art. IV, §3.4.

ICANN's counsel stated at the hearing that the concept of inaction or the omission to act is embraced within "actions of the Board."

Panelist Kantor: At an earlier stage in these proceedings, the panel asked some questions, and we were advised that action here includes both actions and omissions. Does that apply to conduct of ICANN staff or only to conduct of the ICANN Board?

Mr. LeVee: Only to Board.

Hearing Tr., p. 192, l. 25 – p. 193, l. 6.

105. Thus, ICANN confirmed that omissions by the Board to comply with its duties under the Articles and Bylaws constituted breaches of the Articles and Bylaws for purposes of an IRP. See, *also*, ICANN's response to Dot Registry's Submission, ¶ 10 (10 August 2015) ("the only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN's Articles or Bylaws in acting (or failing to act) with respect to that conduct.") and Letter of Jeffrey A. LeVee, Jones, Day LLP, to the Panel, October 12, 2015, at 6 ("ICANN agrees with the statements in Paragraph 53 of the Booking.com IRP Panel's Declaration that . . . the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board . . . .")

106. As discussed, *supra*, at ¶¶ 47-52, Dot Registry contended that the CPE lacked transparency, such as the subject of the research performed, the sources referenced in the performance of the research, the manner in which the research was performed, the results of the research, whether the researchers encountered sources that took issue with the results of

the research, etc. Thus, Dot Registry adequately alleged a breach by ICANN staff and the EIU of the transparency obligations found in the Articles, Bylaws, and AGB.

107. Dot Registry further asserted that it was treated unfairly in that the scoring involved double counting, and that the approach to scoring other applications was inconsistent with that used in scoring its applications. *Id.*

108. Dot Registry alleged that it was subject to different standards than were used to evaluate other Community Applications which underwent CPE, and that the standards applied to it were discriminatory. *Id.*

109. Yet, the BGC failed to address any of these assertions, other than to recite that Dot Registry had failed to identify any “established policy or procedure” which had been violated.

110. Article IV, Section 3.4 of the Bylaws calls upon this Panel to determine whether the BGC, in making its Reconsideration Decision “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision believed to be in the best interests of the company.”

Consequently, the Panel must consider whether, in the face of Dot Registry’s Reconsideration Requests, the BGC employed the requisite due diligence and independent judgment in determining whether or not ICANN staff and the EIU complied with Article, Bylaw, and AGB obligations such as transparency and non-discrimination.

111. Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

112. An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry Requests for Reconsideration.

Panelist Kantor: Mr. LeVee, in those minutes or in the determinations on the reconsideration requests, is there evidence that the Board considered whether or not the CPE panel report or any conduct of the staff complied with the various provisions of the bylaws to which I referred, core values, inequity, nondiscriminatory treatment, or to the maximum extent open and transparent.

Mr. LeVee: I doubt it. Not that I'm aware of. As I said, the Board Governance Committee has not taken the position that the EIU or any other outside vendor is obligated to conform to the bylaws in this respect. So I doubt they would have looked at that subject.

Hearing Tr., p. 221, l. 17 – p. 222, l. 8.

113. Notably, the Panel question above inquired as to whether the Board considered *either* the conduct of the CPE panel (*i.e.*, the EIU) or the conduct of ICANN staff. Counsel's response that he doubted whether consideration was given relied solely upon the BGC's position that *the EIU* was not obligated to comply with the Bylaws. Regardless of whether that position is correct, ICANN acknowledges that the conduct of *ICANN staff* (as described *supra*, at ¶¶89-101) is bound by the Articles, Bylaws, and AGB. ICANN's argument fails to recognize that in any event the conduct

of ICANN staff is properly the subject of review by the BGC when raised in a Request for Reconsideration, yet no such review of the allegedly discriminatory and non-transparent conduct of ICANN staff was undertaken by the BGC.

114. One of the questions on which an IRP Panel is asked to “focus” is whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts” in front of it. In making this determination, the Panel must look to the allegations in order to determine what facts would have assisted the BGC in making its determination.

115. As discussed, *supra*, at ¶¶ 51 and 94 - 95, the requestor argued that the EIU repeatedly referred to “research” it had performed in making its assessment, without disclosing the nature of the research, the source(s) to which it referred, the methods used, or the information obtained. This is effectively an allegation of lack of transparency.

116. Transparency was yet another of the principles which an applicant for the position of Community Priority Evaluator, such as EIU, was required to respect. Indeed, an applicant for the position was required to submit a plan to ensure that transparency would be respected in the evaluation process. *See, generally, supra*, ¶¶ 17 – 18.

117. Transparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.

118. In ICANN's Articles of Incorporation, Article 4 refers to "open and transparent processes." Among the Core Values listed in its Bylaws intended to "guide the decisions and actions of ICANN" is the "employ[ment of] open and transparent policy development mechanisms." Bylaws, Art. I, § 2.7.

119. Indeed, ICANN devotes an entire article in its bylaws to the subject. Article III of the Bylaws is entitled, "TRANSPARENCY." It states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Bylaws, Art. III, § 1.

120. Moreover, in the very article that establishes the Reconsideration process and the Independent Review Process, it states in Section 1, entitled "PURPOSE:"

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

121. By their very terms, these obligations govern conduct not only by the Board, but by "ICANN," which necessarily includes its staff.

122. It seems fair to say that transparency is one of the most important of ICANN's core values binding on both the ICANN Board and the ICANN

staff, and one that its contractor, EIU, had pledged to follow in its work for ICANN. The BGC had an obligation to determine whether ICANN staff and the EIU complied with these obligations. An IRP Panel is charged with determining whether the Board, which includes the BGC, complied with its obligations under the Articles and the Bylaws. The failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those obligations is itself a failure by the Board to comply with its obligations under the Articles and Bylaws.

123. Has the BGC been given the tools necessary to gather this information as Part of the Reconsideration process? The section on reconsideration (Bylaws, Art. IV, Section 2) provides it with those tools. It gives the BGC the power to “conduct whatever factual investigation is deemed appropriate” and to “request additional written submissions from the affected party, or from other parties.” Bylaws, Art. IV, § 2.3, d and e. The BGC is entitled to “ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the website.” Bylaws, Art. IV, §2.11. The BGC is also empowered to “request information relevant to the request from third parties, and any information collected from third parties shall be provided to the requestor [for reconsideration].” Bylaws, Art. IV, § 2.13.

124. The requestor for reconsideration in this case also complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to

other successful applicants. If this were true, the EIU would not only have failed to respect the principles of fairness and non-discrimination it had assured ICANN that it would respect, it would not have lived up to its own assurance to all applicants for CPEs in its CPE Guidelines (Exhibit R-1) that “consistency of approach in scoring applications will be of particular importance.” *See, supra*, ¶¶ 18 and 83.

125. The BGC need only have compared what the ICANN staff and EIU did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the EIU treated the requestor in a fair and non-discriminatory manner. The facts needed were more than reasonably at hand. Yet the BGC chose not to test Dot Registry’s allegations by reviewing those facts. It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.

126. The Panel is called upon by Bylaws Art. IV.3.4 to focus on whether the Board, in denying Dot Registry’s Reconsideration Requests, exercised due diligence and care in having a reasonable amount of facts in front of it and exercised independent judgment in taking decisions believed to be in the best interest of ICANN. The Panel has considered above whether the BGC complied with its “due diligence” duty. Here the Panel considers whether the BGC complied with its “independent judgment” duty.

127. The Panel has no doubt that the BGC believes its denials of the Dot Registry Reconsideration Requests were in the best interests of ICANN.

However, the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment in taking those decisions. The only documentary evidence in the record in that regard is the text of the Reconsideration Decisions themselves and the minutes of the BGC meeting at which those decisions were taken. No witness statements or testimony with respect to those decisions were presented by ICANN, the only party to the proceeding who could conceivably be in possession of such evidence.

128. The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.

129. Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website."

