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INDEPENDENT REVIEW PROCESS  
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ASIA GREEN IT SYSTEM, ) ICDR Case No.:  
BILGISAYAR SAN. VE TIC.LTD.STI., ) 01-15-00055-9838  
Claimant, )  
)  
vs. )  
)  
INTERNET CORPORATION FOR )  
ASSIGNED NAMES AND NUMBERS, )  
)  
Respondent. )  
)  
----- )

TELEPHONIC HEARING

Thursday, May 4, 2017  
9:05 a.m. - 12:34 p.m.

Reported by: Jana J. Bommarito, CSR No. 10880

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THE PANEL :

CALVIN HAMILTON  
HONORABLE WILLIAM J. CAHILL  
KLAUS REICHERT SC

ALSO PRESENT :

AMY STATHOS  
CASANDRA FUREY

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I N D E X

Opening Statement

Rebuttal

MR. RODENBAUGH

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MR. ENSON

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1 Irvine, California; Thursday, May 4, 2017

2 9:05 a.m. - 12:34 p.m.

3  
4 MR. HAMILTON: So we're here with respect to the  
5 Asia Green IT Systems Bilgisayar San vs. ICANN, and  
6 that is ICDR 01-15-00055-9838.

7 For purposes of the reporter, did you get  
8 that?

9 THE REPORTER: Yes.

10 MR. HAMILTON: Good, terrific. Thank you.

11 Welcome, everybody. Good to be here, and  
12 hopefully we will effectively and efficiently resolve  
13 all the issues that we need to, at least with respect  
14 to today in these hearings.

15 We've identified who we all are, so I'll --  
16 I'll -- I'll proceed past that.

17 And just with respect to the court reporter,  
18 would you kindly allow or provide your current details  
19 to Mr. Enson, and I'll ask Mr. Enson to provide a copy  
20 of all the contact details to us, "us" being the  
21 Tribunal.

22 Can you do that? Hello?

23 MR. ENSON: Mr. Hamilton, this is Eric.

24 MR. HAMILTON: Yes.

25 MR. ENSON: I will certainly have that

1 information. My office does have it.

2 MR. HAMILTON: Okay. Terrific.

3 And -- and -- and a bit of homework with  
4 respect to the reporter. How soon will we get, "we"  
5 being the Tribunal and the parties, a copy of the  
6 transcript?

7 THE REPORTER: We have a normal two-week  
8 turnaround, so if counsel needs to expedite, they can  
9 order that on their end.

10 MR. HAMILTON: Okay. Let me go back to you then,  
11 Eric. How soon would you be able to expedite that?

12 MR. ENSON: Well, Mr. Hamilton, I think that's  
13 really up to the -- the court reporting service in  
14 terms of how quickly they can turn it around. If --

15 MR. HAMILTON: Two weeks. You can expedite that  
16 in less time if you wanted to.

17 MR. ENSON: Yeah. And I guess the real question  
18 for the Panel is whether the Panel believes that they  
19 need a -- a copy of the transcript sooner than two  
20 weeks. And if you believe we do, then we will work  
21 with an expedite.

22 MR. HAMILTON: All right. Well, we don't want to  
23 incur the cost -- sorry? Somebody wanted to say  
24 something?

25 All right. I was about to say that we don't

1 want to elevate your costs more than is absolutely  
2 necessary. Obviously the sooner we get the transcript,  
3 the better. We can get to what we ought to be doing,  
4 which I'm assuming that it would be working towards at  
5 least the Tribunal deliberating on -- on the award and  
6 getting -- starting towards in that direction. So the  
7 sooner you get that to us, the better, but I suspect  
8 we'll work with two weeks then.

9 Is that good?

10 MR. ENSON: Well --

11 MR. RODENBAUGH: Well, that's acceptable for the  
12 Claimants. I do understand sometimes we can get rough  
13 drafts sooner than that, so if that becomes available,  
14 I'll take it whenever I can get it as well.

15 MR. HAMILTON: All right. Members of the  
16 Tribunal, is two weeks acceptable?

17 JUDGE CAHILL: This -- this is Cahill. That's  
18 fine, yeah. Cahill, this is fine. Yeah, fine.

19 MR. HAMILTON: Okay. Klaus, that's good for you?

20 MR. REICHERT: Yes. This is Klaus, and that's  
21 fine.

22 MR. HAMILTON: Okay. Terrific. All right.

23 Well, I think we should get to the business  
24 at hand then. And we had agreed that each side would  
25 have an hour and 15 minutes to make respective

1 presentations and each side, in turn, will have 30  
2 minutes with respect to rebuttal.

3 Are we comfortable with that?

4 MR. RODENBAUGH: Yes, Claimant is fine with that.  
5 Thank you.

6 MR. ENSON: Yes. Thank you.

7 MR. HAMILTON: Okay. Terrific. So unless there  
8 are matters that either side may want to raise right  
9 now, procedural matters and any other matter of  
10 concern, then we'll move right into the presentation.  
11 And unless there are other procedural matters, then  
12 I'll ask Mike if you can then do us the honor.

13 MR. RODENBAUGH: Okay. Thank you, Mr. Hamilton.

14 This is Mike Rodenbaugh. Thank you to the  
15 Panel and ICANN counsel and to the ICDR, our court  
16 reporter for making this happen today. We appreciate  
17 it very much to finally have our day with the Panel.

18 I can assure you that the -- our presentation  
19 is not going to be anywhere near 75 minutes. I also  
20 would really encourage members of the Panel to stop me  
21 at any time and identify themselves and -- and ask any  
22 questions or points of clarification along the way.

23 Personally I just find that kind of  
24 interaction a whole lot more useful than hearing a  
25 monologue after reading a 60-minute monologue of

1 myself. I won't be close to 60 minutes, for that  
2 matter.

3 So I will just move into certainly the first  
4 questions. I do really appreciate and my client  
5 appreciates that the Panel obviously has read all the  
6 parties' briefings. I know there's about 150 pages of  
7 briefing so far. I hope we are done with that now.

8 And there are a few fairly clear questions  
9 for the parties to answer, and I think we've both taken  
10 a shot at that in our slides. I'll generally follow  
11 the -- the chronology and format of -- of those  
12 questions.

13 So to start, I think that ICANN and Asia both  
14 agree essentially with the -- the formulation set forth  
15 in the Merck decision and in the bylaws in Question 1  
16 from the Panel. That essentially the -- the Panel's  
17 task is to identify the actions or inactions which my  
18 client contests.

19 And I believe we have identified seven  
20 distinct topics in our Opening Brief and -- and, again,  
21 explained in our Supplemental Brief. I'm sure we'll  
22 talk about those during the presentation and -- and  
23 through your questions. And then evaluating whether  
24 each of those actions or inactions is consistent with  
25 ICANN's articles and bylaws.



1           And to do that, essentially the Panel is  
2           tasked with -- with analyzing whether the Board  
3           exercised due diligence and care and had a reasonable  
4           amount of facts in front of it and, conjunctively, did  
5           they exercise independent judgment in taking that  
6           decision believed to be in the best interest of ICANN.

7           And, of course, by extension, as ICANN is a  
8           public benefit corporation under ICANN law (sic), and  
9           its mission is very clear, we're really not typically  
10          talking about the best interest of ICANN. We're  
11          talking about the best interest of the internet  
12          community, in other words, the global public rather  
13          than the company itself so that that is clear.

14          Also, of course, there is now a body of  
15          precedents analyzing the bylaws that we'll be talking  
16          about today, and the bylaws themselves provide that  
17          prior -- prior declarations are to be precedential.

18          In other words, we should not constantly be  
19          relitigating matters. That obviously goes to the  
20          benefit of ICANN insofar as they're always a party to  
21          this proceeding -- these proceedings, and that there  
22          is, you know, always an opportunity and clear incentive  
23          to relitigate issues over and over again if they  
24          haven't gone their way in previous cases.

25          That really needs to be stopped, and it's

1 something I will be talking about as one of the issues.  
2 You know, we've claimed that ICANN, in fact, has  
3 violated its bylaws by ignoring precedents over and  
4 over again.

5 So the bigger issue really around ICANN's  
6 authority or around the Panel's authority that I think  
7 was initiated by -- by the briefing about a year ago,  
8 where there were two rounds of briefing on this -- this  
9 issue of Panel authority, is the -- the Panel's  
10 authority to make recommendations to ICANN and whether  
11 those recommendations would be binding on ICANN in the  
12 event, of course, and only in the event that the Panel  
13 finds that -- that ICANN has violated its bylaws or  
14 articles.

15 I think the DCA Trust .Africa case went to  
16 great lengths to analyze that question in far more  
17 detail than any other Panel prior or since. In fact,  
18 prior to that, there had only really been one  
19 discussion quite a few years ago, and it was -- it was  
20 really just a few pages and -- and not particularly  
21 relevant to the Panel's decision.

22 Also, subsequent discussions of that issue  
23 similarly have not gone to anywhere near the depth and  
24 have not been nearly as relevant to those proceedings  
25 as in .Africa, because in .Africa, that was the first

1 case where a Panel found ICANN to have violated its  
2 bylaws.

3 The subsequent treatments of that question  
4 have -- have generally been cases, particularly the  
5 cases cited by ICANN, where ICANN was not found to have  
6 violated its bylaws. So the discussion about the DCA  
7 Trust .Africa precedent, which should not have  
8 happened, but was not briefed in those cases even by  
9 ICANN. And Number 2, was simply dicta since the issue  
10 was really not before the Panel in any practical way.

11 So it -- it is, of course, our strong belief  
12 and the well-considered opinion of the DCA Trust Panel  
13 that ICANN's IRP must allow the Panels to make  
14 recommendations, remedial recommendations, in the event  
15 that the Panel finds that ICANN has done something  
16 wrong. Otherwise, obviously ICANN would simply have no  
17 accountability to anyone but itself.

18 I mean, the -- the IRP provisions of the  
19 bylaws would be rendered essentially meaningless. The,  
20 you know, hundreds of thousands of dollars that go into  
21 these cases would essentially be all for naught if a  
22 Panel finds that ICANN violated its bylaws and is not  
23 able to recommend that ICANN fix that problem.

24 And so we've seen in not only .Africa, but in  
25 at least a couple of other cases since, and those are

1 cited towards the end of our -- our Supplemental Brief,  
2 that, in fact, Panels have -- have found that they have  
3 the authority to make those sorts of recommendations  
4 and exercise that authority.

5 Moreover, in each case, including in the  
6 .Africa case, the ICANN Board has accepted those  
7 recommendations. And, again, that provision of the  
8 bylaws, Article IV, Section 3.21, says that the Board's  
9 subsequent action on those declarations also has  
10 precedential value.

11 So, again, in this case I'll be talking about  
12 the analogy between this case and the .Africa case  
13 quite a bit. And, you know, we feel that it's a very  
14 strong analogous precedent and that the same relief  
15 should be awarded in this case as in that case, which  
16 is essentially to disregard the unsubstantiated  
17 Government Advisory Committee or -- or GAC, as we'll  
18 refer to it over and over again, advice on these  
19 applications and, therefore, return the applications to  
20 processing, which in this case would mean that  
21 contracts would be awarded since there are no other  
22 objections or contention with other applicants.

23 So just a few other points that I made on  
24 Slide 3 about the DCA Trust case on this point, that  
25 it -- it certainly analyzed the prior decision in the

1 .XXX matter from several years prior. You know, it  
2 recognized that ICANN has this critical public benefit  
3 role in the internet governments.

4 It recognized that ICANN, you know, has  
5 essentially forced the contract on all TLD applicants.  
6 It was a uniform contract that nobody was able to  
7 negotiate in any way whatsoever, and it included a  
8 complete waiver of any judicial oversight or review of  
9 ICANN's decisions, which, in fact, has been upheld  
10 twice now by the Central District of California per  
11 ICANN's arguments when -- when applicants were  
12 dissatisfied with the IRP results or with ICANN's  
13 subsequent actions after the IRP results, and have  
14 tried to sue.

15 In both of those matters, the Court in  
16 Los Angeles has -- has agreed with ICANN that the  
17 waiver is enforceable, and I believe at least one of  
18 those matters is on appeal. But in any event, that is  
19 the state of the law on that issue at the moment.

20 The DCA Trust Panel also made it clear that,  
21 you know, ambiguity in the bylaws since they are,  
22 again, solely drafted by ICANN, must be construed  
23 against ICANN. And the bylaws in question in this  
24 case, the -- the 2012 version of the bylaws do not  
25 clearly derive at the IRP --

1           (Whereupon the reporter interrupted the  
2 proceedings.)

3           MR. RODENBAUGH: I will try to talk slower. I'm  
4 not sure I can do much more about the connection, other  
5 than try to talk closer to my phone here.

6           So I was talking about the -- the 2012  
7 version of the bylaws, and from ICANN's perspective,  
8 they're ambiguous. I think that the DCA Trust Panel  
9 found not particularly from this -- particularly in  
10 light of legislative history, if you will, back all the  
11 way to the formation of ICANN looking at the  
12 congressional hearings that took place and -- and  
13 finding that -- that there's no way that the U.S.  
14 Government or even that ICANN itself would have  
15 designed a process that could be, you know, advisory  
16 only and imagine that could be an effective  
17 accountability mechanism.

18           And to put the final point on this, the --  
19 the new bylaws that came into force six, seven months  
20 ago certainly reinforced the intent of the earlier  
21 bylaws and clarified that -- that essentially the IRP  
22 is to be viewed as a -- as a standard commercial  
23 arbitration where, of course, arbitrators have the  
24 power to award affirmative relief.

25           So that's probably enough on this issue for

1 now. I guess I'll just pause just for a moment in case  
2 anybody has any questions or clarifications at this  
3 point before I move on to the substance of this  
4 particular case.

5 JUDGE CAHILL: Cahill, that's fine. I'm fine. Go  
6 ahead.

7 MR. RODENBAUGH: Thank you, your Honor. It allows  
8 me to take a little sip of glass of water too since  
9 I've been talking for 15 straight minutes.

10 All right. So turning to -- to this specific  
11 case, I want to just talk a little bit -- and I'll have  
12 slides on this. I noticed ICANN did have a few slides  
13 on it -- of the -- of the background of the New TLD  
14 matter or program and the relevant bylaws and, you  
15 know, the Applicant Guidebook processes that led us  
16 here.

17 I won't take too long, because I think both  
18 our Opening Brief and ICANN's brief discuss that in --  
19 in pretty good detail with the appropriate citations.  
20 I don't think there's a lot of disagreement about these  
21 underlying facts, but I do feel it will help set up the  
22 discussion a little bit.

23 If you recall, that the Applicant Guidebook  
24 really is the embodiment of 46 years and tens of  
25 thousands of volunteer and paid ICANN staff man hours

1 and women hours. It went through several iterations.  
2 It went through four or five different public comment  
3 periods, and I was very intimately involved in the  
4 entire process as a member of the GNSO Council.

5 I can assure you, I am not aware of any  
6 document ever created that could have taken more time  
7 and more effort, and -- and it was very, very clear,  
8 you know, the provisions in the Guidebook that we're  
9 talking about, you know, that -- that there were  
10 community applications with one -- one subset of  
11 applications that were permitted.

12 But, frankly, despite the use of community  
13 objection throughout our briefing, community  
14 applications are not at issue in this case. That was a  
15 different subset of applications where the Guidebook  
16 set forth standards for getting community consent and  
17 demonstrated support. There was a 14-point test where  
18 applicants had to go through in order to get a  
19 privilege in the application process.

20 These applications were not part of that  
21 process, but they were deemed to be -- to have an  
22 effect on the community by various governmental  
23 objectors, and, of course, that's how we got here  
24 today.

25 So the Guidebook foresaw that and set forth



1 four different processes by which those objections  
2 could be made at least. I think ICANN's pointed out a  
3 fifth in their slides, which is just a general public  
4 comment period, but there were far more well-defined  
5 and -- and specific processes set out, mainly the GAC  
6 Early Warning Process, followed by the Independent  
7 Objector Process, followed by the Community Objection  
8 Process. And while all of that was going on, there  
9 was, of course, GAC deliberations and GAC advice module  
10 of the Guidebook.

11 So all of those were in play with respect to  
12 these two applications. There were GAC early warnings  
13 from several countries, which they're -- have been  
14 discussed in the briefing and in the -- and by the  
15 independent objector and by Mr. Cremades in the  
16 community objection proceeding.

17 Several of those went by the wayside. They  
18 were -- those governments apparently were satisfied  
19 with my client's responses and did not further object  
20 during the process; but, of course, the UAE did, and  
21 we'll get to that in a minute.