130. Bylaws Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party."

131. Elsewhere in the Bylaws and the Articles of Incorporation, as discussed above, ICANN undertakes general duties of transparency and accountability that are also implicated by ICANN's decision to shield relevant staff work from public disclosure by structuring the staff work to benefit from legal privilege.

132. The documents disclosed by ICANN to the Panel pursuant to the Panel's document orders do not include any documents sent from BGC members to ICANN staff or sent from any Board members to any other Board members. The privilege log submitted by ICANN in these proceedings does not list any documents either sent from Board members to any ICANN staff or sent from any Board member to any other Board member, only a small number of documents sent from ICANN staff to the BGC. The only documents of the BGC that were disclosed to the Panel are the denials of the relevant Reconsideration Request themselves, the agendas for the relevant BGC meetings found on the ICANN website, and the Minutes of those meetings also found on the ICANN website.

133. No documents from ICANN staff to the BGC have been disclosed to the Panel. The privilege log lists one document, dated July 18, 2014, which appears to be the ICANN in-house legal counsel submission to the BGC of the "board package" for the July 24, 2014 BGC meeting at which Dot Registry's Reconsideration Requests were considered. The Panel infers that package included an agenda for the meeting, the CPEs themselves and draft denials prepared by ICANN staff, consistent with a

statement to that effect by ICANN counsel at the hearing. As explained by ICANN counsel at the hearing, that package also apparently included ICANN staff recommendations regarding the CPEs and the Reconsideration Requests, prepared by ICANN legal counsel. The Panel presumes the “package” also included Dot Registry’s Reconsideration Requests, setting out Dot Registry’s views arguing for reconsideration.

134. There is nothing in either the document production record or the privilege log to indicate that the denials drafted by ICANN staff were modified in any manner after presentation by staff to the BGC. Rather, from that record it would appear that the denials were approved by the BGC without change. It is of course possible that changes were in fact made to the draft denials involving ICANN legal counsel, but not produced to the Panel. However, nothing in the privilege log indicates that to be the case.

135. The privilege log submitted by ICANN in this proceeding also lists one other document dated August 15, 2014, which appears to be the “board package” for the August 22, 2014 BGC meeting at which the BGC *inter alia* approved the Minutes for the July 24 BGC meeting. Since the agenda and the Minutes for that August 22 meeting, as available on the ICANN website, do not show any reference to the gTLDs at issue in this IRP, it would appear that the material in the August 15 privileged document related to this dispute is only the draft of the Minutes for the July 24 BGC meeting, which Minutes were duly approved at the August 22 BGC

meeting according to the Minutes for that latter meeting. Thus, the August 15 privileged document adds little to assist the Panel in deciding whether the Board exercised the requisite diligence, due care and independent judgment.

136. Every other document listed on the privilege log is an internal ICANN staff document, not a BGC document.

137. From this disclosure and from statements by ICANN counsel at the hearing, the Panel considers that no documents were submitted to the BGC for the July 24, 2014 BGC meeting other than the agenda for the meeting, the CPEs and Dot Registry's Reconsideration Requests themselves, ICANN staff's draft denials of those Reconsideration Requests, and explanatory recommendations to the BGC from ICANN staff in support of the denials. Moreover, it appears the BGC itself and its members generated no documents except the denials themselves and the related BGC Minutes. ICANN asserted privilege for all materials sent by ICANN staff to the BGC for the BGC meeting on the Reconsideration Requests.

138. The production by ICANN of BGC documents was an issue raised expressly by the unanimous Panel in Paragraph 2 of Procedural Order No. 4, issued May 27, 2015:

Among the documents produced by ICANN in response to the Panel's document production request, the Panel expected to find documents that indicated that the ICANN Board had considered the recommendations made by the EIU concerning Claimant's Community Priority requests, that the ICANN board discussed those recommendations in a meeting of the Board or in a meeting of one or more of its committees or subcommittees

or by its staff under the ICANN Board's direction, the details of such discussions, including notes of the participants thereto, and/or that the ICANN Board itself acted on the EIU recommendation by formal vote or otherwise; or if none of the above, documents indicating that the ICANN board is of the belief that the recommendations of the EIU are binding. If no such documents exist, the Panel requests that ICANN's counsel furnish an attestation to that effect.

139. By letter dated May 29, 2015, counsel for ICANN made the requested confirmation, referring to the Reconsideration Decisions and appending the BGC meeting minutes for the non-privileged record.

140. It is of course entirely possible that oral conversations between staff and members of the BGC, and among members of the BGC, occurred in connection with the July 24 BGC meeting where the BGC determined to deny the reconsideration requests. No ICANN staff or Board members presented a witness statement in this proceeding, however. Also, there is no documentary evidence of such a hypothetical discussion, privileged or unprivileged. Thus apart from *pro forma* corporate minutes of the BGC meeting, no evidence at all exists to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff.

141. Counsel for ICANN conceded at the hearing that ICANN legal counsel supplied the BGC with recommendations, but asserted the BGC does not rely on those recommendations.

2 \*\*\* I  
3 will tell you that the Board Governance  
4 Committee is aided by the Office of General  
5 Counsel, which also consults with Board  
6 staff.

7 The Office of General Counsel does  
8 submit recommendations to the Board  
9 Governance Committee, and of course, those  
10 documents are privileged. For that reason,  
11 we did not turn them over. We don't rely on  
12 them in issuing the Board Governance  
13 Committee reports, we don't cite them, and we  
14 don't produce them because they are prepared  
15 by counsel.

Hearing Tr., p. 94, l. 2 – 15.

For several reasons, the assertion that the BGC does not rely on ICANN staff recommendations, and thus is not obligated to make those staff views public pursuant to Bylaws Arts. I.2.7 and I.2.10, is simply not credible.

142. First, according to Bylaws Art. IV.2.14, the BGC is to act on Reconsideration Requests “on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.” Thus, the Bylaws themselves expect the BGC to look to the public written record, including staff views, in making its decisions.

143. Moreover, according to the documents produced by ICANN in this proceeding and the ICANN privilege log, the BGC apparently had no substantive information before it other than the CPEs, the recommendations of ICANN staff regarding the CPEs, including the recommendations of the Office of General Counsel, and the contrary arguments of Dot Registry contained in the Reconsideration Requests. The Minutes for the July 24 BGC meeting state succinctly that “Staff

briefed the BGC regarding Dot Registry, LLC's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panels' Reports, and ICANN's acceptance of those Reports."

144. Counsel for ICANN made similar points at the hearing.

12 MR. LEVEE: I can.

13 So the Board Governance Committee  
14 had the EIU, the three EIU reports, and it  
15 had the lengthy challenge submitted by Dot  
16 Registry regarding those reports. As I've  
17 said before, the Board Governance Committee  
18 does not go out and obtain separate  
19 substantive advice, because the nature of its  
20 review is not a substantive review.  
21 So I don't know what else it would  
22 need, but my understanding is that apart from  
23 privileged communication, what it had before  
24 it was the materials that I've just  
25 referenced, EIU's reports and Dot Registry's  
1 reconsideration requests, which had attached  
2 to it a number of exhibits.

3 MR. KANTOR: So in evaluating that  
4 request and the CPE panel report, would it be  
5 correct to say that the diligence and care  
6 the Board Governance Committee took in having  
7 a reasonable amount of facts in front of it,  
8 were those two submissions an [sic] inquiry of  
9 staff which is privileged?

10 MR. LEVEE: Yes.

11 MR. KANTOR: Subclause C: How did  
12 the Board Governance Committee go about  
13 exercising its independent judgment in taking  
14 the decisions it took on the reconsideration  
15 requests? Again, with as much specificity as  
16 you can reasonably undertake.