22 But before that happened, the independent  
23 objector, which had budgeted some \$20 million from  
24 ICANN to look at the pool of applications and analyze  
25 which ones were potentially problematic to any

1 potential communities and, you know, affirmatively  
2 reach out to those communities, reach out to the  
3 applicants, all publicly transparent with the  
4 reports -- with the correspondence and conclusions  
5 documented in the independent objector website to  
6 analyze whether, Number 1, there was substantial  
7 opposition of any defined community and, Number 2,  
8 whether the applications would cause any material  
9 detriment to that community.

10 Of course, in this case the independent  
11 objector found neither. He went through two rounds of  
12 briefing with my client. He considered the inputs from  
13 the UAE and other governments that -- that made early  
14 warnings that had communicated with the independent  
15 objector, including specifically the OIC organization  
16 with a lot of countries which, of course, ended up  
17 being the opponent objector a couple of years later.

18 The independent objector found that -- that  
19 the objection simply was not well-founded, and not only  
20 that, but that the applications would specifically  
21 benefit the public interest by furthering freedom of  
22 expression in the Muslim community through these TLDs  
23 .Islam and .Halal.

24 So, of course, the UAE government and the  
25 OIC -- the OIC was specifically invited by the

1 independent objector to file a community objection on  
2 its own. It did not do so. Instead, apparently a  
3 decision was made to allow the United Arab Emirates  
4 government, the UAE, to carry the freight and file the  
5 community objection, which they did.

6 And Mr. Cremades was appointed the -- the  
7 Panelist, who is a distinguished arbitrator in his own  
8 right, and really gave the UAE more -- you know, quite  
9 an exceptional opportunity to prove its case.

10 There were two procedures basically designed  
11 to allow the UAE to provide new evidence that it hadn't  
12 provided in its initial submission, which, frankly, was  
13 out of bounds, was not supposed to be allowed in the  
14 process, but it was.

15 And the UAE took advantage of it, as my  
16 client was afforded the same opportunity, fairly,  
17 and -- and at that point we produced a lot more  
18 evidence of my client's community support for these  
19 applications.

20 The UAE, meanwhile, provided its evidence of  
21 non-support, if you will, or evidence of people who  
22 supported the UAE's position that my client's  
23 application should be rejected.

24 So Mr. Cremades took all that into account,  
25 applied the very clear, defined criteria of the

1 Guidebook, and found, again, that there was no  
2 substantial opposition to my client's applications and  
3 that my client's applications, my client's operation of  
4 these global domains would not cause any material  
5 detriment to any client community, specifically the  
6 Muslim community.

7 And like the independent objector before him,  
8 Mr. Cremades also found that there was public interest  
9 behind my client's applications, that there would  
10 further be freedom of expression rights of the Muslim  
11 community.

12 So while that was going on, the GAC was also  
13 deliberating and could not come to a consensus against  
14 the applications. You'll note, I think it was ICANN  
15 that pointed out in one of its slides -- of course,  
16 it's in the briefing -- that there was three potential  
17 outcomes from GAC advice as to any TLD application.

18 One was consensus advice that the application  
19 be rejected, which would create a presumption for the  
20 ICANN Board that it would be rejected. That was the  
21 situation in the .Africa case. That Panel in the IRP  
22 decision found that that was a violation of ICANN's  
23 bylaws, that there had to be some rationality.

24 The GAC couldn't simply say we recommend it  
25 be rejected and then the Board simply accept that.

1     Instead, the Panel said that ICANN should have gone  
2     back to the GAC and provided a rationale.

3             The second option was what ICANN claims is in  
4     play in this case, which was that the GAC could express  
5     concerns with an application. And in this case, it was  
6     not the complete GAC that expressed concerns, but  
7     specifically a -- "some members" of the GAC was the  
8     phrase expressed, some concerns with the applications  
9     and suggested they be rejected.

10            Now, the third option was that the -- the GAC  
11     as a whole would suggest to the ICANN Board that the  
12     application be approved but with some remediation. The  
13     GAC did not choose that option with respect to these  
14     applications either.

15            So after two GAC meetings, a whole bunch of  
16     rhetoric from governmental organizations and vigorous  
17     debate within the GAC, all we got from the GAC was some  
18     members have stated concerns based on religious  
19     sensitivities, and those members view that the  
20     application should be rejected.

21            So from there, basically ICANN waited until  
22     Mr. Cremades issued his opinion and then went back to  
23     the GAC, confirmed there would be no further  
24     discussion, no further input from the GAC in the matter  
25     and held a -- a secret meeting in Durban.

1           Noting also that at the prior GAC meeting  
2 where these concerns of some members were expressed,  
3 was also a closed, secret meeting. There's never ever  
4 been a transcript or notes or minutes or agenda or  
5 anything from those meetings that's been published. I  
6 can tell you they were not open to the public. I was  
7 there in person in Beijing and went to the meeting. I  
8 was not allowed in. In fact, I was kicked out.

9           So they -- they repeated that process  
10 essentially in Durban, but only with respect to the few  
11 GAC members that were objecting. You know, it's our  
12 view, certainly the view of a couple of the Board  
13 members at the time, that that was an inappropriate  
14 process; that expressing some concern with some  
15 members, the Board was required to get back to the  
16 entire GAC, not just to those members, to understand  
17 what the concerns were, and, you know, by the same  
18 token, why other countries were not concerned. Of  
19 course, the vast majority here expressed no concern,  
20 and that's why there was no consensus against the  
21 applications.

22           So they had that meeting in Durban,  
23 South Africa, that was, you know, hastily arranged  
24 basically on one week's notice. A transcript never has  
25 seen the light of day. A recording only saw the light

1 of day late last year when we finally recovered it in  
2 discovery.

3 There's no evidence that that meeting was  
4 ever -- anything about that meeting was ever posted to  
5 the Board itself or to the entire GAC. And in any  
6 event, the meeting was 32 minutes. And if you listen  
7 to the transcript, there is just simply nothing  
8 illuminating in there.

9 All of these objections all along the way, so  
10 basically they're on the same ground, that my client is  
11 alleged to not have sufficient community support for  
12 its applications. Notwithstanding the fact that it  
13 wasn't required to have any community support for its  
14 applications, there was not a community application.

15 So, you know, that -- that's really the first  
16 actions of the Board that we've challenged; that --  
17 that they had these secret meetings with the GAC and  
18 with some members of the GAC that ultimately all turned  
19 up in discovery with the OIC itself, not to mention  
20 anyone else in -- in the public or in the internet  
21 community, such as the GNSO which devises gTLD policy.

22 And nobody was ever consulted about those  
23 meetings or about these applications. It's simply  
24 ICANN listening to a few government objectors and  
25 essentially agreeing with them without any public

1 input, which is just completely contrary to ICANN's  
2 bylaws.

3 We also argue that ICANN has refused to open  
4 the investigation or identify the objectors' concerns.  
5 All we've gotten anywhere along the way was that  
6 there's some concerns, some conflicts that are  
7 unspecified and would have to be resolved by Asia Green  
8 before the applications can move forward.

9 We believe effectively that's created a new  
10 policy, again, without any sort of community input  
11 which allow those government objectors -- objectors an  
12 effective veto of my client's applications.

13 Simply put, we can't move forward until they  
14 agree, and they won't talk to us. We don't know what  
15 criteria we -- they would judge whether or not they  
16 would agree. We don't know what criteria ICANN would  
17 then judge whether or not to agree with them or with  
18 us. We simply have really no daylight as to what can  
19 be done to move these applications forward or push it  
20 even to a decision to reject. We're simply in  
21 purgatory at the whim of these government objectors.

22 So all of that leading to the fourth  
23 substantive point of -- of ICANN's violations where all  
24 of that really ignores the -- the unanimous advice of  
25 the GNSO Council expressed in the TLD recommendations



1 and principles that, you know, by near unanimous  
2 resolution had adopted those Council resolutions,  
3 essentially defined by the bylaws, and that -- that the  
4 application and criteria be clearly stated before the  
5 application process began, you know.

6 That essentially has not happened in this  
7 case, because at the last hour, after all the processes  
8 were exhausted, ICANN has come back and imposed these  
9 new extremely vague criteria on Asia. We'll talk in  
10 more detail about that and the specific bylaws as we  
11 move forward.

12 And those are the substantive violations that  
13 we allege outlined on Slide 4. There's also a few  
14 procedural violations as to the IRP that -- that we  
15 allege, and those are outlined on 5, where in this  
16 matter ICANN repeatedly refused to provide documents to  
17 us that would --

18 MR. REICHERT: I'm sorry. This is Klaus Reichert.  
19 Could I stop you for a moment before you go to the  
20 procedural matters that you wish to draw to our  
21 attention?

22 MR. RODENBAUGH: Yes.

23 MR. REICHERT: All of the substantive matters in  
24 your Complaint at Page 11, you say that the -- your  
25 primary challenge is the decision to put the

1 applications on hold, as you describe it akin to  
2 purgatory, and that's what your -- is that your primary  
3 challenge?

4 MR. RODENBAUGH: Yes, it is. As stated --

5 MR. REICHERT: Okay. Thanks for that.

6 The next question I have is that the -- you  
7 were notified of this in a letter from ICANN 7th of  
8 February, 2014. It's from Mr. Crocker to your client,  
9 and it's in the PDF of the exhibits to the large number  
10 of exhibits to the Complaint. The page is 489 and 490  
11 of the PDF. You were notified of the on-hold decision.

12 Now, looking at that, as of that moment or up  
13 to the moment you were informed of the on-hold  
14 decision, as far as your client is concerned, was there  
15 anything else that needed to be done for the ICANN  
16 Board to make a decision, yes or no, to your client's  
17 applications?

18 MR. RODENBAUGH: No. As of that point, all  
19 objection processes had been exhausted in our favor.  
20 The GAC had very clearly concluded its discussions on  
21 the matter, and so per Section 1.15 of the Guidebook,  
22 that that scenario was clearly foreseen as a standard  
23 scenario where we passed evaluation. We prevailed in  
24 the objections. There was no contention from any other  
25 applicants, and, therefore, the contract should be

1 awarded.

2 MR. REICHERT: Well, before you say "the contract  
3 should be awarded," just so that we are clear, as of  
4 that moment, you -- your client had undertaken  
5 everything that was needed to be done in order to bring  
6 about the circumstances for a decision, yes or no, by  
7 the ICANN Board.

8 Is that --- am I fair in my description of  
9 that?

10 MR. RODENBAUGH: Yes, except I would say that at  
11 that point, quite frankly, the Board really didn't even  
12 have discussions. We had met all of the requirements  
13 in the contract, as well as all of the third-party  
14 objections, as well as the governmental objection  
15 processes without any recommendation against our  
16 applications, and, therefore, ICANN should have  
17 approved it at that point.

18 MR. REICHERT: But, of course, you didn't even get  
19 to a "yes" or a "no." You don't know whether there's a  
20 "yes" or a "no," and, of course, it is speculation as  
21 to whether it would have been a "yes" or a "no."

22 But am I correct then in thinking that your  
23 primary challenge, as you say in your final Complaint,  
24 that the fact that ICANN didn't effectively make its  
25 mind up there and then is a breach of the bylaws?

1 MR. RODENBAUGH: Yes, that's correct. And I would  
2 also say that the decision to put it on hold is, of  
3 course, essentially a no, right? I mean, we can't  
4 operate. We don't have a contract. Our investment --  
5 our client -- my client's investment is, you know,  
6 completely wasted.

7 While, meanwhile, all of these other New TLD  
8 applicants have got their contracts. They're out in  
9 the marketplace. They're recouping their investment.  
10 They're taking marketshare, and we're in purgatory. So  
11 effectively --

12 MR. REICHERT: I'm not sure, but just -- just to  
13 be looking at this from -- slight removed, I'm not sure  
14 that ICANN has said "no." It may be in your submission  
15 that you believe that they've effectively said "no."  
16 But as it stands at the moment, there is no decision,  
17 and --

18 MR. RODENBAUGH: And that's correct.

19 MR. REICHERT: -- it's -- it's the absence of a  
20 decision that seems to be your principal complaint.

21 MR. RODENBAUGH: Well, I would say, of course,  
22 that if the decision is "no," then we would have the  
23 same complaint. I mean, it's been on hold now for,  
24 what, three and a quarter years since the 2/7/2014  
25 letter. There's been absolutely no movement. And

1 as -- as stated previously, they simply have no basis  
2 to say "no." That's why they haven't.

3 MR. REICHERT: And one final -- sorry to -- to  
4 detain you on this, but one final question.

5 In the lead-up -- in all the sort of lead-up  
6 to the moment when ICANN said to you that they're --  
7 they were effectively not making a decision, is  
8 there -- I know you mentioned a number of matters with  
9 which you have complaint, but would it not -- isn't it  
10 not really in substance by that point that you overcame  
11 all of those on your case and all of those complaints  
12 really are not the key -- are not the key factor; the  
13 key factor is a failure to make a decision?

14 MR. RODENBAUGH: I -- I think ultimately the  
15 non-decision, that's the culmination of all of these  
16 other substantive violations. But if the decision were  
17 to be made tomorrow, no, they will not proceed, then we  
18 would argue all of those things were violations that  
19 led to that decision as well.

20 MR. REICHERT: But that's speculation, of course.

21 MR. RODENBAUGH: Well, sure, certainly and  
22 pessimism that that would happen.

23 But at this point what ICANN has effectively  
24 done is delegated its decision-making authority to the  
25 governmental entities to essentially say, "Until they

1 say it's okay, you're on hold."

2 MR. REICHERT: Okay. Thank you.

3 JUDGE CAHILL: Judge Cahill. This is  
4 Judge Cahill. I -- I'm a little concerned -- I'm a  
5 little confused about the way I understand the Board's  
6 compound responsibilities, they're -- they're supposed  
7 to make an independent decision. You're not asking us  
8 to say what the Board should do. You're just asking us  
9 to say whether or not they had to decide "yes" or "no."

10 But you're not expecting us to say  
11 everything's been done perfectly and now the Board is  
12 required to approve your application, are you?

13 MR. RODENBAUGH: We are saying, your Honor, that  
14 everything in the -- all of these things in the process  
15 were violations of the bylaws, that the -- the current  
16 and ultimate objections here were out of time and out  
17 of bound. They were not called for in the Guidebook in  
18 any way, shape or form. To the extent they were, they  
19 were dealt with by ICANN's appointed experts, the  
20 independent objector and ultimately Mr. Cremades, not  
21 to mention, of course, the -- the GAC consideration in  
22 the matter.

23 So what we are requesting, to be specific,  
24 the relief we -- we are requesting is the same relief  
25 that was awarded in the DCA Trust .Africa case, which

1 is that governmental advice, since it was out of bound,  
2 since it's not supported by any documented rationale  
3 whatsoever, should be disregarded; and, therefore, the  
4 applications would go back into the contracting process  
5 just as was recommended in the DCA Trust opinion,  
6 which, of course, the Board immediately followed.

7 JUDGE CAHILL: But -- but that's not -- that's not  
8 telling the Board what to do, saying just go back to  
9 get this going again, right?

10 MR. RODENBAUGH: Well, it's -- it's recommending  
11 to them what to do.

12 JUDGE CAHILL: Well, okay. But -- but you  
13 don't want us to -- you're not asking us to recommend  
14 that the Board approve your application, right?

15 MR. RODENBAUGH: I'm asking --

16 JUDGE CAHILL: You're just saying they need --  
17 they need to decide?

18 MR. RODENBAUGH: We are saying that; that they  
19 need to disregard these late and out-of-bound  
20 governmental objections and decide to return the  
21 applications to processing, as in .Africa and as in the  
22 .Registry case that -- that came later.

23 JUDGE CAHILL: Okay. I think -- I think I might  
24 have more questions. I'll let you know. So I'll be  
25 quiet now. Thank you.

1 MR. RODENBAUGH: It is no problem. Appreciate it.

2 Okay. So I shall move on. Just briefly  
3 outlining for the moment the -- the procedural  
4 violations. We'll get back to them toward the end, but  
5 we did allege three procedural violations. And one of  
6 the Panel's questions was asking -- was asking  
7 specifically about the overall question that -- that at  
8 least Mr. Reichert was -- was discussing.

9 You know, you -- you asked, "If your -- if  
10 your -- your decision was that that ultimate issue is  
11 resolved and in ICANN's favor, then is that the end of  
12 the matter?" And, you know, we would answer that  
13 question in the negative; that no, there are still  
14 other violations of the guidelines leading up to that  
15 ultimate decision. And if ICANN violated its bylaws in  
16 any respect, substantive or procedural, then there  
17 should be a recommendation as to how that is just.

18 So we'll talk a little bit more at the end  
19 about the -- the document disclosure issues, the  
20 standing Panel, which is, frankly, just a ridiculous  
21 situation -- some five years after the .Africa decision  
22 on that issue, ICANN still has done nothing -- and --  
23 and the issue of precedence. But I'll prefer to spend  
24 more time on the -- on the substance and answering the  
25 Panel's questions on the substance.



1           So in -- in your document starting with --  
2 with Number 2, you asked about Dr. Crocker's letter  
3 from Feb. 7, which -- which essentially has been our  
4 primary challenge as stated. You asked where exactly  
5 are the objections that Dr. Crocker mentioned in those  
6 letters, and I think that ICANN and -- and I have given  
7 you links or copies of those letters.

8           But I think it's worth looking at the  
9 specific language of those letters, because essentially  
10 they're calling for a neutral non-governmental  
11 multi-stakeholder technical operator, which is exactly  
12 what my client is and has proposed in its governance  
13 model and in its application to ICANN.

14           So those objections are stated in these very  
15 brief letters. I mean, I think the longest one is a  
16 page and a half. And on their face they just don't  
17 state a valid objection. They -- they provide no  
18 evidence that those objectors have considered my  
19 client's governance model or public interest  
20 commitments.

21           There is -- there's no evidence that they  
22 considered the independent objectors' process or the  
23 community objection process, Mr. Cremades and all of  
24 the various inputs into those processes.

25           And, essentially, they just concluded that

1 these applications are sensitive based on religion, and  
2 my client doesn't have community support, and they  
3 should only be awarded to essentially the OIC is  
4 basically what these letters say. And that is -- it's  
5 just very remarkable and -- and didn't really become  
6 clear until discovery in this matter that that's quite  
7 what they say.

8 But if you look at the -- the language and  
9 certainly the OIC's letter -- oh, where is that? I got  
10 that one right here. Yeah, it basically says that it  
11 has to be a -- a -- oh, what's the exact phrase they  
12 used -- the -- involvement -- yeah, the involvement and  
13 support of the OIC as the sole official representative  
14 of -- of Muslims is required.

15 You know, they're basically saying unless we  
16 get it, nobody should have these, and -- and that just  
17 ignores the fact that they could have applied. You  
18 know, I believe the Arab states applied and won .Arab  
19 TLD. The Catholic church applied and won .Catholic. A  
20 prior --

21 (Whereupon the reporter interrupted the  
22 proceedings.)

23 MR. RODENBAUGH: I think I'm using top-level  
24 domains and speaking with a dot, so I know you're just  
25 not familiar with the process, and I apologize, but I

1 will try to talk slower.

2 So .Kosher was another TLD that was applied  
3 for at ICANN to go to a private company. I think it's  
4 called Kosher Marketing Assets, LLC or something. It  
5 had nothing to do with any religious body. And the OIC  
6 was also specifically invited by the independent  
7 objector to file a community objection against all  
8 applications, did not do so.

9 But the UAE did essentially argue the same  
10 things, and we prevailed, quite rightly, because not  
11 only is there not substantial opposition proved as of  
12 that time or argued since.

13 But, of course, the relevant time is also  
14 important here, and there was contractual expectation  
15 that these matters would be resolved  
16 non-discriminatorily in a time frame applicable to all  
17 applicants, and that certainly didn't happen here.

18 Instead ICANN basically has bent over  
19 backwards to try to continue allowing the OIC to object  
20 and object and object, even though it refused to  
21 formally do so during the process.

22 So these -- you know, these letters are --  
23 are essentially the sole basis that ICANN is explaining  
24 as the reason for our -- the -- the on-hold status of  
25 our application, and they just simply don't really say

1 anything.

2           They certainly don't say anything that wasn't  
3 said within ICANN's documented processes of the  
4 independent objector, the community objection and the  
5 GAC. And they don't really explain how our client,  
6 first of all, was required to have any community  
7 support, because they weren't, and second of all, how  
8 the community support, which we have voluminously  
9 documented on several occasions, is insufficient, and  
10 that -- all that is in the record as well.

11           Then Dr. Crocker further compounds and  
12 confuses the matter by saying that some sort of  
13 conflict is created between these letters and our  
14 client's representations, presumably meaning all of  
15 this documented support and the governance model, but  
16 not specifically saying that, not identifying what  
17 these conflicts are, nor how they could be, quote,  
18 resolved.

19           Instead, simply saying, "Deal with these  
20 objectors, and until you get their approval, you're on  
21 hold," and that's just -- we're -- we're the only  
22 applicant that's been put in anywhere remote of a  
23 position like that. There's been no other applicant  
24 put on hold or denied due to non-consensus government  
25 advice.

1           So this is violating all sorts of -- of ICANN  
2 bylaws about non-discriminatory treatment, about  
3 transparen- -- transparency, about applying documented  
4 policies fairly and neutrally and about -- and about  
5 basing decisions on expert advice.

6           You know, here we've got two experts  
7 commissioned specifically by ICANN for precisely this  
8 reason who are both finding in our favor, and ICANN,  
9 without any explanation at all, completely disregards  
10 them.

11           In fact, in the denial of our reconsideration  
12 request, the Board even admitted that the expert  
13 decisions of Mr. Cremades were not even material for  
14 the Board's decision. Of course, it doesn't explain  
15 what was material. It said that those were not, which  
16 is just, again, completely in violation of those  
17 bylaws.

18           So moving on to Question 2B -- there we go --  
19 "Were the objections referenced in Dr. Crocker's letter  
20 in substance argued before the expert?" Well, I think  
21 ICANN agrees that they were. The lack of community  
22 support, that was the basis for all of these objections  
23 throughout the two years that these objections were  
24 being stated in and out of ICANN process through the  
25 independent objector, through the objection and the

1 GAC.

2 ICANN really misstates in that Slide 23 the  
3 positions of the OIC and other countries were not  
4 before Mr. Cremades. In fact, it's very clear they  
5 were. In fact, if you look at the Feb. 7 letter, it's  
6 actually addressed to the ICC as part of Mr. Cremades'  
7 efforts and accommodation to the UAE to allow the UAE  
8 to show letters in support of the UAE's position.

9 Of course, the independent objectors' report  
10 specifically stated that the OIC was fully aware of --  
11 of its -- of the -- of the applications and of its  
12 opportunity to object and, therefore, could do so. It  
13 chose not to. And, of course, Mr. Cremades also had  
14 before him the other government early warnings from the  
15 UAE, Saudi Arabia, India, other countries.

16 And, you know, again, he bent over backwards,  
17 frankly, issuing two procedural orders allowing the UAE  
18 to provide all of the documentation it could of  
19 objections to our applications, and the UAE did so, and  
20 Mr. Cremades still felt that was insufficient --  
21 insufficient.

22 So 2C, the question was, "Did the objectors  
23 listed in that letter have an opportunity to put their  
24 objections before Mr. Cremades?" And they did. As  
25 with the UAE, anybody could have filed an objection.

1 Once the UAE filed, certainly any of those parties  
2 could have joined the objection. There was -- there  
3 was other objections that were jointly fought. I  
4 recall one, I believe it was CPA, but anyway, that was  
5 possible.

6 And, regardless, Mr. Cremades specifically  
7 invited the UAE to -- to put any and all evidence and  
8 objections before him, and so the UAE had full  
9 opportunity to -- all of these objectors had full  
10 opportunity to be before him.

11 So moving on to -- to 2D, 2D and E are really  
12 the big questions. "Is it consistent with the articles  
13 and the bylaws to ask Asia to resolve matters with  
14 these few objectors, notwithstanding all the processes  
15 we had gone through?"

16 And, of course, our answer on that is no;  
17 that the New TLD principles, which were very carefully  
18 developed over a long period of time and, you know,  
19 were the underpinnings of the -- the Guidebook, you  
20 know, required advanced, clear documentation of all  
21 application evaluation, criteria and dispute resolution  
22 policies, you know, and it said specifically no  
23 additional selection criteria should be used, you know.

24 So ICANN's core values is 7 and 8, which  
25 require ICANN to base its decisions on documented

1 transparent policies and expert advice. And, you know,  
2 the Guidebook, the Community Objection Process, the  
3 Independent Objector Process, the GAC Advice Processes  
4 all were very carefully, specifically, voluminously  
5 documented and -- and followed in this case. I think a  
6 lot more now.

7 In fact, ICANN has argued many, many times,  
8 including in the Merck case, and I believe they won  
9 every single one of these cases, that objection process  
10 results could not be disregarded or overturned by an  
11 IRP. We cited a whole bunch of those cases in our  
12 original Complaint at Note 29 and in the Supplemental  
13 Brief at Note 12.

14 And if I'm not mistaken, I believe ICANN won  
15 that argument every time, and quite rightfully so. In  
16 those cases ICANN concurred with the expert decisions.  
17 The parties that have lost in those proceedings  
18 challenged it and they lost, as well they should.

19 At this point, you know, ICANN really should  
20 be stopped from arguing that -- that these expert  
21 decisions can be ignored because they fought so hard in  
22 so many other cases to uphold them.

23 In this case, you know, both, again, the  
24 Board Governance Committee specifically stated and the  
25 NGPC, which is the New gTLD Program Committee of the



1 Board, they -- they stated specifically that  
2 Mr. Cremades' opinions were not even material to their  
3 analysis, and that's just, again, flies in the face of  
4 these bylaws requiring decisions to be based on expert  
5 advice.

6 Even the -- the GAC portion of the Guidebook  
7 specifically says that the Board may consult with  
8 experts, such as, objection process experts in  
9 evaluating GAC advice; and yet, here the Board  
10 apparently said that it -- it would not consider it.

11 So moving on to 2E, Slide 10, if the answer  
12 to the foregoing question is "yes," then do the current  
13 bylaws require ICANN to give my client notice, what we  
14 need to do to resolve these objections and was that  
15 communicated to us?

16 And our answer, of course, is yes, of course,  
17 we need to be provided notice of what we're supposed to  
18 do in order to resolve the objections since the  
19 objections were completely out of bounds, not  
20 considered or called for or really allowed by the  
21 provisions of the Guidebook at all, and all of those  
22 objections that were called for in the Guidebook had  
23 been resolved.

24 So of course, if there's something new that  
25 we're supposed to do, you need to tell us what it is.

1 I mean, fundamentally we object to the notion that we  
2 should be told to do anything additional. But to the  
3 extent you're breaching our contract and telling us to  
4 do something more, you need to be more specific than,  
5 you know, we need approval of these third parties.  
6 Based on what criteria, we don't know.

7 And whether that was communicated to Asia  
8 first, we argue strenuously it was not. The only  
9 thing -- the only thing communicated to us was in the  
10 Feb. 7 letter, you know, not even a paragraph of text  
11 from Dr. Crocker, basically just summarizing those four  
12 letters from the governments.

13 So, you know, again, we argue core value  
14 Number 8, the bylaws require decisions to be made by  
15 documented policies. ICANN has been completely out of  
16 bound on that. The underlying principles of the  
17 program require transparent, non-discriminatory,  
18 predictable criteria fully available to the applicants  
19 prior to the initiation of the process.

20 You know, it just goes on and on.  
21 Pre-published, objective and measurable criteria,  
22 dispute resolution, general processes established prior  
23 to the start of the process.

24 And, you know, here we had all of that in the  
25 Guidebook, and ICANN threw it out the window. There

1 simply was no provision for other late government  
2 advice outside of the objection processes and time  
3 frame that was set for all applicants equally.

4           Instead, my client's been singled out for  
5 unique treatment, even though it's complied with all of  
6 the documented criteria, and, in fact, it's gone well  
7 beyond it. It demonstrated community support, even  
8 though we didn't have to do it. We put forth a neutral  
9 multi-stakeholder governance model that these objectors  
10 say they wanted, even though we weren't required to do  
11 it, even though other --

12           (Whereupon the reporter interrupted the  
13 proceedings.)

14           MR. RODENBAUGH: I apologize. I will try to slow  
15 down. I am getting near the end here anyway.

16           So, you know, even though we weren't required  
17 to put that governance model in place, we did so. We  
18 agreed to it as a binding part of our contract if the  
19 contract were to be awarded. And the -- the  
20 independent objector found that that governance model  
21 addressed his concerns, and Mr. Cremades had it before  
22 him but really didn't even address it or consider it  
23 important in denying the UAE's community objection.

24           You know, ICANN very recently provided  
25 evidence that the -- the European GAC members had

1 assumed that our applications would be approved after  
2 the -- the GAC advice retains, and that's in -- in our  
3 Supplementary Brief, Page 12, Annex 28, ICANN Document  
4 Number 130. And that's when ICANN, you know, stopped  
5 basically saying its impressions of what the Europeans  
6 believed the effect of that GAC advice was.

7 And even the OIC, in documents provided by  
8 ICANN, had acknowledged that the GAC had probably  
9 authorized AGIT's applications, and that's Respondent's  
10 Annex 10. Yet, you know, these are the, you know, sort  
11 of issues for the objectors' concerns. They're simply  
12 unsubstantiated and twice have been found by ICANN's  
13 experts to lack substance, and more importantly,  
14 failing to demonstrate how my client's applications  
15 would cause any detriment to the Muslim community.

16 You know, on the contrary, both experts found  
17 that rejection of the applications would cause  
18 detriment to their right of free expression, the  
19 communities' right of free expression, and that is  
20 another fundamental principle of the program.

21 So, you know, these experts found that our  
22 applications specifically benefit the public interest.  
23 ICANN has never explained how my client's operation  
24 would harm any public interest. That certainly is not  
25 in Dr. Crocker's letter, nor in any of the four

1 underlying letters really.

2 All that's put out there is some sort of  
3 religious sensitivity boogeyman, but there's simply no  
4 identification of how my client's operation would harm  
5 any public interest. And that's ICANN's mandate at its  
6 core, to decide what is the public interest that  
7 matters, to merely explain how, by what process we can  
8 resolve those concerns, you know.

9 We argue we did resolve it by going through  
10 the processes through the two experts, through the GAC.  
11 You know, the GAC did not suggest that the application  
12 be remediated. The GAC did not suggest the application  
13 be rejected. The GAC simply forwarded on that a few  
14 members had unspecified concerns. We are owed a lot  
15 more than that for our investment in these applications  
16 for reliance on contracts.

17 So effectively, the Board has rejected the  
18 applications or demanded they be remediated, even  
19 though those weren't part of the GAC recommendations.  
20 Unless and until we're approved by way of a criteria  
21 these objectors choose to apply, we're stuck on hold.

22 So moving on to -- to Question F, you know,  
23 "Is it consistent with the articles and bylaws to place  
24 an application on hold and not make a decision?" And,  
25 of course, we say no, it's not; that the -- that no

1 other applications have been put on hold for  
2 governmental concerns. Any of those would have been  
3 rejected rather than put on hold, and including  
4 .Africa. A lot of those were by consensus and GAC  
5 advice to reject.

6 So, you know, just talking about the core  
7 values a little bit more, Number 7 requires  
8 well-informed decisions based on expert advice, you  
9 know, not non-decisions disregarding expert advice,  
10 which is what we have here.

11 It requires making decisions by applying  
12 documented policies neutrally and objectively with  
13 integrity and fairness, not non-decisions which have  
14 ignored those documented policies in favor of unfair,  
15 secretive government lobbying we have here.

16 The bylaws in Article II, Section 3 require  
17 no party be singled out for disparate treatment, unless  
18 justified by substantial or reasonable cause, but ICANN  
19 certainly hasn't offered any substantial cause. To the  
20 extent there's any substantial cause at all, it's twice  
21 been deemed unsubstantial by ICANN's experts appointed  
22 to just exactly that question.

23 And ICANN's not offered any reasonable cause  
24 at all. It's only basically mocking their own  
25 unreasonable concerns of the objectors that's also been

1 twice deemed unsubstantial, unreasonable and, in fact,  
2 harmful by two of ICANN's appointed experts.

3 So, you know, the final point we can put on  
4 that is, you know, Article of Incorporation Number 4  
5 requires conformance with government principles of  
6 international law. Well, how can it be legal for ICANN  
7 to put out an extremely detailed contract, meaning the  
8 application and incorporating the Guidebook, then  
9 essentially usurp my client's application fees  
10 indefinitely, subject to some third-party's approval of  
11 the application based on we don't know what. There's  
12 no criteria or process or, indeed, any real chance by  
13 which we could get that approval.