17 MR. LEVEE: The primary thing I  
18 obviously have to refer you to is the report,  
19 the 23-page report of the Board Governance  
20 Committee. I, I don't have other materials  
21 that I have tendered to the panel to say that  
22 the Board members exercised their independent  
23 judgment, beyond the fact that they wrote a

24 document which goes pretty much point by  
25 point through the complaints that Dot  
1 Registry asserted, evaluated each of those  
2 points independently, and reached the  
3 conclusions that they reached.  
4 MR. DONAHEY: Were there drafts of  
5 that 23-page report?  
6 MR. LEVEE: Yes.  
7 MR. DONAHEY: And were those  
8 produced?  
9 MR. LEVEE: They were not.  
10 MR. DONAHEY: And was that because  
11 they were privileged?  
12 MR. LEVEE: Yes.  
13 MR. KANTOR: Mr. LeVee, what exists  
14 in the record before this panel to show that  
15 the Board Governance Committee exercised its  
16 judgment independent from that of ICANN's  
17 staff, including office [of] general counsel?  
18 MR. LEVEE: The record is simply  
19 that the six voting members of the Board  
20 Governance Committee authorized this  
21 particular report after discussing the  
22 report. I cannot give you a length of time  
23 that it was discussed. I don't have a record  
24 of that, but I can tell you, as reflected in  
25 many other situations where similar questions  
1 have been asked, that the voting members of  
2 the Board take these decisions seriously.  
3 They are then reflected in minutes of the  
4 Board Governance Committee which are  
5 published on ICANN's website.  
6 Candidly, I'm not sure what else I  
7 could provide.

Hearing Tr., at pp. 217-219.

145. The BGC thus had before it substantively only the views of the EIU accepted by ICANN staff (the CPEs), the "reports" (i.e., the reconsideration decisions drafted by staff), the staff's own briefing, and the contrary views of Dot Registry. As the Reconsideration Decisions themselves evidence, the BGC certainly did not rely on Dot Registry's

arguments. The BGC therefore simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff.

146. The Minutes of the July 24, 2014 BGC meeting state that “After discussion and consideration of the Request[s],” the BGC denied the Reconsideration Requests. Similarly, counsel for ICANN argued at the hearing that “the six voting members of the Board Governance Committee authorized this particular report after discussing the report. \*\*\* I can tell you, as reflected in many other situations where similar questions have been asked, that the voting members of the Board take these decisions seriously.”

147. Arguments by counsel are not, however, evidence. ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes. The Panel is well aware that such a *pro forma* statement is regularly included in virtually all corporate minutes recording decisions by board of director committees, regardless of whether or not the discussion was more than rubber-stamping of management decisions.

148. If there is any evidence regarding the extent to which the BGC did in fact exercise independent judgment in denying these Reconsideration Request, rather than relying exclusively on the recommendations of

ICANN staff without exercising diligence, due care and independent judgment, that evidence is shielded by ICANN's invocation of privileges in this matter and ICANN's determination under the Bylaws to avoid witness testimony in IRPs.

149. ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges. The ICANN Board is not free, however, to disregard mandatory obligations under the Bylaws. As noted above, Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website." (emphasis added). Bylaws, Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party" (emphasis added). The transparency commitments included in the Core Values found in Bylaws, Art. I, §2 are part of a balancing process. However, the obligations in the Bylaws to make that staff work public are compulsory, not optional, and do not provide for any balancing process.

150. None of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus

subject to the shield of privilege) in reaching its conclusions. By exercising its litigation privileges, though, the BGC has put itself in a position to breach the obligatory requirements of Bylaws Art. IV.2.11 and Art. IV.2.14 to make that staff work public. ICANN has presented no real evidence to this Panel that the BGC exercised independent judgment in reaching its decisions to deny the Reconsideration Requests, rather than relying entirely on recommendations of ICANN staff. Thus, the Panel is left highly uncertain as to whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision.” And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC (other than the *pro forma* meeting minutes), the BGC has put itself in contravention of Bylaws IV.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public.\

#### D. Conclusion

151. In summary, the Panel majority declares that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.

152. The Panel majority emphasizes that, in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB. There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach. Rather the Panel majority has concluded that, in making its reconsideration decisions, the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publically available the ICANN staff work on which the BGC relied). The Panel majority further concludes that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.

153. The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority. The IRP Panel is tasked specifically "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." Bylaws, Art. IV, §3.4. This is what the Panel has done.

154. Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution (“ICDR”) totaling \$4,600.00 and the compensation and expenses for the Panelists totaling \$461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC \$235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.

155. The Panel retains jurisdiction for fifteen days from the issuance of this Declaration solely for the purpose of considering any party’s request to keep certain information confidential, pursuant to Bylaws, Article IV, Section 3.20. If any such request is made and has not been acted upon prior to the expiration of the fifteen-day period set out above, the request will be deemed to have been denied, and the Panel’s jurisdiction will terminate.

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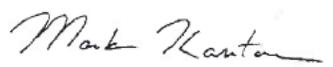
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156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

A handwritten signature in cursive script that reads "Mark Kantor". The signature is written in black ink and is positioned above a horizontal line.

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Mark Kantor

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M. Scott Donahey, Chair

156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2018

For the Panel Majority

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Mark Kantor

A handwritten signature in dark ink, appearing to read "M. Scott Donahey", written over a horizontal line.

M. Scott Donahey, Chair

## DISSENTING OPINION OF JUDGE CHARLES N. BROWER

1. With the greatest of regard for my two eminent colleagues, I respectfully dissent from their Declaration (“the Declaration”). In my view, Dot Registry LLC’s (“Dot Registry”) Community Priority Evaluation (“CPE”) Applications to operate three generic top level domains (“gTLDs”) (.INC, .LLC, and .LLP) were properly denied, as were Dot Registry’s Reconsideration Requests to the Board Governance Committee (“BGC”) of the Internet Corporation for Assigned Names and Numbers (“ICANN”). Dot Registry’s requests for relief before this Independent Review Proceeding (“IRP”) Panel should have been rejected in their entirety.
2. I offer four preliminary observations:
3. **First**, the Declaration commits a fundamental error by disregarding the weakness of Dot Registry’s underlying CPE Applications. The applications never had a chance of succeeding. The “communities” proposed by Dot Registry for three types of business entities (INCs, LLCs, and LLPs) do not demonstrate the characteristics of “communities” under any definition. They certainly do not satisfy the standards set forth in ICANN’s Applicant Guidebook (“AGB”), which require applicants to prove “awareness and recognition of [being] a community,” in other words “more . . . cohesion than a mere commonality of interest,”<sup>1</sup> because the businesses in question function in unrelated industries and share nothing in common whatsoever other than their corporate form. As ICANN stated:

*[A] plumbing business that operated as an LLC would not necessarily feel itself to be part of a “community” with a bookstore, law firm, or children’s daycare center simply based on the fact that all four entities happened to organize themselves as LLCs (as opposed to corporations, partnerships, and so forth). Although each entity elected to form as an LLC, the entities literally share nothing else in common.*<sup>2</sup>
4. That foundational flaw in Dot Registry’s underlying CPE Applications alone precluded Dot Registry from succeeding at the CPE stage because failure to prove Criterion #1, “Community Establishment,” deprives an applicant of four points, automatically disqualifying the applicant from reaching the minimum passing score of 14 out of a possible 16 points. Therefore while I do not agree that any violation of ICANN’s Articles of Incorporation (“Articles”) or ICANN’s Bylaws (“Bylaws”) occurred in this case, even if it had, this Panel should have concluded that those violations amounted to nothing more than

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<sup>1</sup> AGB § 4.2.3 (“‘Community’ - Usage of the expression ‘community’ has evolved considerably from its Latin origin – ‘*communitas*’ meaning ‘fellowship’ – while still implying more of cohesion than a mere commonality of interest. Notably, as ‘community’ is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.”).

<sup>2</sup> ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2016, ¶ 6.

harmless error.<sup>3</sup>

5. Moreover, the BGC in entertaining a Reconsideration Request is entitled to take its views of the underlying CPE into account in deciding whether or not to exercise its discretion under the Bylaws Article IV.3.d to “conduct whatever factual investigation is deemed appropriate,” Article IV.3.e to “request additional written submissions . . . from other parties,” Article IV.8.11 or to “ask the ICANN staff for its views on the matter.” As ICANN stated in the hearing of this case:

*The fact that you may have your own personal views as to whether the EIU got it right or got it wrong may or may not inform you, your thinking in terms of whether the Board Governance Committee, in assessing the EIU's reports from a procedural standpoint, did so correctly, in essence.*<sup>4</sup>

Hence the BGC’s approach to a Reconsideration Request is in no way necessarily divorced from such views as it may have regarding the underlying subject of the Request.

6. ***Second***, the Declaration purports to limit its analysis to action or inaction of the ICANN Board, but in fact it also examines the application of ICANN’s Articles and Bylaws to ICANN staff and to third-party vendor, the Economic Intelligence Unit (“EIU”). ICANN has conceded that its staff members are subject to its Articles and Bylaws,<sup>5</sup> but ICANN clarified that staff conduct is not reviewable in an IRP,<sup>6</sup> and ICANN has explained that the EIU is neither bound by the Articles or Bylaws, nor may EIU conduct be reviewed in an IRP.<sup>7</sup> The Declaration suggests that it “is *not* assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB.”<sup>8</sup> The Declaration, however, repeatedly concludes that ICANN staff and the EIU are bound by the Articles and Bylaws.<sup>9</sup> Despite the Declaration’s statement to the contrary,<sup>10</sup> I cannot

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<sup>3</sup> I have no quarrel with the Declaration insofar as it recognizes that this Panel should not “substitute our judgment for the judgment of the [CPE Panels] as to whether Dot Registry is entitled to Community priority.” Declaration ¶ 153. However, I disagree with the Declaration’s statement that “the Dissent’s focus on whether Dot Registry should have succeeded in its action is entirely misplaced.” Declaration ¶ 70. ICANN stated that it expects the IRP Panel might consider the merits of Dot Registry’s underlying CPE Applications when resolving this dispute, *See* Hearing Transcript dated 29 Mar. 2016, at 254:14–20, and Dot Registry expressly asked the Panel to rule on its CPE Applications. *See* Claimant’s Post-Hearing Brief dated 8 Apr. 2016, ¶ 21 (“As Dot Registry considers it is the Panel’s role to independently resolve this dispute, it affirmatively requests that the Panel not recommend a new EIU evaluation. Instead, Dot Registry requests that the Panel conclusively decide—based on the evidence presented in the final version of the Flynn expert report, including the annexes detailing extensive independent research—that Dot Registry’s CPE applications are entitled to community priority status and recommend that the Board grant the applications that status.”).

<sup>4</sup> Hearing Transcript dated 29 Mar. 2016, at 254:14–20.

<sup>5</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 196–97, 199–200, 209.

<sup>6</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 187–88, 200.

<sup>7</sup> *See* ICANN’s Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 5–8; ICANN’s Response to Claimant Dot Registry’s Additional Submission dated 10 Aug. 2015, ¶ 9.

<sup>8</sup> Declaration ¶ 152. (Emphasis added.)

<sup>9</sup> *See* Declaration, Heading IV.C(1) and paragraphs 84–89, 100–01, 106, 110, 122, 124.

<sup>10</sup> *See* Declaration ¶ 152 (“There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority’s approach.”).

help but think that the implicit foundation for the Declaration's entire analysis is that ICANN staff and the EIU committed violations of the Articles and Bylaws which, in turn, should have triggered a more vigorous review process by the ICANN Board in response to Dot Registry's Reconsideration Request.

7. In my view, my co-Panelists have disregarded the express scope of their review as circumscribed by Article IV.3.4 of ICANN's Bylaws, which focuses solely on the ICANN Board and not on ICANN staff or the EIU:

*Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*

- a. *did the Board act without conflict of interest in taking its decision?*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

8. ***Third***, in concluding that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws,"<sup>11</sup> the Declaration has effectively rewritten ICANN's governing documents and unreasonably elevated the organization's obligations to act transparently and to exercise due diligence and care above any other competing principle or policy. Tensions exist among ICANN's "Core Values." Article I.2 of ICANN's Bylaws states: "Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."
9. The Declaration recognizes that the "transparency commitments included in the Core Values found in Bylaws, Art. I, § 2 are part of a balancing process," but it goes on to state, in the context of discussing communications over which ICANN claimed legal privilege, that "the obligations in the Bylaws to make [] staff work public are compulsory, not optional, and do not provide for any balancing process."<sup>12</sup> This analysis is misguided. To begin with, Bylaws Article I.2 ("Core Values") concludes thus:

*These core values are deliberately expressed in very general terms, so that*

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<sup>11</sup> Declaration ¶ 151.

<sup>12</sup> See Declaration ¶¶ 149–50.

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

Moreover, the cited provisions are in no way “compulsory.” Article IV.2.11 states that “the [BCG] **may** ask the ICANN staff for its views on the matter, which comments shall be made available on the Website [of ICANN],” and Article IV.2.14 provides that “The [BCG] shall act on a Reconsideration Request on the basis of the public written record, including information submitted by . . . the ICANN staff . . .” (Emphasis added.) Thus if the BGC chooses not to “ask the ICANN staff for its views on the matter,” no such views become part of the “public written record.” The BGC is not mandated to inquire of the ICANN staff, and there is no indication in the record of the proceedings before the BGC, or in the present proceeding, that the BGC exercised its discretion in that regard. All four of the items listed on ICANN’s privilege log addressed to the BGC that the Declaration cites were originated by attorneys. Furthermore, the Declaration itself in paragraph 150 records that “it is beyond doubt that the BGC obtained and relied upon information and views **submitted** by ICANN staff,” not solicited by the BGC. (Emphasis added.)

10. The Declaration otherwise disregards any “balance among competing values” and focuses myopically on transparency and due diligence while ignoring the fact that ICANN may have been promoting competing values when its Board denied Dot Registry’s Reconsideration Requests. For example:

- ICANN was “[p]reserving and enhancing [its] operational stability [and] reliability” by denying meritless Reconsideration Requests. **(Core Value 1)**
- ICANN was “delegating coordination functions” to relevant third-party contractors (the EIU) and also to ICANN staff in assisting with the Determination on the Reconsideration Requests. **(Core Value 3)**
- ICANN was “[i]ntroducing and promoting competition in the registration of domain names” because there are collectively 21 other competing applications for the three gTLDs in question. **(Core Value 6)**
- ICANN was “[a]cting with a speed that is responsive to the needs of the Internet” because it dealt with meritless Reconsideration Requests in an expedient manner. **(Core Value 9)**

11. ***Fourth***, Dot Registry has gone to great lengths to frame this IRP as an “all or nothing” endeavor, repeatedly reminding the Panel that no appeal shall follow the IRP.<sup>13</sup> Under the guise of protecting its rights, Dot Registry has attempted to expand the scope of the IRP, and, in my view, has abused the process at each step of the way. For example:

- Dot Registry submitted four fact witness statements<sup>14</sup> and a 96-page expert report to reargue the merits of its CPE Applications,<sup>15</sup> none of which were submitted with Dot Registry’s Reconsideration Requests to the BGC, even though Article IV.2.7 of ICANN’s Bylaws permitted Dot Registry to “submit [with its Reconsideration Requests already] all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.”
- Dot Registry insisted that it be allowed to file a 75-page written submission despite the requirement set forth in Article 5 of ICANN’s Supplementary Procedures that “initial written submissions of the parties [in an IRP] shall not exceed 25 pages each in argument, double-spaced and in 12-point font.”<sup>16</sup>
- Dot Registry filed a 70-page written submission in response to limited procedural questions posed by the Panel, using the opportunity to reargue at great length the merits of the proceeding despite the Panel’s warning that “submissions be focused, succinct, and not repeat matters already addressed.”<sup>17</sup>
- Dot Registry requested that the Panel hold an in-person, five-day hearing even though Article IV.3.12 of ICANN’s Bylaws directs IRP Panels to “conduct [their] proceedings by email and otherwise via the Internet to the maximum extent feasible” and Article 4 of ICANN’s Supplementary Procedures refers to in-person hearings as “extraordinary.”<sup>18</sup>
- Dot Registry introduced a fact witness to testify at the hearing<sup>19</sup> in plain violation of Article IV.3.12 of ICANN’s Bylaws (“the hearing shall be limited to argument only”), paragraph 2 of the Panel’s Procedural Order No. 11 (“There will be no live percipient or expert witness testimony of any kind permitted at the hearing. Nor may a party attempt to produce new or additional evidence.”), and paragraph 2 of the Panel’s Procedural Order No. 12 (same).