14 So I'll stop there for a second in case  
15 there's any questions before I address Questions 3 and  
16 4 and wrap up.

17 Okay. So Question 3 was  
18 essentially looking -- was essentially pointing out  
19 that ICANN seems to have taken into account evidence  
20 and opinions of persons that are not experts but  
21 members of the GAC. I don't -- I don't think that's  
22 particularly here nor there. Of course, the Board has  
23 discretion in considering inputs it wants.

24 But we would point out that obviously the  
25 Guidebook was designed to collect GAC advice and to

1 collect expert advice. And, in fact, the GAC advice  
2 module, again, reflected that the Board could -- could  
3 consider expert advice and consider GAC opinions. So  
4 it's -- as we've seen, the GAC had no interest in  
5 providing any rationale for any of its decisions ever  
6 in this process.

7 But what we do know is the GAC as a whole  
8 clearly decided not to object, nor to suggest  
9 remediation, but only to state the concerns of some few  
10 members, which, again, have all been exhaustively  
11 resolved several times previously by ICANN's appointed  
12 experts.

13 Again, Mr. Cremades even gave the UAE a  
14 pretty exceptional opportunity to demonstrate that  
15 opposition by anyone and everyone else, and the UAE did  
16 its best but still was found lacking.

17 So, you know, what we have is basically ICANN  
18 still today has made no effort to understand the views  
19 of the full GAC, nor to review evidence and arguments  
20 considered by the independent objector or  
21 Mr. Cremades.

22 In fact, ICANN admits in -- in its slide that  
23 the Board only considered the results in the community  
24 applications, rather than all of the evidence and  
25 arguments that led to those results. And yet, at the



1 same time, the Board admitted that it didn't consider  
2 those results material in its decision.

3 So ICANN simply made no effort really to  
4 understand or explain any substance or rationality to  
5 the objectors' "concerns about lack of community  
6 support." It made no effort to contrast those concerns  
7 with our voluminous documentation of community support  
8 and the carefully designed neutral governance model.  
9 It -- it appears that none of that was even considered  
10 by the Board.

11 So we've done all we can do to meet the  
12 substance of those concerns as far as we understand  
13 them, but those efforts have been completely ignored  
14 both by the objectors and by ICANN. We have no idea  
15 what to do next.

16 And so the final question that you had posed  
17 is, you know, "Why is the scenario described in  
18 Section 1.1.5 not to be considered persuasive?" That  
19 lays out very, very clearly the common scenario that is  
20 expected in the applications, where a party would pass  
21 the evaluation, ICANN's very, very thorough evaluation  
22 of the, you know, some 500-page applications typically.

23 We would then prevail in these objection  
24 proceedings, which were very lengthy and expensive as  
25 well. And there's no contention from any other

1 applicants for the strings. Therefore, we should be --  
2 we should be awarded the contracts and allowed to  
3 delegate the TLDs.

4 That scenario was very clear. It set all the  
5 applicants' expectations, including my client's, and it  
6 contractually binds ICANN to that outcome. ICANN tries  
7 to argue in its Slide 28 that there may be a variety of  
8 other ways of combinations that things could go, but,  
9 in fact, our applications follow that precise scenario.  
10 That guaranteed that we should be awarded the  
11 contracts.

12 ICANN can't disregard conclusions of its own  
13 processes, its own documentation, its own appointed  
14 experts, nor the gTLD principles, nor the bylaws. We  
15 prevailed at every step. The Board did not explain how  
16 any of those steps were faulty or how our client -- my  
17 client's operation of these TLDs would harm the public  
18 interest in any way, shape or form.

19 And, therefore, it hasn't even satisfied the  
20 one part of the Guidebook that they hang their hat on  
21 entirely, which is Section 5.1, the section that  
22 essentially gives them the right to individually -- in  
23 their view individually consider an application based  
24 on whatever criteria they feel is appropriate,  
25 secretive, open, reasonable, unreasonable or no

1 criteria at all.

2 But even that section specifically requires  
3 ICANN to make a determination that the applications are  
4 not in the public interest. They haven't done that.  
5 So at this point, now they're on hold for -- for more  
6 than three years, and we're entitled to know what are  
7 the conflicts that we have to resolve to whose  
8 satisfaction, by what criteria, by what process, in  
9 order for ICANN to make a decision.

10 All they've done so far is created unique,  
11 immeasurable, subjective criteria to be determined or  
12 not by these third-party objectors, rather than by  
13 ICANN itself. It's completely delegated its authority  
14 in this case to them, and that's completely  
15 inappropriate under the bylaws.

16 So that concludes my presentation at this  
17 point. Thank you.

18 MR. HAMILTON: All right. One -- one hour and 15  
19 minutes. Good job. Thank you very much. And now  
20 it's, indeed, Respondent's opportunity to begin their  
21 presentation. We'd love to hear it.

22 MR. ENSON: Yes, Mr. Hamilton. Thank you very  
23 much. This is Eric Enson from Jones Day on behalf of  
24 Respondent ICANN.

25 First, I want to thank the Panel and

1 Claimant's counsel for their work on this matter. The  
2 IRP process is an incredibly important accountability  
3 mechanism that ICANN takes very seriously.

4 As the Panel is aware, ICANN was formed in  
5 1998 as a California not-for-profit public benefit  
6 corporation. ICANN's mission is to ensure the stable  
7 and secure operation of the global internet's unique  
8 identifier systems, including the internet domain name  
9 system.

10 The New gTLD program, which really is the  
11 backdrop for this entire IRP, is by far ICANN's most  
12 ambitious expansion of the naming system. The  
13 program's goals included enhancing competition and  
14 consumer choice through the introduction of new  
15 top-level domains or what we refer to as TLD.

16 ICANN received almost 2,000 applications for  
17 New TLDs, and to date, over 1200 New TLDs have been  
18 added to the internet. ICANN is, in my view,  
19 rightfully proud of the work it's done in navigating  
20 this completely new landscape, and it's pleased to  
21 provide the Panel with more information about the steps  
22 ICANN has taken, the steps the ICANN Board has taken,  
23 the steps that the ICANN committees have taken in  
24 connection with the .Islam and .Halal application.

25 And with that, I will move on to Number 1

1 slide in my presentation.

2 ICANN has a proven commitment to  
3 accountability and transparency. In all of its  
4 practices, ICANN considers these principles to be  
5 fundamental safeguards in ensuring that its  
6 international bottom-up and multi-stakeholder operating  
7 model remains effective.

8 The mechanisms through which ICANN achieved  
9 accountability and transparency are built into every  
10 level of its organization and they are mandated by the  
11 bylaws. ICANN's IRP process is one of its most  
12 important accountability mechanisms created by ICANN to  
13 ensure that it remains accountable to the internet  
14 community.

15 IRP Panels are charged with evaluating the  
16 Board's actions and comparing them with the ICANN  
17 articles and bylaws to issue a declaration of whether  
18 those actions are consistent with the articles and  
19 bylaws.

20 So pursuant to the bylaws, there is only one  
21 question before this Panel. Did the ICANN Board act  
22 contrary to the articles and bylaws by deciding to not  
23 proceed with the applications until the conflicts  
24 between Claimant's representation and the objections of  
25 third parties are resolved?

1           Today I plan on detailing the reasons why we  
2 believe that the Board's conduct was consistent with  
3 the I -- articles and bylaws. Along the way, I plan on  
4 addressing the issues raised by the Panel's questions.  
5 And at the end of my presentation, I will provide  
6 specific answers to each of the questions. But please  
7 feel free to stop me at any point if the Panel has  
8 additional questions.

9           And Madam court reporter, if I speak too  
10 quickly or if I use a phrase or a term that you don't  
11 understand, please feel free to stop me.

12           Now I'll move to Slide 2 about presentation,  
13 please.

14           The Board's decision to suspend consideration  
15 of .Islam and .Halal was based on advice from the  
16 Government Advisory Committee or what we refer to as  
17 the GAC, as well as the Board's consultation with the  
18 GAC regarding that advice and increasing objection and  
19 input to organizations and countries representative of  
20 the Muslim community.

21           The Board followed the procedures set forth  
22 in the Guidebook and even went beyond those  
23 requirements to better understand the scope of the  
24 objections and to assist Claimant in attempting to  
25 successfully resolve its applications. And most

1 important for the purposes of this IRP, the Board's  
2 decision and action was fully consistent with the  
3 articles and bylaws.

4 And with that, I will move to Slide 3,  
5 please.

6 As the Panel correctly noted in its first  
7 question to the parties, and as Mr. Rodenbaugh  
8 mentioned earlier in the day, ICANN's bylaws contained  
9 a defined standard of review. There are three elements  
10 of the defined standard of review.

11 Meaning, this Panel must ask itself did the  
12 Board act without a conflict of interest in taking its  
13 decision? Did the Board exercise due diligence and  
14 care in having a reasonable amount of facts in front of  
15 them? And did the Board exercise independent judgment  
16 in taking that decision believed to be in the best  
17 interest of the company?

18 As the Merck IRP Panel found, an IRP Panel  
19 must have a mandatory focus on the three elements of  
20 the standard of review defined in the bylaws. And I'm  
21 going to come back to this defined standard of review a  
22 few times today because it is -- it is critical to the  
23 decision this Panel must make. If the answer to these  
24 three questions are "yes," as we believe them to be,  
25 this IRP must be denied.

1 I'll move to Slide 4, please.

2 Several other IRP Panels have agreed that the  
3 only way to answer the question of whether the Board  
4 acted consistent with the articles and bylaws is to  
5 rely on and consult the defined standard of review.  
6 For instance, the Vistaprint, V-i-s-t-a-p-r-i-n-t, IRP  
7 Panel declared that an IRP Panel is "neither asked to,  
8 nor allowed to substitute its judgment for that of the  
9 Board."

10 Likewise, the Merck, M-e-r-c-k, IRP Panel  
11 declared that "it is clear that the Panel may not  
12 substitute its own view of the merits of the underlying  
13 dispute."

14 And as to Booking.com, B-o-o-k-i-n-g, dot  
15 c-o-m, IRP Panel declared, "So long as the Board acts  
16 without a conflict of interest and with due care, it is  
17 entitled, indeed required, to exercise its independent  
18 judgment in acting in what it believes to be the best  
19 interest of ICANN."

20 In other words, the question for this Panel  
21 is not whether the ICANN Board got it right. The  
22 question is not whether this Panel wouldn't have made a  
23 different decision with respect to Claimant's  
24 applications. The question instead is whether the  
25 Board acted without a conflict of interest and whether



1 it exercised independent judgment based on a reasonable  
2 amount of facts.

3 And I'm moving to Slide 5 now, please.

4 The New gTLD Applicant Guidebook, I think, is  
5 an ideal starting point for understanding the Board's  
6 action in this matter. The New gTLD program has been  
7 implemented through a 338-page Guidebook, which sets  
8 forth the procedures for evaluating the New gTLD  
9 applications.

10 And as Mr. Rodenbaugh mentioned earlier  
11 today, the Guidebook was developed and introduced  
12 between 2008 and 2012 based on extensive consultation  
13 between ICANN and the ICANN community through numerous  
14 drafts and literally thousands and thousands of public  
15 comments on each draft.

16 From the very beginning of the program and  
17 the drafting of the Guidebook, there were serious  
18 concerns of how ICANN would deal with applications that  
19 were controversial or raised sensitivities, including  
20 geographic, political and religious sensitivities.

21 For this reason, the Guidebook provides  
22 several mechanisms by which concerned organizations,  
23 governments, businesses and even individuals can voice  
24 objection to or provide advice regarding certain  
25 applications. These mechanisms include GAC advice,

1 formal objection proceedings, public comments, among  
2 others.

3 And if we move to Slide 6, I will walk you  
4 through each of these.

5 One of the -- the more critical objection  
6 mechanisms is GAC advice. As a reminder, ICANN's  
7 Government Advisory Committee provides public policy  
8 advice directing -- directly to ICANN's Board of  
9 Directors providing an effective role for governments  
10 in ICANN's governance model.

11 Membership in the GAC is open to all national  
12 governments and distinct economies around the globe.  
13 ICANN's bylaws specifically recognize the importance of  
14 the GAC and the importance of GAC advice by requiring  
15 the ICANN Board to take into account all advice from  
16 the GAC on public policy matters.

17 The Guidebook does the same thing but goes  
18 further. The Guidebook defines a specific role for the  
19 GAC by setting forth a process under which the GAC can  
20 address applications that are identified by governments  
21 to be problematic, such as those that potentially  
22 violate national law or raise sensitivity.

23 The GAC, much like United Nations, attempts  
24 to operate on a -- on a basis of consensus and provides  
25 ICANN with advice through communiques. ICANN

1 publically posts all of those communiques and asks to  
2 comment on them as well.

3           The Guidebook provides three types of advice  
4 with respect to the New gTLD program, that is,  
5 consensus advice against an applicant -- excuse me --  
6 against an application proceeding, non-consensus advice  
7 that there are concerns with an application, and advice  
8 that an application should not proceed unless reme- --  
9 remediated.

10           And if you'll turn to Slide 7, please, I'll  
11 address the GAC advice that is at issue in this IRP.

12           Only one type of GAC advice is relevant to  
13 this IRP, and that is non-consensus advice. According  
14 to the Guidebook, if the GAC issues non-consensus  
15 advice expressing concerns with an application, as it  
16 did with .Islam and .Halal, the New gTLD Program  
17 Committee of the ICANN Board is expected to take two  
18 steps.

19           First, the Board is expected to "enter into a  
20 dialogue with the GAC to understand the scope of the  
21 concerns." And, second, the Board is expected to  
22 "provide a rationale for its decision" on how to  
23 proceed.

24           As we'll detail in our presentation today,  
25 the Board complied with both of these expectations in

1 connection with the GAC non-consensus advice on .Islam  
2 and .Halal.

3 Now moving to Slide 8, please.

4 Another mechanism by which government and  
5 other organizations can object to a gTLD application is  
6 the formal objection process. There are several  
7 grounds on which an application can -- excuse me -- an  
8 objection can be filed.

9 The first is a string confusion objection,  
10 which claims that an applica- -- that two applications  
11 are confusingly similar. The next is a legal rights  
12 objection, claiming that an application violates the  
13 legal rights of the objector in some way.

14 Third is a limited public interest objection,  
15 claiming that an application violates  
16 generally-accepted legal norms of morality and public  
17 order. And the fourth type of objection is a community  
18 objection, which is relevant to this IRP in a certain  
19 sense.

20 Any established institution associated with a  
21 clearly delineated community can file a community  
22 objection against an application. Community objections  
23 are heard and decided by independent expert Panels  
24 selected by the International Chamber of Commerce or  
25 what we refer to as the ICC.

1           To succeed on a community objection, an  
2           objection -- excuse me -- an objector must show that  
3           there is a substantial opposition to the application  
4           from a significant portion of the community to which  
5           the gTLD string may be explicitly or implicitly  
6           targeted. Finally, findings of an expert Panel will be  
7           deemed expert advice that ICANN accepts through a  
8           dispute resolution process.

9           If you would turn with me to Slide 9.

10           Another mechanism by which any government  
11           organization or individual may object to a gTLD  
12           application is ICANN's public comment process. Public  
13           comment is a vital part of ICANN's bottom-up  
14           multi-stakeholder model. It provides all interested  
15           parties an opportunity to provide input and feedback on  
16           issues that are important to them.

17           In fact, the public comment mechanisms are  
18           hard-wired into ICANN's bylaws as part of ICANN's  
19           policy development, implementation and operational  
20           processes.

21           The Guidebook also includes public comment  
22           provisions by specifically informing applicants that  
23           public comment is "a mechanism for the public to bring  
24           relevant information and issues to the attention of  
25           those charged with handling New gTLD applications.

1 Anyone may submit a comment in a public comment forum."

2 The Guidebook -- oh, excuse me. The -- the  
3 Guidebook also informs applicants that a general public  
4 comment forum will remain open through all stages of  
5 the evaluation process to provide a means for the  
6 public to bring forward any other relevant information  
7 or issues. And this -- these passages regarding public  
8 comment are found in the Guidebook, which is  
9 Respondent's Exhibit 5, Section 1.1.2.3.

10 And really, just to better understand the  
11 importance of public comment procedures and really  
12 the -- the volume of public comments related to New  
13 gTLD applications, I urge the Panel to consider  
14 Respondent's Exhibit 24, which is a snapshot of ICANN's  
15 New gTLD public comments page. It's a good  
16 demonstration of not only how important this is to  
17 ICANN's multi-stakeholder model, but it also shows how  
18 frequently ICANN received public comments.