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<sup>13</sup> See, e.g., Dot Registry’s Additional Submission dated 13 July 2015, ¶ 4.

<sup>14</sup> See Witness Statement of Elaine F. Marshall dated 17 Apr. 2015; Witness Statement of Jeffrey W. Bullock dated 24 Apr. 2015; Witness Statement of Shaul Jolles dated 13 July 2015; and Witness Statement of Tess Pattison-Wade dated 13 July 2015.

<sup>15</sup> See Expert Report of Michael A. Flynn dated 13 July 2015.

<sup>16</sup> See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 4.

<sup>17</sup> See Submission of Dot Registry, LLC on the Law Applicable to ICANN and the Structure of the IRP Proceedings dated 12 Oct. 2015 (see especially paragraphs 29–54); Procedural Order No. 6 dated 26 Aug. 2015, ¶ 2.

<sup>18</sup> See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 6.

<sup>19</sup> See Hearing Transcript dated 29 Mar. 2016, at 37–42.

12. The Panel has been extremely generous in accommodating Dot Registry's procedural requests, most of which, in my view, fall outside the purview of an IRP. The Declaration loses sight of this context, and ironically the core principle underlying the Declaration's analysis is that Dot Registry has been *deprived of due process and procedural safeguards*. I vigorously disagree. Dot Registry has been afforded every fair opportunity to "skip to the front of the line" of competing applicants and obtain the special privilege of operating three community-based gTLDs. Its claims should be denied. The denial would not take Dot Registry out of contention for the gTLDs, but, as the Declaration correctly acknowledges, would merely place Dot Registry "in a contention set for each of the proposed gTLDs with [all of the other 21 competing] applicants who had applied for one or more of the proposed gTLDs."<sup>20</sup> In this respect, I find the Declaration disturbing insofar as it encourages future disappointed applicants to abuse the IRP system.

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13. Turning to the merits of the dispute, the Declaration determines that ICANN failed to apply the proper standards in ruling on Dot Registry's Reconsideration Requests, and it concludes that the actions and inactions of the ICANN Board violated ICANN's Articles and Bylaws in four respects. I would note that Dot Registry did not specifically ask this Panel to assess whether or not the BGC applied the proper standard of review when evaluating Dot Registry's Reconsideration Requests.<sup>21</sup> Therefore, I believe that the Declaration should not have addressed the BGC's standard of review. As to the four violations, I have grouped them by subject matter ("Discrimination," "Research," "Independent Judgment," and "Privilege") and address each in turn.

### **Discrimination**

14. The Declaration finds that the ICANN Board breached its obligation of due diligence and care, as set forth in Article IV.3.4(b) of the Bylaws, in not having a reasonable amount of facts in front of it concerning whether the EIU or ICANN staff treated Dot Registry's CPE Applications in a discriminatory manner. That is, the ICANN Board should have investigated further into whether the CPE Panels applied an inconsistent scoring approach between Dot Registry's applications and those submitted by other applicants.<sup>22</sup> A critical mistake of the Declaration is its view that Dot Registry, when filing its Reconsideration Requests, actually "complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to other successful applicants."<sup>23</sup> A review of Dot Registry's three Reconsideration Requests

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<sup>20</sup> Declaration ¶ 20.

<sup>21</sup> See Dot Registry's Request for Independent Review Process dated 22 Sept. 2014, ¶ 65; Dot Registry's Additional Written Submission dated 13 July 2015, ¶ 42; Claimant's Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 20-21.

<sup>22</sup> See Declaration ¶¶ 98-100, 103-04, 122.

<sup>23</sup> Declaration ¶¶ 47-48, 124.

filed with the BGC reveals otherwise. In response to issue number 8 on each of the three “Reconsideration Request Forms,” entitled “Detail of Board or Staff Action — Required Information,” Dot Registry listed the alleged bases for reconsideration:

*The inconsistencies with established policies and procedures include: (1) the Panel's failure to properly validate all letters of support and opposition; (2) the Panel's repeated reliance on "research" without disclosure of the source or substance of such research; (3) the Panel's "double counting"; (4) the Panel's apparent evaluation of the [.INC/.LLC/.LLP] Community Application in connection with several other applications submitted by Dot Registry; and (5) the Panel's failure to properly apply the CPE criteria in the AGB in making the Panel Determination.*<sup>24</sup>

15. As can be discerned from Dot Registry’s own submissions, it raised NO allegations concerning discrimination. Paragraph 22 of the Declaration paraphrases the bases for Dot Registry’s Reconsideration Requests — again, notably NOT including any allegations concerning discrimination — but then the Declaration inexplicably states in paragraph 47 that Dot Registry had alleged “unjustified discrimination (disparate treatment).”
16. My colleagues are mistaken. Dot Registry never asked the BGC for relief on any grounds relating to discrimination. As if Dot Registry’s formal request for relief in its Reconsideration Requests, quoted above, were not clear enough, the remainder of the documents confirms that nowhere did Dot Registry mention or even allude to discrimination. Its Reconsideration Requests do not even use the words “discrimination,” “discriminate,” “discriminatory,” “disparate,” or “unequal.” To the extent that my colleagues take the position that Dot Registry’s discrimination argument was somehow “embedded” within the Reconsideration Requests, I respectfully disagree. At most, Dot Registry referred in passing to an appeals mechanism used in another application (.edu),<sup>25</sup> and it noted, again in passing, that the BGC had ruled a certain way with regard to .MED,<sup>26</sup> but Dot Registry never articulated any proper argument about discrimination. It is undisputed that Dot Registry has alleged discrimination in this IRP<sup>27</sup> — but of course it only raised those arguments after the BGC issued its Determination on Dot Registry’s Reconsideration Requests. By holding the BGC accountable for failing to act in response to a complaint that Dot Registry never even advanced below, the Declaration commits an obvious error.

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<sup>24</sup> See Reconsideration Request for Application 14-30 at 4; Reconsideration Request for Application 14-32 at 3; Reconsideration Request for Application 14-33 at 3.

<sup>25</sup> See Reconsideration Request for Application 14-30 at 16 & n.39; Reconsideration Request for Application 14-32 at 14 & n.39; Reconsideration Request for Application 14-33 at 14 & n.35.

<sup>26</sup> See Reconsideration Request for Application 14-30 at 6-7; Reconsideration Request for Application 14-32 at 4-5; Reconsideration Request for Application 14-33 at 4-5.

<sup>27</sup> See Dot Registry’s Additional Written Submission dated 17 July 2015, at 15-17; Dot Registry’s Submission dated 12 Oct. 2015, at 27-30.

## Research

17. The Declaration finds that the ICANN Board also breached the same obligation of due diligence and care in having a reasonable amount of facts in front of it concerning transparency. More specifically, it concludes that the BGC did not take sufficient steps to see if ICANN staff and the EIU acted transparently when undertaking “research” that went into the CPE Reports.<sup>28</sup> The only references to “research” in the CPE Reports are the same two sentences that are repeated three times verbatim in each of the CPE Reports:

*Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an [INC, LLC, LLP]. Based on the Panel's research, there is no evidence of [INCs, LLCs, LLPs] from different sectors acting as a community as defined by the Applicant Guidebook.*<sup>29</sup> (Emphasis added.)

18. The Declaration traces the origins of this language back to correspondence between ICANN staff and the EIU in which the former suggested that the latter refer to “research” in a draft of what would eventually become the final CPE Reports in order to further “substantiate” the conclusion that INCs/LLCs/LLPs do not constitute “communities.”<sup>30</sup> The Declaration observes that Dot Registry had asserted in its Reconsideration Requests that the CPE Reports “repeatedly relie[d]” upon research as a “key factor” without “cit[ing] any sources or giv[ing] any information about [] the substance or the methods or scope of the ‘research.’”<sup>31</sup> My colleagues are troubled by what they view as ICANN’s Board making “short shrift” of Dot Registry’s position concerning the “research.”<sup>32</sup> The BGC disposed of Dot Registry’s argument as follows:

*The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to “cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to “perform independent research, if deemed necessary to reach informed scoring decisions.[”] The Requestor cites to no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope, or methods of its independent research. As such, the Requestor’s argument does not support reconsideration.*<sup>33</sup>

19. The Declaration views this analysis by the BGC as insufficient. It concludes that the

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<sup>28</sup> Declaration ¶¶ 94–99, 106, 111, 115–22.

<sup>29</sup> Community Priority Evaluation Report for “INC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLP” dated 11 June 2014, at 2, 3, 4.

<sup>30</sup> Declaration ¶¶ 96–99.

<sup>31</sup> Declaration ¶ 94 (quoting Dot Registry’s Reconsideration Requests).

<sup>32</sup> Declaration ¶ 95.

<sup>33</sup> Determination of the Board Governance Committee Reconsideration Request 14-30, 14-32, 14-33 dated 24 July 2014, at 11 (internal citations omitted).

“failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those [transparency] obligations is itself a failure by the Board to comply with its [transparency] obligations under the Articles and Bylaws.”<sup>34</sup>

20. The Declaration suffers from several fatal flaws. To begin with, it consists of a thinly veiled rebuke of actions taken by the EIU and ICANN staff. Although the Declaration does not explicitly so state, it hints at a strong disapproval of the cooperation between the EIU and ICANN staff in drafting the CPE Reports, and it all but says that the EIU and ICANN staff violated ICANN’s transparency policies by citing “research” in the CPE Reports but failing to detail the nature of that “research.” As noted above, however, this Panel’s jurisdiction is expressly limited to reviewing the action or inaction of the ICANN Board and no other individual or entity. ICANN itself has recognized that “the only way in which the conduct of ICANN staff or third parties is reviewable [by an IRP Panel] is to the extent that the Board allegedly breached ICANN’s Articles or Bylaws in acting (or failing to act) with respect to that conduct.”<sup>35</sup> In my opinion, my co-Panelists’ conclusion that ICANN’s Board breached its Articles and Bylaws is driven by their firm belief that ICANN staff and the EIU should have disclosed their research. This reasoning places the “cart before the horse” and fails on that basis alone.
21. Nor has the Declaration given proper consideration to the BGC’s analysis (quoted in paragraph 18 above) or to ICANN’s position as articulated in one of its written submissions to this Panel:

*[T]he CPE Panels were not required to perform any particular research, much less the precise research preferred by an applicant. Rather, the Guidebook leaves the issue of what research, if any, to perform to the discretion of the CPE panel: “The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.”*

*[T]he research performed by the EIU is not transmitted to ICANN, and would not have been produced in this IRP because it is not in ICANN’s custody, possession, or control. The BGC would not need this research in order to determine if the EIU had complied with the relevant policies and procedures (the only issue for the BGC to assess with respect to Dot Registry’s Reconsideration Requests).<sup>36</sup>*

Moreover, as noted in paragraph 5 above, it was reasonable for the BGC not to exercise its discretion to inquire into the details of the EIU’s research, given the rather obvious absence of merit in Dot Registry’s CPE submissions for .INC, .LLC, and .LLP.

22. Had my co-Panelists fully considered the BGC’s Determination on the Reconsideration Requests and ICANN’s analysis, they would have found that both withstand scrutiny. Section 4.2.3 of the AGB establishes a CPE Panel’s right — but not obligation — to perform

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<sup>34</sup> Declaration ¶ 122.

<sup>35</sup> ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 10.

<sup>36</sup> See ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 44 (citing AGB § 4.2.3) (emphasis in original).

research, which it “deem[s] necessary to reach [an] informed scoring decision.” The Declaration effectively transforms that discretionary right into an affirmative obligation to produce any research performed by any ICANN personnel or even by third parties such as the EIU. The Declaration cites for support general provisions concerning transparency that, it says, “reverberate[] through [ICANN’s] Articles and Bylaws,”<sup>37</sup> but it notably fails to cite any clause specifically requiring the disclosure of “research.” There is no such clause. ICANN, its staff, and its third-party vendors should not be penalized for having exercised the right to perform research when they were never required to do so in the first place. I disagree with the Declaration which forces the BGC to “police” any voluntary research performed by ICANN staff or the EIU and spell out the details of that research for all unsuccessful CPE applicants during the reconsideration process.

23. In any event, any reader of the underlying CPE Reports rejecting Dot Registry’s applications would be hard pressed to find that the reasoning and conclusions expressed in those reports would no longer hold up if the two sentences referring to “research” had never appeared in those reports. My colleagues are fooling themselves if they think that extracting those ancillary references to “research” from the CPE Reports would have meant that the CPE Panels would have awarded Dot Registry with four points for “Community Establishment.” Any error relating to the disclosure of that research was harmless at best.

### **Independent Judgment**

24. The Declaration cites Article IV.3.4(c) of ICANN’s Bylaws, which instructs IRP Panels to focus on, *inter alia*, whether “the Board members exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company.”<sup>38</sup> It finds that “the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment.”<sup>39</sup> Besides the text of the BGC’s Determination on the Reconsideration Requests and the minutes of the BGC meeting held concerning that determination, which my co-Panelists dismiss as “*pro forma*” and “routine boilerplate,” the Declaration finds nothing to support the conclusion that the BGC did anything more than “rubber stamp” work supplied by ICANN staff.<sup>40</sup> The Declaration chastises ICANN for submitting “no witness statements or testimony” or documents to prove that its Board acted independently.<sup>41</sup> In response to an assertion from ICANN’s counsel that the Board did not rely on staff recommendations, the Declaration retorts, “[That] is simply not credible.”<sup>42</sup> Ultimately, it holds ICANN in violation of Article IV.3.4(c) on the basis that ICANN presented “no real evidence” that the BGC exercised independent judgment.<sup>43</sup>

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<sup>37</sup> See Declaration ¶¶ 117–21.

<sup>38</sup> Declaration ¶ 126.

<sup>39</sup> Declaration ¶¶ 127, 147.

<sup>40</sup> Declaration ¶¶ 126, 140, 147.

<sup>41</sup> Declaration ¶¶ 127, 147.

<sup>42</sup> Declaration ¶ 141.

<sup>43</sup> Declaration ¶¶ 126, 147, 150.

25. The Declaration<sup>44</sup> relies heavily on Articles IV.2.11 and IV.2.14 of ICANN's Bylaws which state:

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

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

26. The Declaration interprets these Articles by finding that the "obligations in the Bylaws to make . . . staff work public are compulsory, not optional."<sup>45</sup>
27. Once again, the Declaration elevates the mantra of transparency above all else. It is worth recalling, as is set forth in paragraph 9 above, that Article IV.2.11 vests in the BGC the right — but not the obligation — to seek staff views. ICANN has explained that there are no records of "staff . . . views" or "information submitted . . . by the ICANN staff," as contemplated by Articles IV.2.11 and IV.2.14. It should be noted that the privilege log submitted by ICANN does show that there were 14 e-mail exchanges between ICANN officials and their counsel relating to Dot Registry, which controverts the "rubber-stamping" conclusion of the Declaration.<sup>46</sup> ICANN's Senior Counsel has even gone so far as to submit a signed, notarized attestation (albeit after being compelled to do so by the Panel)<sup>47</sup> that ICANN had produced all non-privileged documents in its possession responding to the Panel's inquiries concerning ICANN's internal communications.<sup>48</sup> The Panel, nonetheless, deems ICANN's position "simply not credible."<sup>49</sup> Credibility determinations have no place in this IRP, especially in relation to counsel.<sup>50</sup> The Declaration has effectively gutted the meaning of Articles IV.2.11 and IV.2.14 as discretionary tools available to ICANN and converted them into affirmative obligations that ICANN produce enough evidence in an IRP to prove that its Board acted independently.
28. Curiously, the Declaration refers not even once to "burden of proof." It was wise not to do so, notwithstanding that both Dot Registry and ICANN contended that the other Party bore a burden of proof, given that nowhere in the Bylaws relating to the BGC or to this IRP is there

<sup>44</sup> See Declaration ¶¶ 128, 142, 149–50.