19 In addition, I will note, and I'll come back  
20 to this later today, if the Panel reviews Respondent's  
21 Exhibit 24, you will see that each of the  
22 communications ICANN received objecting to Claimant's  
23 applications were publicly posted on this page, which  
24 defeats the claims that Claimant has been making  
25 throughout this process that it was unaware of the

1 objectors' identities and concerns.

2 And now moving to Slide 10, please.

3 One final but important point on these  
4 objection mechanisms is the fact that the Guidebook  
5 intentionally provides for several separate  
6 mechanisms -- mechanisms for objecting to applications,  
7 each mechanism having different requirements and  
8 different standards.

9 For example, the requirements for filing a  
10 community objection are very different from the  
11 requirements for making a public comment. Likewise,  
12 the standards by which a community objection is judged  
13 is very different from standards under which the GAC  
14 issues advice on a new application.

15 Given this, governments, organizations and  
16 individuals can employ one or more of these mechanisms  
17 as they see fit. Meaning that one mechanism or the  
18 results of one objection mechanism does not trump  
19 another.

20 And if you would, please, turn with me to  
21 Slide 11.

22 I know that the -- the Panel is already  
23 familiar with the underlying facts, but I do think -- I  
24 do think a quick review of the facts associated with  
25 the .Islam and .Halal applications is important because

1 the circumstances regarding these applications changed  
2 over time, and those changed circumstances greatly  
3 impacted the Board's action on the application.

4 While it's not surprising that applications  
5 for sensitive religious terms like Islam and Halal were  
6 always subject of objections, so volume and voices  
7 objecting to those applications increased and changed  
8 over time.

9 So I'd like to start with the early  
10 objections to Claimant's applications, which began with  
11 the GAC early warnings issued by the government of  
12 United Arab Emirates and India. Both early warnings  
13 expressed serious concerns regarding a lack of  
14 community involvement in and support for the  
15 applications.

16 Shortly thereafter, as we know, in March of  
17 2013, the UAE filed a formal community objection to go  
18 with .Islam and .Halal with the ICC. And the  
19 community -- the community objection proceedings would  
20 span the next six months or so.

21 On 11 April 2013, after a regularly-scheduled  
22 meeting of the GAC in Beijing, China, the GAC issued  
23 Beijing communique. In the Beijing communique, the GAC  
24 issued non-consensus advice to the ICANN Board stating,  
25 "The GAC recognizes that religious terms are sensitive



1 issues. Some GAC members have raised sensitivities on  
2 the applications that relate to Islamic terms,  
3 specifically .Islam, .Halal."

4 The GAC members' concern have noted that the  
5 applications for .Islam and .Halal lack community  
6 involvement and support. It is the view of these GAC  
7 members that these applications should not proceed.

8 As we discussed earlier, this non-consensus  
9 advice obligated the Board to meet with the GAC to  
10 understand its concerns and then take some action on  
11 the applications and provide a rationale for that  
12 action.

13 On 4 June 2013, the NGPC of the ICANN Board  
14 accepted the GAC advice on the applications and  
15 informed the GAC that the Board "stands ready to enter  
16 into a dialogue with the GAC on this matter" as it was  
17 required to do so on the Guidebook.

18 Moving on to Slide 12.

19 Then pursuant to the Guidebook, ICANN Board  
20 members met with GAC members in Durban, South Africa on  
21 18 July 2013 to better understand the scope of the  
22 GAC's concerns of the application.

23 If the -- if the Panel has not done so  
24 already, I urge you to listen to Claimant's Annex 23,  
25 which is an audio recording of this meeting between

1 ICANN Board members and concerned GAC members, and I  
2 urge you to do that for a few reasons.

3 The first is, the recording clearly  
4 demonstrates the real concerns GAC members had with the  
5 use of religious terms that they hold dear. Almost all  
6 of the comments noted that the Muslim community was not  
7 consulted in any way by Claimant, and there were no  
8 assurances that the TLDs used in these important terms  
9 would be operated in a manner consistent with those  
10 terms.

11 Mr. Rodenbaugh earlier in the day referred to  
12 a religious sensitivity boogeyman. That's not what  
13 these people are doing. In fact, one of the commenters  
14 noted that the term "Halal" essentially means  
15 "permissible" in Arabic, so a .Halal TLD would imply  
16 that all websites on the TLD were permitted by Islam,  
17 which is not -- which was not in any way guaranteed by  
18 the Claimant's applications.

19 Second, the -- the recording demonstrates  
20 that the ICANN Board members were working hard to  
21 understand the scope of these concerns. And then,  
22 finally, the recording demonstrates that Claimant's  
23 assertion that this meeting was some part of a  
24 conspiratorial effort to undermine the application is  
25 just false. The recording makes clear that this

1 meeting was a meeting of people working hard to  
2 understand the -- understand and deal with sensitive  
3 and, frankly, difficult issues.

4           After the meeting, objections to the  
5 applications continued through ICANN's public comment  
6 process. In July 2013 Kuwait and the Gulf Cooperation  
7 Council, or GCC, which is an intergovernmental  
8 organization consisting of, I think, six Arabic  
9 countries, they both expressed objections to the  
10 application because of the sensitivities inherent in  
11 religious terms.

12           Then in September 2013 Lebanon issued its own  
13 letter to ICANN also objecting to the applications  
14 because Lebanon believed that the management and  
15 operation of these TLDs must be conducted by a neutral  
16 non-governmental multi-stakeholder group.

17           And moving on to Slide 13, please.

18           On 24 October 2013 the ICC Panelists  
19 considering the UAE's community objections finally  
20 issued its determinations denying the objections.  
21 Claimant had made much of this victory both in its  
22 brief and then here today.

23           But it is critical that this Panel carefully  
24 examine the Panelists' determination because the  
25 Panelists did not have access to the same information

1 the ICANN Board had access to when it eventually made  
2 its decision on the applications, mainly the input and  
3 objection from the Organization of Islamic Cooperation  
4 or the OIC.

5 At first in its determinations, the Panelists  
6 concluded that the OIC, as the second largest  
7 international organization after the United Nations,  
8 "is a valid speaker for the Muslim population."

9 But based on the evidentiary record before  
10 the Panelists, the Panelists concluded that the UAE had  
11 not established whether the OIC favors or disfavors the  
12 applications for .Islam and .Halal. So the Panelists  
13 was of the opinion that the OIC remains neutral as to  
14 the registration of the strings by Respondent.

15 Moving on to Slide 14, please.

16 Second, the Panelists concluded that the UAE  
17 had only evidenced objection of the applications on  
18 behalf of seven of the OIC's 57 Member States.

19 As Mr. Rodenbaugh pointed out earlier, and he  
20 is correct, the Panelists, therefore, concluded that  
21 there is opposition to Respondent's applications to  
22 some extent, but such opposition is not substantial as  
23 required to uphold community objection.

24 So there are two important aspects of the  
25 Panelists' determinations that undercut Claimant's

1 reliance on these determinations. First, the Panelists  
2 did not have the benefit of input from the OIC, which  
3 it bound to be the valid voice of the Muslim  
4 population.

5 And, second, as I mentioned earlier, the fact  
6 that Claimant succeeded in opposing the community  
7 objections does not mean that other ICANN objection  
8 mechanisms, such as GAC advice and public comment,  
9 could not be pursued by concerned entities or  
10 considered by the ICANN Board.

11 In fact, regardless of the outcome of the  
12 community objections, the ICANN Board still had a duty,  
13 according to the Guidebook, to address the GAC's  
14 non-consensus advice objecting to the application.

15 In addition, there's no demonstration by  
16 Claimant or there's no provision in the Guidebook that  
17 says that community objection results are conclusive of  
18 any other type of objection.

19 Moving on to Slide 15.

20 And this is the point shortly after the  
21 community objections that things started to change  
22 significantly. After the community objections were  
23 resolved, the OIC made its opposition to the  
24 application known to ICANN through ICANN's public  
25 comment mechanisms.

1           In November 2013, the OIC wrote ICANN  
2 identifying itself as "the sole official representative  
3 of 1.6 billion Muslim peoples around the world."

4           The letter also provided an official  
5 opposition of the member state of the OIC toward use of  
6 .Islam and .Halal strings by any entity not rep- -- not  
7 representing the collective voice of the Muslim people.

8           Then on 19 December 2013, the OIC informed  
9 ICANN that the 57 Member States of the OIC unanimously,  
10 all 57 Member States, adopted a resolution officially  
11 objecting to the operation of .Islam and .Halal TLDs by  
12 any entity not reflecting the collective voice of  
13 Muslim people.

14           MR. REICHERT: Counsel, this is Klaus Reichert.  
15 Could I stop you for a moment? Do we have that  
16 resolution in the papers before us?

17           MR. ENSON: Mr. Reichert, we do not have a copy of  
18 that resolution. The resolution was revised to ICANN  
19 in the 19 December 2013 letter to ICANN, and I'm not  
20 sure if it's because the -- the resolution's in Arabic.  
21 I just don't know why it was not attached to that  
22 letter.

23           MR. REICHERT: One further question that just  
24 occurs to me.

25           Did OIC have an opportunity to participate in

1 the process, the ICC process, before Mr. Cremades?

2 MR. ENSON: As -- as Mr. Rodenbaugh mentioned  
3 earlier, yes, I think it's fair to say that the OIC had  
4 an opportunity. But another important point about  
5 listening to Claimant's Annex 23 is there's some  
6 explanation of what is the background with the OIC and  
7 what is -- the OIC is now in the process of getting its  
8 members together and getting its members knowledgeable  
9 about these issues, and it plans on taking action.

10 And they did not take action before  
11 Mr. Cremades issued his determination, and I don't know  
12 exactly why. I assume it's hard to -- to get 57 Member  
13 States to do anything, let alone unanimously accept  
14 a -- a resolution.

15 But another point to keep in mind is, there's  
16 no requirement that the OIC participate in community  
17 objection. As I mentioned earlier, there are a number  
18 of different ICANN mechanisms that can be used in order  
19 for an entity or an individual or a government to issue  
20 objection to an application, and that's how the OIC  
21 took.

22 MR. REICHERT: Okay. Thank you.

23 MR. ENSON: So, finally, on 24 December 2013 the  
24 government of Indonesia was the latest government to  
25 officially object to these applications, strongly

1 objecting to the use of them in its 24 December 2013  
2 letter.

3 So, again, this is a level of objection to  
4 the applications that a community of objection  
5 Panelists did not have before it when it rendered its  
6 determinations, but it's a level of objection that the  
7 ICANN Board could not ignore in evaluating the GAC  
8 advice and ultimately the applications.

9 JUDGE CAHILL: This is Judge Cahill.

10 Why not -- if all this is happening, why not  
11 just deny it? Why -- why put it in a separate  
12 category?

13 MR. ENSON: Judge Cahill, it's a good question,  
14 and I think it's a question that -- that demonstrates  
15 what ICANN's doing here. And ICANN, rather than just  
16 denying the applications based on every Muslim country  
17 saying they don't want this, the ICANN Board gave  
18 Claimant an opportunity to work with the very community  
19 and the very group of people they sought to represent  
20 in these applications and allowed them to try to  
21 resolve the conflicts between what Asia -- the Claimant  
22 was saying about its governance model and what every  
23 Muslim country was saying about the governance model  
24 because it didn't match up.

25 The objecting governments did not approve of



1 and did not believe in the governance model set forth  
2 by the Claimant, yet the Claimant was telling ICANN  
3 that everything had been satisfied, done  
4 satisfactorily. The ICANN Board said, "There are  
5 conflicts here. We are going to give you an  
6 opportunity to try to work with the community you want  
7 to represent," and they allowed them to do that.

8 MR. REICHERT: Yes, Klaus Reichert speaking up  
9 about this same point.

10 Why then -- I know that your position is that  
11 you gave them an opportunity, but that's now some years  
12 ago. Why didn't you at some point make a decision, yes  
13 or no?

14 MR. ENSON: Well, I think -- I think it's  
15 important to note that I think within a month of ICANN  
16 making a Board decision, these proceedings began and a  
17 cooperative engagement process was opened up between  
18 ICANN and Claimant, and we've been in that hold, that  
19 pattern since that time.

20 And so it -- it may be the Board is waiting  
21 to see what happens here before it takes any further  
22 action, although I can't speak for the Board. That  
23 certainly would be an understandable reason why the  
24 Board is not taking any action yet.

25 JUDGE CAHILL: Well, that may be the reason,

1 but -- what's my question?

2 The question is, it seems like a big task to  
3 go to all the Muslim countries in the world and try to  
4 work it out. Is that what is expected? Because I bet  
5 everybody has a different reason for not appreciating  
6 this application.

7 MR. ENSON: Judge Cahill, I agree. I think there  
8 is a challenge to convincing all 57 Member States of  
9 the OIC on a -- a governance model for these two TLDs.  
10 But these are the two TLDs that the Claimant applied  
11 for.

12 They had to have known that this -- these  
13 were going to be controversial, and it may be that  
14 they're not able to work out and reach -- and resolve  
15 these conflicts. That may ultimately be where they end  
16 up. I don't know whether they've been making those  
17 efforts or not. It doesn't seem like they have and  
18 instead decided to pursue this IRP.

19 But the Board has given them this opportunity  
20 to try to do that, and if they can't, then that's, you  
21 know, a different decision point for the Board. If  
22 they come back --

23 MR. REICHERT: Counsel -- Counsel, this is  
24 Klaus Reichert.

25 What do you say to the Claimant's complaint

1 against you that it simply doesn't know what the  
2 complaints are all from the objectors and it's in a --  
3 I hope the expression is clear -- a catch 22 situation;  
4 that it just doesn't know what to do?

5 MR. ENSON: Well, I -- I think that the -- the  
6 objections that I have been able to glean from reading  
7 the record and from listening to the -- the -- the  
8 audio recording of the tapes is that there are major  
9 concerns with, one, just the overall sensitivity of a  
10 religious term as a TLD.

11 And I think maybe more importantly is, if  
12 these TLDs are going to exist, there must be a  
13 multi-stakeholder governance model in place. The ICANN  
14 Board's letter of 7 February 2014 says that. It  
15 identifies the multi-stakeholder government issue as  
16 the issue that many of these governments have raised,  
17 and that is the issue that needs to be -- be resolved.

18 MR. REICHERT: Well, before we go to that point,  
19 you just have raised a -- the -- the sensitivity point  
20 of the -- the two names, that there may be religious  
21 sensitivities, and I can understand that.

22 But if those are sensitivities which are held  
23 by Member States of the OIC, is it -- is it the case  
24 that those sensitivities may never be overcome because  
25 purely by -- by -- by reference to the name -- to the

1 words being used? And if that's the case, perhaps then  
2 the Claimant should know that.

3 MR. ENSON: That -- that certainly, Mr. Reichert,  
4 is a possibility, that the sensitivities may not ever  
5 be overcome, but ICANN has given them a chance to make  
6 an effort at reaching out to the very organization that  
7 represents this community to try to develop a  
8 multi-stakeholder governance model, put it in place,  
9 and perhaps overcome sensitivities.

10 That is the opportunity they have been given.  
11 Rather than the ICANN Board simply rejecting these  
12 applications, the Board has given the opportunity to  
13 talk to the very people they want to represent to try  
14 to work this out.

15 MR. REICHERT: But so that I'm clear, I mean, it  
16 may not matter one way or the other if there's -- with  
17 the governance if at the threshold point there are  
18 religious sensitivities about these names, and it may  
19 be that no matter what the governance model is  
20 proposed, the religious sensitivities will always come  
21 first.

22 MR. ENSON: That is -- that is possible, but, you  
23 know, one point that I think is important is the point  
24 I made about .Halal earlier, where one of the speakers  
25 at the meeting between ICANN Board members and GAC

1 members was concerned about .Halal because it implies  
2 that any website on that TLD is permissible by Islam.

3 And they wanted to be sure that whatever  
4 websites appear on .Halal are actually permissible, and  
5 the way to do that and the way to overcome those  
6 sensitivities is through a multi-stakeholder governance  
7 model that would evaluate those types of issues.

8 So I agree with you. These sensitivities may  
9 not ever be able to be overcome, but there is an  
10 ability to try and an ability to build in a system that  
11 would overcome some of these sensitivities and make  
12 people who are in the community more comfortable with  
13 them. And that's the opportunity we decided to give to  
14 the Claimant, rather than simply rejecting the  
15 application based on these objections.