<sup>45</sup> Declaration ¶ 149.

<sup>46</sup> See Privilege Log (attached to Letter from ICANN to the Panel dated 19 June 2015).

<sup>47</sup> See Procedural Order No. 6 dated 12 June 2015, ¶ 4.

<sup>48</sup> See Attestation of Elizabeth Le dated 17 June 2015.

<sup>49</sup> Declaration ¶ 151.

<sup>50</sup> Note that the Declaration also repeatedly refers to the "Declaration" submitted by EIU Contact Information Redacted on behalf of ICANN as evidence showing that ICANN staff worked closely with the EIU. See Declaration ¶¶ 14, 15, 36, 43, 90–92. EIU Contact Information Redacted did not submit a traditional "witness statement." He is the EIU Contact Information Redacted of the EIU. He wrote one five-page declaration dated 13 April 2015 that was submitted by ICANN to Dot Registry as part of the document-production process in this dispute.

any provision for a burden of proof. To the contrary, the present IRP is governed by Bylaws Article IV.3.4, which prescribes that this Panel “shall be charged with comparing contested actions of the Board [BGC] to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of [them].” Nevertheless, it is self-evident that the Declaration not only placed the burden on ICANN to prove that its Board acted independently, but the Declaration’s repeated references to the “silence in the evidentiary record”<sup>51</sup> make it clear that the Declaration viewed ICANN’s failure to submit evidence as *the single decisive factor* behind its holding. None of the previous IRP panels has placed the burden on ICANN to disprove a claimant’s case.<sup>52</sup> Why would they? Guided by the mandate of Bylaws Article IV.3.4, the Panel should simply have taken the record before it, compared it to the requirements of the Articles of Incorporation and the Bylaws, weighed the record and the Parties’ arguments, and then, without imposing any burden of proof on either Party, have proceeded to its decision.

29. Applying that approach to this particular dispute should have led the Panel to the two most obvious pieces of evidence on point: the 23-page Determination on the Reconsideration Requests and the minutes of the Board meeting during which its members voted on that Determination. In my view, the 23-page Determination on the Reconsideration Requests is thorough and sufficient in and of itself to show that the ICANN Board fully and independently considered Dot Registry’s claims. Each argument advanced by Dot Registry was carefully recorded, analyzed, dissected, and rejected. What more could be necessary? Another IRP Panel, deciding the dispute in *Vistaprint Limited v. ICANN*, apparently agreed. It stated:

*In contrast to Vistaprint's claim that the BGC failed to perform its task properly and “turned a blind eye to the appointed Panel's lack of independence and impartiality”, the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC's analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel's own analysis.*<sup>53</sup>

30. The minutes of the ICANN Board meeting held on 24 July 2014 also show that “[a]fter discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports.”<sup>54</sup> The Declaration summarily dismisses those

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<sup>51</sup> Declaration ¶ 128.

<sup>52</sup> See Hearing Transcript dated 29 Mar. 2016, at 91:8–18, 174:14–19.

<sup>53</sup> *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel, ¶ 159.

<sup>54</sup> See <https://www.icann.org/resources/board-material/minutes-bgc-2014-07-24-en>.

minutes as “boilerplate” and “*pro forma*.”<sup>55</sup> Here, too, the Declaration is mistaken. It is to be appreciated that the minutes only go into minimal detail, but the Declaration fails to accord any meaning or weight whatsoever to the words “discussion and consideration.” The words must mean what they say: ICANN’s Board “discussed” and “considered” Dot Registry’s Reconsideration Requests and decided to deny them for all of the reasons set forth in the Determination on the Reconsideration Requests.

31. To accept the analysis set forth in the Declaration, one must start from the premise that ICANN’s Board Members had to “wrestle” with difficult issues raised by Dot Registry’s Reconsideration Requests and therefore a long paper trail must exist reflecting inquiries, discussions, drafts, and so forth. A sober review of the record, however, suggests that the Board never needed to engage in any prolonged deliberations, because it was never a “close call.” Dot Registry’s CPE applications only received 5 out of 16 points (far short of the 14 points necessary to prevail), and its Reconsideration Requests largely reargued the merits of its underlying CPE Applications. The ICANN Board assessed and denied Dot Registry’s weak applications with efficiency. It should have no obligation to detail its work beyond that which it has done.
  
32. Instead of doing as it should have done, however, and in addition to converting discretionary powers of the BGC under the Bylaws into unperformed mandatory investigations, the Panel engaged in repeated speculation in paragraph after paragraph: it “infer[red],” para. 133; “presume[d],” para. 133; stated that “it would appear,” para. 134; “consider[ed],” para. 137; found that since “[n]o ICANN staff or Board members presented a witness statement in this proceeding,” and there is “no documentary evidence of such a hypothetical discussion,” i.e., “oral conversations between staff and members of the BGC, and among members of the BGC, . . . in connection with the July 24 session BGC meeting where the BGC determined to deny the reconsideration requests,” . . . “no evidence at all exists [‘apart from *pro forma* corporate minutes of the BGC meeting’] to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff,” para. 140; found that “[t]he BGC . . . simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff,” para. 145; and concluded that “ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes . . . regardless of whether or not the discussion was more than rubber-stamping of management decisions,” para. 147. (Emphasis in original.)

### **Privilege**

33. Related to the last issue and relying once more on its mistaken interpretation of Articles IV.2.11 and IV.2.14 of ICANN’s Bylaws when viewed in combination as mandating public posting of unsolicited comments from ICANN staff, the Declaration finds that the ICANN

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<sup>55</sup> Declaration ¶ 147.

Board breached its obligation to make ICANN staff work publicly available by claiming legal privilege over communications involving ICANN's Office of General Counsel.<sup>56</sup> It is undisputed that ICANN submitted a three-page privilege log, listing 14 documents, and ICANN's counsel did not hide the fact that ICANN had withheld from its productions those communications concerning Dot Registry that involved ICANN's Office of General Counsel.<sup>57</sup>

34. The question for the Panel is whether ICANN's transparency obligations, particularly those found in the provisions quoted at paragraph 25 above, even as wrongly interpreted by the majority Declaration, prohibited ICANN from claiming legal privilege over communications otherwise reflecting ICANN staff views on Dot Registry's Reconsideration Requests. ICANN's Bylaws could have included limiting language recognizing that ICANN's obligations under Articles IV.2.11 and IV.2.14 to make staff work available to the public would be subject to legal privilege, but the Bylaws do not do so. On the other hand, neither do the Bylaws expressly state that ICANN's transparency obligations trump ICANN's right to communicate confidentially with its counsel, as any other California corporation is entitled to do.<sup>58</sup> Article III of ICANN's Bylaws, entitled "Transparency," does not specifically answer the question before the Panel. My colleagues rely heavily on the first provision of the Article, which states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." My colleagues do not cite the only provision found within Article III that does address "legal matters," albeit in the context of Board resolutions and meeting minutes, which suggests that ICANN's general transparency obligations do NOT trump its right to withhold legally privileged communications.<sup>59</sup> As such, I would not have found ICANN in violation of its Bylaws but I would have favored a Declaration adopting an approach similar to that taken recently by another IRP Panel, *Despegar v. ICANN*, in which the Panel rejected all of the claims brought by the claimants but suggested that ICANN's Board address an issue outside of the IRP context.<sup>60</sup> This Panel just as easily could have urged ICANN to clarify how legal privilege fits within its transparency obligations without granting Dot Registry's applications in this IRP.