16 JUDGE CAHILL: This is Judge Cahill again.

17 There's no obligation on behalf of the  
18 members to even talk to the Claimant here, right? So  
19 you say work it out, but nobody has to return your  
20 phone calls.

21 Is that -- there's no jurisdiction that ICANN  
22 has over these members to talk to, is there?

23 MR. ENSON: You're -- you're right, Judge Cahill.  
24 There's no -- ICANN has no ability to force the OIC,  
25 for example, to speak with the Claimant about the

1 application. That's beyond ICANN's powers. But it  
2 seems like there has been some discussion between the  
3 OIC and Claimant over the years, so it's possible they  
4 will speak with him. I -- I don't know.

5 One of the alternatives, if that's the case,  
6 if the case is that the Claimant cannot make any  
7 progress in trying to resolve these conflicts, they  
8 should inform ICANN in some official manner and inform  
9 the Board. It has not done that.

10 JUDGE CAHILL: Okay. That's my question for now.  
11 I'll be quiet again.

12 MR. ENSON: Then I will move on. Thank you very  
13 much.

14 I'll move on to Slide 15, please, which  
15 discusses the Board's evaluation of the application.  
16 And -- and there's a critical overriding point that I  
17 just -- I must reiterate, and that is because the GAC  
18 issue is a non-consensus advice against .Islam and  
19 .Halal, the Board was required by the Guidebook to make  
20 a decision on how to proceed and then provide a  
21 rationale for that decision.

22 In other words, the Board was required by the  
23 Guidebook to take some action on these applications and  
24 then provide a rationale for that -- for that action,  
25 which is precisely what the Board did.

1           But before taking any action, the Board  
2 confirmed with the GAC that its evaluation of the  
3 application was complete, to ensure that the Board had  
4 a reasonable amount of facts before it in advance of  
5 any action on the application.

6           Once the GAC confirmed that there would be no  
7 further GAC input, the Board addressed the application  
8 at its 5 February 2014 meeting. At the meeting the  
9 Board considered the GAC advice contained in the  
10 Beijing communique and considered the Board meeting  
11 with the GAC members to discuss the concerns with the  
12 application.

13           It discussed the results of community  
14 objection proceedings, the OIC's letters regarding the  
15 application as well, and it also considered Claimant's  
16 representations regarding its application.

17           Ultimately, however, the Board adopted a  
18 resolution noting the significant concerns expressed  
19 from the dialogue between ICANN and GAC members, an  
20 additional opposition raised including the OIC, which  
21 represents 1.6 billion members of the Muslim community.

22           Moving on to Slide 17, the Board also  
23 authorized the issuance of the 7 February 2014 letter,  
24 which I know we're all familiar with and we've already  
25 talked about quite a bit today. But in review of that

1 letter, it makes clear that Dr. Crocker explained on  
2 behalf of the ICANN Board what the opposition to the  
3 applications were, where the opposition was coming  
4 from, and what the applicant needed to do to try to  
5 move its applications forward.

6 To contrary, Claimant's assertions that the  
7 Board did not identify the objectors' identities, the 7  
8 February 2014 letter clearly identifies the GCC, the  
9 OIC, Lebanon and Indonesia as objecting to the  
10 applications, and the date of the letters of the  
11 objection, which, again, were all publicly available  
12 and publicly posted on ICANN's public comments page.

13 Moving on to Slide 18.

14 I -- I apologize for the -- the rather  
15 lengthy recitation of the facts, but, again, I think  
16 they are important for understanding that the ICANN  
17 Board's actions complied fully with the Guidebook's  
18 procedures.

19 To summarize the action and the procedures,  
20 the Board published the Beijing communique with its  
21 advice regarding of the application. The Board  
22 resolved to enter into a dialogue with the GAC  
23 regarding its advice on the application as required by  
24 the Guidebook.

25 The Board, in fact, met with the GAC re- --



1 representatives to discuss the scope of the GAC  
2 concerns to the application as required by the  
3 Guidebook. And the Board took no action until after  
4 community objections were resolved, the GAC's  
5 consideration of the applications was complete, and  
6 further comments were submitted by interested parties,  
7 thereby, ensuring that the Board had a reasonable  
8 amount of facts before it in order to make its  
9 decision.

10 Moving to Slide 19, please.

11 The Board completed its compliance with the  
12 Guidebook by providing a rationale for its decision in  
13 its 7 February 2014 letter, which was clearly  
14 identifying that there were conflicts between what  
15 Claimant was saying with respect to its governance  
16 model and what the objectors were saying with respect  
17 to the governance -- governance model.

18 And as I said earlier, the letter went on  
19 to -- to identify the objecting entities, summarize  
20 their concerns in explaining what Claimant must do to  
21 proceed resolving those noted conflicts.

22 Moving on to Slide 20, please.

23 Most important for this IRP is that the  
24 Board's actions complied fully with ICANN's articles  
25 and bylaws because the Board exercised independent and

1 transparent judgment based on proper due diligence.

2 One, the Board had no conflict of interest in  
3 taking its action. I believe in one of our earlier  
4 calls on administrative matters, the Claimant admitted  
5 as much.

6 Two, the Board made its decision on a  
7 reasonable amount of facts, GAC advice, complication  
8 with GAC members, the community objections, public  
9 comments for and against the applications in Claimant's  
10 own representations.

11 Three, the Board exercised independent  
12 judgment in making its decision. The Board took all  
13 steps it needed to take to gather sufficient amount of  
14 facts and relevant information and then decided how to  
15 proceed on that information.

16 And this is what makes this IRP in this  
17 situation different from the DCA IRP that  
18 Mr. Rodenbaugh spoke about earlier. In that IRP the  
19 Panel concluded that the Board accepted GAC consensus  
20 advice without performing sufficient due diligence of  
21 the GAC's concerns, and, therefore, the Board did not  
22 exercise independent judgment.

23 In this IRP the Board performed its due  
24 diligence. It met with the GAC, understood its  
25 concerns, and then took action based on that

1 information and the information from other objectors,  
2 as well as Claimant.

3 And, finally, the Board took its action in an  
4 open -- open and transparent manner. The Board's  
5 resolution about the GAC advice was publicly posted.  
6 The letters the Board received and the letters the  
7 Board sent regarding the applications were all publicly  
8 posted, and the Board's resolutions of '14 -- February  
9 2014 were open and public as well.

10 And if I could just briefly talk about the  
11 four substantive areas that Mr. Rodenbaugh raised  
12 earlier that Claimant asserts were violations of the  
13 articles and bylaws.

14 JUDGE CAHILL: Before you do that -- this is  
15 Judge Cahill -- I was thinking about this question  
16 during the break.

17 Remember earlier on when the Claimant argued  
18 that we should issue an order that says consider this  
19 and go back and make a decision, and then the decision  
20 has to be that the application is granted? You heard  
21 one of us say, "Is that -- that sounds like  
22 speculation." You heard me say, "Is that really what  
23 you want us to do?"

24 And what do you think about that particular  
25 argument?

1 MR. ENSON: Judge Cahill, thank you.

2 IRP Panels are vested with specific duties  
3 and asked to perform specific tasks. Specifically, IRP  
4 Panels are tasked to provide a written declaration  
5 declaring whether or not an action or inaction of the  
6 Board was inconsistent with the articles and the  
7 bylaws.

8 An IRP Panel is supposed to designate a  
9 prevailing party; an IRP Panel is supposed to design  
10 costs of the IRP; and an IRP Panel is authorized to  
11 make a recommendation to the Board.

12 An IRP Panel is not authorized and has no  
13 ability to award affirmative relief of the type that  
14 Claimant is seeking. This Panel could not order and  
15 require the ICANN Board to grant Claimant's  
16 applicant -- applications. There is no portion of the  
17 bylaws, either old or new, that will permit an IRP  
18 Panel to award that type of relief.

19 JUDGE CAHILL: Okay. I think that's what -- I  
20 think that was underlying Mr. Reichert's concern and  
21 mine too. It sounds like we just have to see if what  
22 the Board did was in conformance with the bylaws, and I  
23 guess -- yeah. Okay. I just wanted to hear what you  
24 had to say. We understand that, but I --

25 MR. ENSON: Well, I think that's correct,

1 Judge Cahill. And -- and, you know, to the point  
2 that -- that you and Mr. Reichert were asking earlier  
3 about, you know, why didn't the Board make a decision  
4 there? Why didn't the Board make some other step with  
5 respect to the application?

6 And I don't precisely know why the Board did  
7 or didn't do those things, and no one knows that but  
8 the Board. What's important for this IRP is, did the  
9 Board take that action in the absence of a conflict of  
10 interest based on due diligence and based on  
11 independent judgment, and I don't think there's any  
12 question about that. And if that's what this Panel  
13 finds, then the IRP must be denied, even if this Panel  
14 believes the Board should have done something  
15 different.

16 JUDGE CAHILL: Well, there's two different --  
17 there are two things there. One is to get us to say  
18 the Board should do something different, which the  
19 first step is to decide this issue. And the second  
20 issue is the Board should have done something  
21 different, which is approve it. I think our questions  
22 are going to the second category, not the first.

23 MR. ENSON: Right.

24 JUDGE CAHILL: Okay.

25 MR. ENSON: Agreed. Agreed.

1           But even as to the first, I think that the  
2 proper question is not whether the Board should have  
3 done something different, but whether what the Board  
4 did complied with the articles and bylaws, and the --  
5 the only reason -- the only way to reach that decision  
6 is to apply the defined standard of review in the  
7 bylaws.

8           MR. REICHERT: This is Klaus Reichert.

9           I -- I have understood the case, but I will  
10 be corrected, I would hope, that the -- that one of the  
11 Claimant's complaints is that the ICANN Board took a  
12 step which was to make a decision not to make a  
13 decision, and that's not something that the Board  
14 should have done.

15           The Board either makes a decision one way or  
16 the other. It should have made a decision in February  
17 2014 to say this, "We say yes" or "We say no," and  
18 say -- and saying, "We don't want to say anything for  
19 the moment" was not a -- was not consistent with the  
20 bylaws.

21           I -- I hope my understanding of -- of that  
22 position is correct. But what do you say to that  
23 proposition, that by not making a decision, that that  
24 in of itself was inconsistent with the bylaws?

25           MR. ENSON: Certainly. And -- and I'm glad you

1 raised that, Mr. Reichert, because it is a point  
2 that -- that I made a note on when you raised the issue  
3 earlier. And I -- I think -- I think you do have a  
4 good understanding of the process, but it is a bit  
5 different, I think, from what -- what you just  
6 described.

7           The Board in many circumstances does -- does  
8 not even address these applications for New TLDs. In  
9 many circumstances the Board takes no action on these  
10 TLDs. Instead, the applications follow the Guidebook  
11 through the process. As they pass through each  
12 evaluation section, they then move to contracting and  
13 delegation in the internet without the Board doing  
14 anything.

15           In exceptional circumstances, like when  
16 there's GAC advice or when the Board decides to  
17 exercise its subjective judgment on a particular TLD or  
18 TLD application, the Board may take some action. But  
19 there's no requirement that the Board say "yes" or "no"  
20 as to each TLD application. And as I said, in many  
21 circumstances the Board doesn't take any action on  
22 these applications. They just move through the  
23 process.

24           So there was no requirement in February 2014  
25 that the Board say "yes" or "no" as to these

1 applications. And as I said earlier, the Board saw  
2 this as an opportunity to provide the Claimant with a  
3 chance to move its applications forward by working with  
4 the community the applications were targeting, rather  
5 than just rejecting it at that point.

6 JUDGE CAHILL: Are you saying that the -- that the  
7 Board can just ignore the applications, not take any  
8 action at all when you say that -- yeah, that's my --  
9 that's my question. If there's an application,  
10 something -- "yes" or "no" has to happen?

11 MR. ENSON: Yes. But the "yes" or "no,"  
12 Judge Cahill, happens through the application process,  
13 not through Board review. So in the Guidebook there  
14 are certain stages that applications go through. And  
15 if they pass each stage, such as the initial  
16 evaluation, then they move on to the next stage. If  
17 they pass the next stage, then they move on to  
18 contracting and delegation.

19 And essentially the "yes" comes through a  
20 process, not through a Board vote. Very rarely has the  
21 Board actually taken action on specific applications  
22 because most of them just move through the process from  
23 application to eventually contracting and delegation in  
24 the internet.

25 So I want to be clear. I'm not saying the



1 Board just leaves applications in limbo. That's not  
2 what happens. The -- the applications move through the  
3 process based on the Applicant Guidebook.

4 In certain circumstances, like when the GAC  
5 raises concerns with an application, then the Board  
6 gets involved and -- and -- and makes a decision and  
7 determination on how to proceed.

8 MR. REICHERT: In those circumstances -- sorry,  
9 Bill. I'll let you go.

10 JUDGE CAHILL: No, you go ahead.

11 MR. REICHERT: Thank you, Bill.

12 But in those circumstances where -- and I --  
13 I can appreciate that the Board would only get involved  
14 if there was an issue with a particular application.  
15 If -- if -- if an application goes through without any  
16 issue whatsoever, I -- I'm -- I can appreciate that the  
17 Board wouldn't get involved.

18 But where you have in this circumstance a --  
19 two applications where there are issues, I suppose  
20 putting it at -- at its most simplest, why didn't the  
21 Board make a decision?

22 MR. ENSON: As I -- as I mentioned earlier, the  
23 decision was to allow the Claimant to continue to  
24 process its application and continue to seek the TLD.  
25 But in order to do that, the Claimant had to resolve

1 the conflicts regarding its governance model, and  
2 that's what the Board permitted the Claimant to do.

3 I don't think Mr. Rodenbaugh is asking ICANN  
4 or the ICANN Board to say "yes" or "no" on these  
5 applications. That's not what the Claimant is asking  
6 for. They're asking for --

7 JUDGE CAHILL: He asked for that -- he asked for  
8 that about two hours ago.

9 MR. ENSON: Well, I haven't seen that in any of  
10 their papers, Judge Cahill, and -- and if they wanted  
11 to --

12 JUDGE CAHILL: I hadn't either. I had not either.  
13 So anyway, let's --

14 MR. ENSON: I guess -- I guess what I would say --  
15 I guess what I would say to that is, the decision the  
16 Board makes -- it did make a decision and it provided a  
17 rationale, and the decision was to allow the Claimant  
18 to continue to pursue its application.

19 If the Claimant didn't want to, then it could  
20 have sought a refund, for example, of its fees, its  
21 application fees. But the Board gave the Claimant the  
22 opportunity to continue to pursue, rather than getting  
23 a thumbs up or a thumbs down.

24 MR. REICHERT: So perhaps another way of looking  
25 at it is to say that the Board, by deferring the

1 decision of the "yes" or "no" decision, it -- it did  
2 this in aid of the applications to give it an  
3 opportunity to see if this could all be sorted out.

4 MR. ENSON: I think that's exactly what -- what  
5 happened, yes, because, otherwise, it probably would  
6 have been a "no," given -- given the amount of  
7 objection. I'm not going to speculate about what the  
8 Board would have done or could have done.

9 But I think that's right, Mr. Reichert, is  
10 that these -- the Board permitted the Claimant to  
11 continue to seek its applications and continue to seek  
12 these TLDs by allowing it to stay alive, essentially,  
13 and to work with these entities.

14 And, you know, a week later this IR --  
15 this -- this process of the CEP and eventually the IRP  
16 was filed, and so there's nothing more for the Board to  
17 do while this is pending.

18 JUDGE CAHILL: Okay. I got it. Go on.

19 MR. ENSON: So I will move on. I know my time's  
20 getting short, so I'm going to try to move -- move  
21 through quickly and I'll --

22 MR. HAMILTON: I was just about to say that.

23 MR. ENSON: I'll move to Slide 21, please.

24 And -- and I'm not going to spend much time  
25 on this slide because we've talked about it before, but

1 this relates to another issue that the Board -- as I  
2 said, because of the GAC advice, the Board was required  
3 to take some action on -- on Claimant's applications,  
4 which is rare, as we discussed a few minutes ago.

5 But even if there was not that GAC advice,  
6 even if there was not that requirement by the -- the  
7 Guidebook that the ICANN Board act or take an action,  
8 Section 5.1 of the Guidebook rightfully places ultimate  
9 responsibility for the New gTLD program in the hands of  
10 the Board.

11 The Board has the discretion to act or not  
12 act and individually consider or not consider  
13 individual applications. Both the Merck and Vistaprint  
14 hierarchy Panels recognize that the Board enjoys this  
15 discretion.

16 And more importantly, the bylaws  
17 themselves -- forget the Guidebook -- the actual bylaws  
18 require this type of discretion, stating that directors  
19 shall serve as individuals who have a duty to act in  
20 what they reasonably believe are the best interests of  
21 ICANN.

22 So even if the GAC had not issued its  
23 non-consensus advice, the Board had authority to  
24 individually consider and act upon Claimant's  
25 application.

1           And with that, I will now quickly move on to  
2 respond -- responding to the Panel's questions, and the  
3 first is Question 1 at Slide 22, and we've discussed  
4 this before, the standard of review. I think we're all  
5 in agreement the Panel has the correct standard of  
6 review.

7           On Slide 23, the question of where --  
8 Question Number 2 of where the documents referenced in  
9 the 7 February 2014 letter are in -- in evidence, I've  
10 listed them there in the second bullet point.

11           Second question under Question 2 of were the  
12 objections referenced in ICANN's letter in substance  
13 argued before the expert. We've discussed about this  
14 before. We said this earlier, that the UAE did argue  
15 that there was a lack of community support.

16           But of particular importance was that at the  
17 time the Panelists were evaluating it, the official  
18 position of the OIC and the other countries and  
19 entities were not before the Panelists. That didn't  
20 come until almost a month later. So while the -- the  
21 argument was made, the level of support for the  
22 objections was not present at the time of community  
23 objections.

24           And I think we've addressed the -- the third  
25 bullet point as well, is whether the objectors had an

1 opportunity to put their objections before the experts.  
2 And as I said, all interested entities had an  
3 opportunity to file a community objection, but they're  
4 not required to do so. They have other avenues to  
5 raise their objection, such as through GAC advice or --  
6 or public comment.

7 And moving on to Slide 24, remaining question  
8 of Question 2, is it consistent with the articles,  
9 bylaws to ask AGIT to resolve matters with objectors,  
10 not withstanding the processes which had been gone  
11 through before.

12 Yes, particularly when the Board does so in  
13 an open and transparent and non-discriminatory fashion  
14 and acts without a conflict of interest. GAC advice,  
15 community objections, public comment and Board  
16 evaluation are discreet processes that have different  
17 standards.

18 So even though Claimant succeeded at the  
19 community objection level, that does not mean that the  
20 Board was foreclosed from considering GAC advice. If  
21 that truly was the case, that would mean that a  
22 successful resolution of a community objection would  
23 wipe out any sort of GAC advice or other objection  
24 mechanisms. That's just not the case.

25 Moving on to Slide 25, please.

1           The first point here is -- is that the Board  
2 did inform the Claimant that it had to resolve the  
3 conflicts between its representation of community  
4 involvement and claims to the contrary by the objecting  
5 entities.

6           Telling Claimant that it must resolve the  
7 conflict is an explicit instruction that Claimant must  
8 find a way to work with the noted entities and to try  
9 to reach an agreement on how the TLDs will be managed,  
10 and that is what the Board offered to the Claimant in  
11 terms of trying to move forward with its applications.

12           Moving on to Slide 26.

13           Is it consistent with the articles and bylaws  
14 to place an application on hold and not make a  
15 decision? Again, I think we've discussed this quite a  
16 bit today, but I will quickly go back through it.

17           There's no article, bylaw provision or  
18 Guidebook provision that prohibits the kind of action  
19 and the kind of decision the Board took with respect to  
20 Claimant's application. And putting the application on  
21 hold or giving the Claimant time to try to work with  
22 and consult with the very community it was seeking to  
23 represent was the Board attempting to aid the applicant  
24 in successfully obtaining the TLDs itself, rather than  
25 formally decline the application.

1 Moving on to Slide 27.

2 Question 3, whether ICANN took into account  
3 evidence and opinions of bodies, entities or persons  
4 who are neither experts, nor members of the GAC. And  
5 yes, the Board absolutely did.

6 In addition to considering the GAC advice,  
7 consultation with the GAC and the result of community  
8 objections, the Board considered public comments of  
9 other entities, such as the OIC and the GCC, as well as  
10 Claimant's representations regarding the application.

11 And, again, public comment is an important  
12 part of ICANN's policy. The Guidebook makes clear that  
13 general public comment forum will remain open through  
14 all stages of an evaluation process. So it was  
15 completely appropriate for the Board to take into  
16 account the public comment and the objection of  
17 non-experts and non-GAC members.

18 Moving to Slide 28, please, and this is  
19 Question Number 4. "Why is the scenario described in  
20 1.1.5 of the Guidebook not to be considered  
21 persuasive?"

22 Section 1.1.5 of the Guidebook, as  
23 Mr. Rodenbaugh said earlier today, is a list of common  
24 scenarios that applications may go through. GAC advice  
25 and fierce objection from the community were not listed



1 in any of these nine examples. These are simply  
2 examples of ways in which applications may proceed.

3 And just reading proviso of Section 1.1.5  
4 makes that clear, stating that the following scenarios  
5 briefly show a variety of ways in which an application  
6 may proceed through the evaluation process. This is  
7 not intended it be an exhaustive list of possibilities.  
8 There are other possible combinations of paths an  
9 application can follow, and that is certainly what  
10 happened with respect to Claimant's application.

11 Now, moving on to Slide 5 in response to  
12 Question 5, which I interpreted as a -- a question  
13 about the scope of the Panel's authority, and I think  
14 Judge Cahill and I spoke about it a little earlier, but  
15 I will quickly go through it again.

16 The Panel is authorized to issue a written  
17 declaration doing certain things stating whether or not  
18 an action or inaction of the Board is inconsistent with  
19 the Articles of Incorporation or bylaws designating a  
20 prevailing party, assigning costs to the IRP and then  
21 recommending action if the Panel so chooses.

22 It does not -- nowhere in the bylaws is a  
23 Panel authorized to issue the type of affirmative  
24 relief that I believe Claimant is seeking here.

25 JUDGE CAHILL: Let me -- let me say something.

1 This is Judge Cahill again.

2 You know, if -- if you're right -- and I  
3 don't know if you are or not. I have to talk to the  
4 other two Panelists. If you're right that this was  
5 just an opportunity to get this problem resolved,  
6 you're saying at the time the -- the Board took the  
7 action it did, it was reasonable within the bylaws.

8 But one of the objections of the Claimant  
9 is -- and I -- I know you say that just because they  
10 filed this -- this I- -- this action right away, but at  
11 some time, you know, just sitting in limbo like this  
12 for a long time gets to be a problem.

13 Do you think we have anything we could say  
14 about that, saying, well, maybe if this goes on for  
15 another month or two, then it's just too -- it's just  
16 de facto rejection and we've got to move on and then  
17 the Claimant does whatever they want? Because at some  
18 point if it just sits there like this, it isn't --  
19 that's not permitted by the bylaws, right?

20 MR. ENSON: Well, again, part -- as -- as I  
21 mentioned, Judge Cahill, a large part of -- of the  
22 delay has been this proceeding. It was filed shortly  
23 after, and so it has been in limbo based in large part  
24 on this proceeding.

25 And if -- if the Panel wishes to make a

1 recommendation to the Board, that certainly is within  
2 the Panel's authority. And then after the IRP is over  
3 and the declaration is issued, the Board will then take  
4 some action with respect to this Panel's declaration.

5 JUDGE CAHILL: Okay. That's what I want to know.  
6 Thank you.

7 MR. ENSON: Of course. And I'll quickly conclude  
8 on -- on the rest of the response to Question 5, which  
9 I think was asking what -- in Slide 30 what -- what the  
10 Board -- or what the Panel should do with various  
11 claims in -- in Claimant's brief.

12 And, again, my view is there's one Board  
13 action the Claimant has put at issue, and that is the  
14 Board's decision as communicated in the 7 February 2014  
15 letter. If the Panel reaches a conclusion on that  
16 issue of whether it was consistent with the articles  
17 and bylaws, I believe that all the Panel has to do in  
18 this matter, other than designating the prevailing  
19 party and assigning costs of the IRP, both of which I  
20 think can be presented in the Panel's written  
21 declaration.

22 And with that, I thank you for the time. I  
23 note that I am a bit over, and I apologize for that.

24 JUDGE CAHILL: Well, you're probably over because  
25 we're talking. Here's one more question, though.

1 MR. ENSON: Sure.

2 JUDGE CAHILL: Did you ever communicate with the  
3 Claimant that the reason there had been no action is  
4 because they haven't resolved this but also because  
5 they filed this proceeding?

6 MR. ENSON: I'm sorry, Judge Cahill. Would you  
7 repeat the question? I -- I missed the beginning.

8 JUDGE CAHILL: Yeah. One of the things you said  
9 why this was not proceeding was because -- I mean, the  
10 Board has not voted up or down on this partly because  
11 they haven't resolved their issues, but also partly  
12 because of this proceeding.

13 Did -- did anybody at the Claimant know that  
14 this was going to get stalled because of this  
15 proceeding?

16 MR. ENSON: Yes, Judge Cahill. It is public that  
17 on the filing of some sort of accountability mechanism,  
18 like a CEP or IRP, that the application at issue is  
19 automatically on hold. It states so in -- on ICANN's  
20 website, and Claimant knows that when it filed its  
21 application.

22 It's public knowledge. And the Claimant has  
23 known that as long as this is pending, the application  
24 is on hold and the Board will take no action with  
25 respect to the application out of deference to the IRP

1 Panel.

2 JUDGE CAHILL: Okay. Thanks. I don't think I  
3 have any more questions, but I can't speak for anybody  
4 else.

5 MR. ENSON: Thank you.

6 JUDGE HAMILTON: Okay. Well, gentlemen, thank you  
7 very much. There is the opportunity for rebuttals if  
8 you want it.

9 THE REPORTER: Who was that speaking just now?

10 JUDGE HAMILTON: That's Calvin Hamilton. Sorry.

11 THE REPORTER: Thank you.

12 MR. RODENBAUGH: Yes. This is Mike Rodenbaugh. I  
13 would appreciate some -- some time for rebuttal, but  
14 may I suggest that we take a short biological break  
15 first?

16 MR. HAMILTON: All right. Very good. Is five  
17 minutes okay?

18 MR. RODENBAUGH: Yes, for me. Thanks.

19 MR. HAMILTON: Terrific. Okay.

20 (Brief recess taken.)

21 MR. HAMILTON: All right. Well, Mr. Rodenbaugh,  
22 you wanted to use your rebuttal time, I think?

23 MR. RODENBAUGH: Yes, I'll use a very large  
24 portion of it. Thank you.

25 So first of all, my initial presentation went

1 to the limit there. We didn't really get back to  
2 discuss the three procedural violations. I think that  
3 we should just consider them issues submitted on the  
4 briefing, but I do feel that a decision as to those  
5 issues is certainly warranted.

6 Turning back to the substance of -- of what  
7 Mr. Enson presented to the Panel, going through the  
8 slide numbers, on Slide Number 6, he was talking about  
9 the GAC advice. And I think it's important to note the  
10 three different potential paths and the one that was  
11 chosen.

12 The third path was a consensus advice on an  
13 application -- or it's actually not a consensus -- if  
14 you get any sort of advice from the GAC, that an  
15 application should not proceed unless remediated. That  
16 was not the advice of the GAC. Yet, that's essentially  
17 what the Board has required, that ICANN -- that AGIT  
18 should do something in order for them to get approved.  
19 And so, honestly, the path the Board chose is simply a  
20 fly to the face of the GAC advice.

21 Insofar as they evaluated the non-consensus  
22 advice, as -- as the slides show in Number 8, that  
23 requires -- not Number 8 -- Number 7, that required  
24 that the Board enter a dialogue with the GAC, not some  
25 members of the GAC. There's a huge difference.

1           When the Board is talking or taking advice  
2 from the GAC, it's not from some members of the GAC.  
3 It's only from the consensus of the GAC. The GAC is  
4 always operated by consensus, meaning that there's a  
5 position stated and no formal objection to it.

6           And so in this case, the Board didn't get the  
7 advice of the GAC. What it did is it only got  
8 one-sided advice from a few of the objectors, and that  
9 was really unfair to -- to AGIT. It didn't take advice  
10 from AGIT's proponents within the GAC, and certainly  
11 there were -- there were plenty of them, and clearly  
12 the majority of the GAC did not agree with, quote, some  
13 members' concerns.

14           And so the whole process of -- of the -- the  
15 so-called dialogue with the GAC just didn't happen, and  
16 that was clearly known by several Board members,  
17 admitted by the chair of the GAC, and admitted by the  
18 Senior V.P. of Government Relations. All that is in  
19 our briefing and in the annexes and the Supplemental  
20 Brief.

21           JUDGE CAHILL: So my question on that is -- this  
22 is Judge Cahill -- what do you want to do about that?  
23 Should we just start the whole process over? What do  
24 you think we should recommend?

25           MR. RODENBAUGH: I think you should do what was

1 done in the DCA Trust case and in the .Registry case,  
2 which is basically -- and then subsequently in the  
3 Persian Gulf case as well, which was essentially in all  
4 three of those cases, the Panel found that ICANN didn't  
5 comply with its obligations in these processes, so it  
6 threw out the results of those processes and told ICANN  
7 to move on and disregard them, move to the next step of  
8 the process.

9 So with .Africa, that meant sent back to the  
10 contracting process, same with .Registry. And that's  
11 the relief that we've asked for, I think, very  
12 specifically in the last page of our Supplemental Brief  
13 at -- at least. We are essentially asking for the same  
14 scope of relief, the same precise relief that was  
15 granted by the IRP Panels in those previous  
16 precedential decisions.

17 So turning to an issue I had with Mr. Enson's  
18 Slide Number 9, and this really brand-new reliance on  
19 public comment, this was never mentioned in either of  
20 ICANN'S prior briefs and is, just frankly, a ridiculous  
21 argument. Merely because something was posted in a  
22 public comment forum, how is my client supposed to be  
23 aware of that?

24 You can see from -- from ICANN's own exhibit  
25 that that's an enormous doc- -- and -- and ever-growing



1 document. There's just simply no obligation on us to  
2 be monitoring for every comment about our applications.  
3 We paid \$185,000 for ICANN to evaluate them based on  
4 defined criteria, and the Guidebook provides defined  
5 criteria for governmental comments through early  
6 warnings and through GAC advice, both of which are  
7 affirmatively notified to the applicant and the  
8 applicant is provided a set period of time to provide a  
9 response.

10 I mean, the -- the notion that a public  
11 comment could somehow outweigh the established  
12 procedures in the Guidebook is very novel, and I guess  
13 that's why it's only coming up here in the last hour.  
14 But, I mean, taken to its extreme, it basically  
15 obliterates the entire Guidebook.

16 So, you know, ICANN -- and on that point,  
17 ICANN says that the objections changed over time, but  
18 that is just not true. The objections were always  
19 based on a lack of community support, every single one  
20 of them that we've been talking about. And the -- that  
21 was certainly known to Mr. Cremades.

22 You know, ICANN said affirmatively that he  
23 did not have access to the OIC objection, but that is  
24 just patently false. In fact, he issued two procedural  
25 orders trying to get exactly to that -- to that point,

1 to allow the UAE to prove up OIC's objection. And the  
2 OIC even prior to that, during the independent objector  
3 process, was affirmatively engaging with the  
4 independent objector and affirmatively knew of its  
5 ability to file an objection and chose not to do it.

6 So, you know, looking at -- the timing issue  
7 is really significant here. There have to be some  
8 limits. I mean, this was a contract with a financial  
9 expectation and the procedural expectations that were  
10 non-discriminatory and applied to all applicants,  
11 except, of course, my client with respect to only these  
12 two applications.

13 I mean, we have to wonder, what if the OIC,  
14 you know, came to object tomorrow and hadn't before and  
15 we had been operating this TLD? Would ICANN jump up  
16 and down and make us deal with them at that point? We  
17 don't know.

18 But the simple fact is, in this case the OIC  
19 had objected all along, and they refused to participate  
20 in the documented processes, instead going through  
21 back-channel, secretive lobbying to try to get what  
22 they wanted.

23 So moving on to Slide 15, you know, the OIC's  
24 objection saying that -- that, you know, the TLDs can't  
25 be operated by any entity not representing the

1 collective voice of the Muslim people.

2 Well, what does that mean and why did it  
3 not tell my client that its -- its policy Advisory  
4 Committee, which was specifically going to include the  
5 OIC, the GCC, any governmental representatives who  
6 wanted to participate essentially, all of this was  
7 proposed to them as an inclusive governance model?

8 They haven't given us any written feedback  
9 whatsoever as to that model as to how it -- how it  
10 could be changed or made more palatable to them to  
11 allow them to participate. None of the objectors have  
12 provided any sort of feedback, nor, of course, has the  
13 ICANN Board; yet, it's been before them all along.