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<sup>56</sup> Declaration ¶¶ 133, 135-37, 143, 148-50.

<sup>57</sup> Declaration ¶ 141. The Declaration suggests that ICANN has raised both attorney-client privilege and work-product privilege, *see* Declaration ¶¶ 128 and 149, although the last column in ICANN's privilege log lists "attorney-client privilege" as the only applicable privilege to each document listed.

<sup>58</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 211:17-24.

<sup>59</sup> *See* ICANN Bylaws, Article III.5.2 ("[A]ny resolutions passed by the Board of Directors at [a] meeting shall be made publicly available on the Website; provided, however, that any actions relating to . . . legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN) . . . are not appropriate for public distribution, [and] shall not be included in the preliminary report made publicly available."); ICANN Bylaws, Article III.5.4 (same regarding meeting minutes).

<sup>60</sup> *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157-58 ("[A] number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.").

## Conclusion

35. In my view Dot Registry, apparently with the collaboration of the National Association of Secretaries of State (“NASS”), has quite boldly gamed the system, seeking CPEs which all of the other 21 applicants for the three gTLDs in issue thought were obviously unattainable, since they ventured no such applications, in hopes of outflanking, hence defeating, all of them by bulldozing ICANN in the present proceeding. As noted above, the majority Declaration entirely overlooks the fact that the BGC was empowered, but not required, by the rules governing its proceeding to make certain inquiries, and takes no account of how the exercise of the BGC’s discretion in this regard can legitimately be affected by the patent lack of any kind of “community” among all INCs, LLCs, or LLPs. At the hearing I questioned whether the willingness of the NASS to support Dot Registry in its gamble might not be due to its members’ independent interest in the possibility that their enforcement function would be facilitated if Dot Registry’s applications were to be successful:

*JUDGE BROWER: ... Suppose I'm the secretary of state of Delaware or the head of the NASS, and your client comes to me with his proposition of the applications that have been put before us. And the secretary of state says, oh, wow, this is a great enforcement possibility for us. If you get these domain names approved by ICANN and a provision of being able to use it is that one is registered with the secretary of state of one of the states, that's for me, wow, what a great sort of enforcement surveillance mechanism, because I don't have to pay anything for it. It's better than anything we've been able to do, because I will know anyone using the LLC or LLP or INC as a domain name actually has legitimate -- should have a legitimate legal status. So that's my motive, okay? I'll do anything I can to get that done, and he says, sure, I'll sign anything. I'll say they got it all wrong. Does that make -- would that make any difference?*

*MR. ALI: I mean I wouldn't want to speak for the Delaware secretary of state or any other secretary of state. I think that's precisely the sort of question that you could have put to them if they were in front of you. I mean what their motivations were or what their motivations are, I think it would be highly inappropriate for me to try and get. I would not want to offer you any sort of speculation, but I would say that the obverse of not having that I would say surveillance power, they have that anyway if you want to call it surveillance, because the registration, "surveillance" sounds somewhat sinister, particularly in today's environment of being someone who has some background. So I would simply say that the -- by not having this particular institution as we proposed by Dot Registry, the prospects of consumer fraud and abuse are absolutely massive, because if somebody were to gain the rights to these TLDs, or maybe it's not just one company or one applicant, but three different applicants, not a single one of which is based in the United States, just think of the prospect of a company registered who knows where, representing to the world that it's an INC. That would be highly problematic. That would be -- that would create the potential for significant consumer fraud. I mean consumer fraud on the internet is multibillion dollar*

*liability. This stands, if it's not done properly, to create absolute havoc. And so the secretary of state, in his or her execution of his or her mission, might well be motivated by wanting to prevent further consumer fraud, but that's an entirely legitimate purpose. That's really my own speculation.*

*JUDGE BROWER: No, I don't argue with the legitimate purpose. The question is whether it is a basis of community.*<sup>61</sup>

I believe that this exchange speaks for itself.

36. The majority Declaration unilaterally reforms the entire BGC procedure for addressing Reconsideration Requests and also what heretofore has been expected of an IRP Panel. The majority would have done better to stick to the rules itself, and, as the IRP Panel did in *Despegar v. ICANN*, suggest that the ICANN Board “give due consideration” to general issues of concern raised by the Claimant.<sup>62</sup> The present Declaration, in finding the BGC guilty of violating the ICANN Articles and By-Laws, has itself violated them.
37. The majority Declaration intentionally avoids any recommendations to the Board as to how it should respond to this Declaration. This IRP Panel is, of course, empowered to make recommendations to the Board.<sup>63</sup> Since the Declaration, if it is to be given effect, has simply concluded that the BGC violated transparency, did not have before it all of the facts necessary to make a decision, and failed to act independently — all procedural defects having nothing to do with the merits of Dot Registry’s three applications for CPEs — it appears to me that the only remedy that would do justice to Dot Registry, as the majority Declaration sees it, and also to all of the other 21 applicants for the same three gTLDs, hence to ICANN itself, would be for the Board to “consider the IRP Panel declaration at the Board’s next meeting,” as it is required to do under Article IV.3.21 of the Bylaws, and for the BGC to take whatever “subsequent action on th[e] declaration[.]” it deems necessary in light of the findings of the Declaration.<sup>64</sup> In other words, I would recommend that the Board, at most, request the BGC to rehear the original Reconsideration Requests of Dot Registry, making the inquiries and requiring the production of the evidence the majority Declaration has found wanting. Considering the limits of the Declaration, which has not touched on the merits of Dot Registry’s three CPE applications, it would, in my view, be wholly inappropriate for the Board to grant Dot Registry’s request that its three applications now be approved without further ado.
38. For all of the above-mentioned reasons, I would have rejected each of Dot Registry’s claims and named ICANN as the prevailing party. I respectfully dissent.

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<sup>61</sup> Hearing Transcript dated 29 Mar. 2016, at 65:6-67:23.

<sup>62</sup> *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157–58.

<sup>63</sup> ICANN Bylaws, Article IV.3.11(d) (“The IRP Panel shall have the authority to: ... recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”); ICANN Bylaws, Article IV.3.21 (“Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”).

<sup>64</sup> ICANN Bylaws, Article IV.3.21.

29 July 2016

*Charles N. Brower*

Charles N. Brower

# **Exhibit 32**



The Internet Corporation for Assigned Names and Numbers

10 October 2017

**VIA EMAIL** Contact Information Redacted

Arif Ali  
Dechert LLP  
1900 K Street, NW  
Washington, DC 20006-1110

Re: Your correspondence of 8 August 2017

Dear Mr. Ali:

Thank you for your communication of 8 August 2017 on behalf of dotgay LLC (dotgay) to the ICANN Board regarding the Community Priority Evaluation (CPE) process review (the Review). I write to address the issues that you raised in your letter.

As ICANN organization previously advised dotgay LLC, among others, the scope of the Review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration. The Review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. The second track focuses on gathering information and materials from the CPE provider. (See [CPE Process Review Status Update, dated 2 June 2017](#) (2 June 2017 Status Update).)

ICANN organization further advised dotgay, among others, on 1 September 2017, that the interview process of the CPE provider personnel that had involvement in CPEs has been completed. The evaluator, FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice, is also working with the CPE provider to obtain the reference materials for the evaluations that are the subject of pending Reconsideration Requests. The CPE provider has been producing documents on a rolling basis. FTI is currently evaluating whether the CPE provider's production is complete. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two

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weeks. (See [CPE Process Review Status Update, dated 1 September 2017](#) (1 September 2017 Status Update).)

The Board recognizes the desire by many to conclude this Review and proceed with the process. The ICANN Board also looks forward to concluding the Review and proceeding as appropriate.

Once the Review is completed, the Board Accountability Mechanisms Committee (BAMC) and Board will resume consideration of Reconsideration Request 16-3, and will take into consideration all relevant materials.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Disspain", with a long, sweeping underline.

Chris Disspain  
Chair, ICANN Board Governance Committee