14 So there's -- there's just simply no evidence  
15 that either the Board or the objectors even considered  
16 that model, even though it had been in front of them  
17 for essentially a year prior to February 2014.

18 So, I mean, there's no way that ICANN can  
19 deny that my client has been treated in a unique and  
20 discriminatory way. There's no other applications that  
21 have been handled anywhere near this way.

22 My client also applied for other religious  
23 terms, my client, for .Shia, one of the two major sects  
24 of Islam, for .Nowruz, which is a -- N-o-w-r-u-z, which  
25 is a major Muslim holiday, and there were no

1 objections. Those sailed through the process of my  
2 client operating them. But other entities applied for  
3 .Kosher, .Catholic, et cetera, again, no objections,  
4 sailed through the process.

5 So what makes these goverment objections  
6 special? It is a catch 22, as Mr. Reichert pointed  
7 out. I mean, how can we ever address this sensitivity?  
8 We don't really know what it means. We don't know who  
9 is the arbiter on it. We don't know what could  
10 possibly be done to make these governmental entities at  
11 this point in time or at that point in time in 2013  
12 happy. You know, we have --

13 MR. REICHERT: Could I stop you there? Sorry.  
14 Could I stop you there? This is Klaus Reichert.

15 What exactly has your client done in respect  
16 of the parties named in the letter? Has it written to  
17 the -- to the -- the entities referred to in  
18 Mr. Crocker's letter to say, "Mr. Crocker has  
19 identified for us that you have a problem with our  
20 applications. What is it that we can do to sort this  
21 out?"

22 MR. RODENBAUGH: So yes. Realize that after  
23 Dr. Crocker's letter, first there was the  
24 Reconsideration Process, and then when that was denied,  
25 as predicted, there was a -- we filed for a Cooperative

1 Engagement Process, which is a precursor to an IRP.  
2 That lasted for almost two years until, I think,  
3 November 2014 -- 2015 when we filed the IRP.

4 During that time we had multiple  
5 conversations with ICANN. I, in fact, met with  
6 Ms. Stathos and -- and John Jeffrey, general counsel at  
7 ICANN, and other ICANN executives on two of three  
8 occasions with respect to these matters.

9 We also facilitated -- they facilitated a  
10 conference call with the OIC representatives who, not  
11 by any coincidence, is also the UAE representative to  
12 GAC and who, in effect, is the man who has been styming  
13 our applications all along. And -- and the bottom line  
14 is, there have been many discussions with him and with  
15 other GAC members over the years.

16 MR. REICHERT: May we get his name for the record?

17 MR. RODENBAUGH: Yes. His name is Mr. Abdul  
18 Rahman, A-b-d-u-l R-a-h-m-a-n, is his last name.

19 And bottom line is, there's just no movement.  
20 It's a very clear position. I think it's made evident  
21 by the -- the e-mails that have come out in discovery  
22 between ICANN and the OIC rep that -- which actually  
23 was a different person at that time. But in any event,  
24 they -- they make pretty clear that the OIC's intent is  
25 to run this itself. Nobody else is going to be able to

1 do it.

2 So, you know, neither the OIC, nor ICANN has  
3 considered all of our well-documented support or our  
4 neutral governance model. They haven't told us how it  
5 conflicts with what. We don't know.

6 So that alone, it just was not a reasonable  
7 amount of facts in front of the Board when it made this  
8 decision. It had no facts as to what these conflicts  
9 are. Apparently it had no facts as to our support or  
10 our model. They had no facts as to the GAC  
11 deliberations other than what the objectors told them  
12 in that 32-minute secret meeting in Durban, since there  
13 were no minutes, no resolutions, no recording  
14 whatsoever of the GAC deliberations in Beijing that  
15 resulted in the initial advice of some members.

16 So not only was there clearly not a  
17 reasonable amount of facts in front of them, but they  
18 clearly did not exercise independent judgment. It's  
19 very clear they wholly delegated that judgment to these  
20 objectors, and we don't even know which ones or how  
21 they will decide or through what process or how we  
22 might challenge that decision. There's simply no  
23 guidance whatsoever. All we're told is, "Until they  
24 approve, you're on hold." And so that is just not  
25 transparent and certainly not independent.

1           So moving on to the -- sort of the remedial  
2           action, I think we already talked about that. Again,  
3           relying really on these two precedents on the fact that  
4           this process has been tainted; therefore, it should be  
5           disregarded with respect to this out-of-bound advice  
6           and the process should continue for my client.

7           The last point really is that ICANN, again,  
8           has not explained in its resolution or otherwise what  
9           is the public interest that is supposedly harmed by my  
10          client operating these TLDs when objectors haven't said  
11          anything other than there's some religious sensitivity  
12          about it.

13          But that doesn't say anything about the  
14          public interest in my client wanting the TLDs,  
15          particularly with the documented support that they have  
16          and with the governance model that they have provided  
17          or proposed.

18          So --

19          JUDGE CAHILL: This is Judge Cahill.

20          A question I asked to the other side, why  
21          doesn't -- I obviously don't know what I'm going to do,  
22          but I only get to talk to you once.

23          So what -- what's wrong with just saying,  
24          "Okay, Board, go decide this yes or no, up or down,"  
25          and -- and that's clearly -- well, I think that's

1 within our authority.

2 Isn't -- isn't that something that that's  
3 what you're really looking for?

4 MR. RODENBAUGH: I think you clearly can recommend  
5 to the Board that they make a decision up or down, but  
6 we're also asking that you make a recommendation that  
7 the Board has violated its bylaws in various ways in  
8 coming to that decision; and, therefore, the decision  
9 is tainted, that process is tainted, and the proper  
10 remedy is to ignore the tainted process and move to the  
11 next step.

12 JUDGE CAHILL: And the next --

13 MR. REICHERT: Sorry. Sorry, Bill.

14 JUDGE CAHILL: I'm sorry. The next step is what?

15 MR. RODENBAUGH: And the next step, as in the  
16 .Africa case, is simply to return the application to  
17 processing through the GDD, the Global Domains  
18 Division, which will mean in this case that they issue  
19 contracts.

20 MR. REICHERT: So, Counsel, just to be clear,  
21 effectively what you're saying is that we should direct  
22 in a binding fashion that your client get these -- gets  
23 these gTLDs?

24 MR. RODENBAUGH: Well, that will be the effect.

25 MR. REICHERT: I'm sorry. With the time being



1 short, it's not just a question of effect. Either it's  
2 "yes" or "no" to that.

3 MR. RODENBAUGH: Well, that's not precisely what  
4 we're asking for. We're asking --

5 MR. REICHERT: Well, what exactly are you asking  
6 for?

7 MR. RODENBAUGH: We're asking for a recommendation  
8 to the Board, a binding recommendation to the Board  
9 that the tainted process, the out-of-time, out-of-bound  
10 process be disregarded and, therefore, the application  
11 return to normal processing.

12 MR. REICHERT: We seem to be going around in  
13 circles, because doesn't that ultimately end up with  
14 you saying to us that we should effectively take over  
15 the ground process and -- and make sure that you get --  
16 your client gets --

17 (Interruption in the proceedings.)

18 MR. REICHERT: I suppose this just demonstrates  
19 the boundaries of the telephone process.

20 In effect what you're suggesting is that we  
21 should, in effect, in substance, or by whatever means  
22 or whatever roundabout way one comes at it, that the  
23 decision is effectively in our hands as to whether or  
24 not your client gets these two gTLDs; is that correct?

25 MR. RODENBAUGH: I think the decision -- I

1 think that the -- no, that's not correct; that  
2 ultimately the decision is with the Board. But that  
3 you, the Panel, can, and in effect has on at least  
4 three occasions, made binding recommendations. And I  
5 believe this is every time that the Panel has found  
6 ICANN to have violated its bylaws, although there may  
7 be one case where that happened and there was not a  
8 binding recommendation.

9 But the vast majority of the cases where  
10 violations have been found, the Panel have, in fact,  
11 made binding recommendations or at least  
12 recommendations which were then followed by the Board  
13 as to how the Board should remedy the violations.  
14 That's what we're asking for here.

15 MR. REICHERT: Specifically, can you point us to  
16 a -- an IRP precedent where the IRP Panel gave a  
17 binding recommendation that a gLTD (sic) should be  
18 awarded to the applicant?

19 MR. RODENBAUGH: Let me see. No. I can refer --  
20 but let me expound on that a little bit. In the  
21 .Africa DCA Trust case, the binding recommendation was  
22 that the application be returned to processing. In  
23 that case, that meant that it would continue through  
24 a -- a governmental community evaluation process where,  
25 in fact, it didn't have governmental support and it was

1 rejected.

2 In the latest case, .Persiangulf, which is  
3 also my client, AGIT, we were not a party to that  
4 proceeding. So we feel, frankly, that the effect of  
5 this decision was -- is totally unfair, and we're  
6 basically waiting to see how the ICANN Board is going  
7 to view it. But in that case the Panel made a binding  
8 recommendation to ICANN to reject my client's  
9 application, even though we weren't a party to the  
10 proceeding. So there are those two precedents.

11 The -- the third one was .Registry where the  
12 Panel made a binding recommendation, and this is the  
13 one I'm aware of off the top of my head. But in that  
14 case, the Panel made a binding recommendation that  
15 ICANN effectively throw out the tainted evaluation and,  
16 again, return the application to normal processing,  
17 which in that case is still pending.

18 So I hope that clarifies the issue, although  
19 I suspect perhaps it might mess it up a little bit.  
20 But all those decisions are provided --

21 (Interruption in the proceedings.)

22 MR. RODENBAUGH: Okay. I won't try to talk over  
23 that stuff for the court reporter.

24 THE REPORTER: Thank you.

25 MR. RODENBAUGH: So I think I'm just about -- I

1 think I'm just about done. I mean, I could rebut a few  
2 minor points from Mr. -- Mr. Enson's presentation near  
3 the end, but I'll just go ahead and -- and defer.  
4 Thank you very much to the Panel for your  
5 consideration.

6 MR. HAMILTON: Okay. Thank you, Mr. Rodenbaugh.  
7 Mr. Enson?

8 MR. ENSON: Yes. Thank you, Mr. Hamilton. I -- I  
9 will be very brief, and I appreciate this has gone on  
10 for quite some time, so I will be brief.

11 And first I want to talk about this issue of  
12 recommendations and binding -- binding recommendations  
13 and what other IRP Panels have done. No IRP Panel has  
14 ever issued a binding rest -- a binding recommendation.  
15 In fact, I don't know what a binding recommendation  
16 would be. A recommendation is a recommendation.

17 There have been Panels like the DCA Panel,  
18 for example, that made a recommendation to the Board,  
19 and the Board ultimately accepted that recommendation  
20 and followed it. But no Panel has ever said to the  
21 ICANN Board, "You must approve this application or you  
22 must do X, Y and Z." That has never happened because  
23 it's not permitted within the bylaws.

24 An IRP Panel, again, is permitted to issue a  
25 recommendation as part of its declaration of whether or

1 not the ICANN Board conduct, abide with the articles or  
2 bylaws. That is permitted and that has happened.

3 Just -- just quickly, on the -- the  
4 statements that ICANN Board violated the bylaws by only  
5 meeting with certain members of the GAC to discuss the  
6 GAC advice, it's simply not true. The ICANN Board,  
7 after receiving the GAC advice, informed the GAC that  
8 it was willing to meet. The meeting was arranged, and  
9 those GAC members who were interested attended.

10 There were -- again, listening to Annex 23,  
11 there were GAC members from Japan and from other  
12 countries that you would not think had any sort of  
13 interest in the .Islam or .Halal TLD that were present.

14 There were also -- one GAC representative  
15 from the country of Iran was ostensibly in favor of  
16 Claimant's application, although he never really said  
17 that he was in favor of them, but he was present and  
18 did present some of the arguments in favor of the  
19 application. So the Board did hear that some were in  
20 favor of these applications.

21 Finally, I know there's been a --  
22 Mr. Rodenbaugh spent quite an amount of time focusing  
23 on the IOC's -- or excuse me -- the OIC's comments and  
24 objections and calling them out of time and out of  
25 bounds. That's simply not true.

1           As I mentioned earlier, ICANN is built on  
2 public comment and built on public comment from  
3 interested entities and organizations. We made that --  
4 that point in our first Opening Brief. I believe it's  
5 at Page 5 of our Opening Brief in this IRP.

6           So Mr. Rodenbaugh claimed that we're now  
7 raising this for the first time in this hearing. This  
8 is just not true. We raised it a long time ago because  
9 it is an important part of the ICANN process.

10           And the OIC, even if it did not have its  
11 ducks in a row, as it were, to participate in the  
12 UAA -- UAE'S objection proceeding, it certainly did  
13 make its voice known later in the process.

14           And the Board faced with the GAC consensus  
15 advice had to make a decision. If the Board were not  
16 to consider a resolution on behalf of 1.6 billion  
17 Muslims around the world when evaluating .Islam and  
18 .Halal, then the Board would not be acting with a  
19 sufficient -- sufficient amount of facts in front of  
20 it, arguably anyway.

21           So the Board did have to consider that type  
22 of comment and that type of objection from the  
23 committee and the organization representing 57 Member  
24 States of Muslim countries.

25           MR. HAMILTON: Is that it?

1 MR. ENSON: Yes, please.

2 MR. HAMILTON: All right. That concludes your  
3 rebuttal, just to be clear?

4 MR. ENSON: It -- it does. Can I make one final  
5 point on .Shia and .Nowruz, which were --

6 MR. HAMILTON: Sure.

7 MR. ENSON: -- two applications that Claimant did  
8 apply for and was awarded? And the reason that those  
9 applications went through is there was no objection to  
10 them. There was no GAC advice regarding them. So they  
11 did follow the process as it's ordinarily laid out  
12 because they were not part of GAC advice or some other  
13 objection proceeding, and that's why Claimant was able  
14 to take those applications and bring them to fruition.

15 And with that, I thank the Board -- or I  
16 thank the Panel very, very much for their time, as well  
17 as Mr. Rodenbaugh and -- and Madam court reporter.

18 MR. HAMILTON: Okay. Thank you, Mr. Enson.

19 All right. Do my colleagues have any other  
20 questions?

21 MR. REICHERT: None for me.

22 JUDGE CAHILL: And none for Cahill.

23 MR. HAMILTON: Go ahead, Bill.

24 JUDGE CAHILL: No, no questions. No further  
25 questions.

1 MR. HAMILTON: Okay. Klaus?

2 MR. REICHERT: No, no questions.

3 MR. HAMILTON: All right. Well, that leaves me  
4 with my prerogative. I've got a couple for you.

5 And I'm -- I'm a little concerned about this  
6 question of the GAC advice. And if I understand  
7 Claimant's position, it is he's saying, well, yes,  
8 there may have been some communication with individual  
9 members of GAC back to ICANN, but whatever it is, there  
10 was no GAC advice as a whole which considered the  
11 concerns raised by GAC members.

12 In other words, if I understand his concern,  
13 it's that there is a consensus. It's one thing to have  
14 GAC -- GAC individual members voicing concerns, but  
15 another thing is what really constitutes GAC advice for  
16 purposes of either the guidelines or the bylaws.

17 And -- and -- and the guidelines, I think,  
18 says that the GAC as a whole will consider concerns  
19 raised by GAC members and agree on GAC advice to  
20 forward to ICANN Board of Directors. Now, this GAC as  
21 a whole, is that what we had? Did GAC as a whole  
22 provide advice to the ICANN Board?

23 And that's for you, Mr. Enson.

24 MR. ENSON: Thank you, Mr. Hamilton.

25 Yes, we did have advice from the GAC as a



1 whole. That advice was contained in the Beijing  
2 communique after the GAC as a whole considered these  
3 issues, weighed them, discussed them and issued advice  
4 to the ICANN Board stating that certain members within  
5 the GAC had concerns regarding these applications  
6 proceeding.

7 That is what we refer to as non-consensus  
8 advice in the Guidebook, and that is non-consensus  
9 advice from the GAC as a whole. And that advice then  
10 requires the Board to then dialogue and meet with GAC  
11 representatives to understand the scope of those  
12 concerns and then for the Board to take an action and  
13 document its rationale.

14 So we did have advice from the GAC as a whole  
15 in the Beijing communique. It was on a non-consensus  
16 basis. And then the Board met with those members that  
17 did have specific concern and others and -- and  
18 listened to those concerns to better understand them.

19 MR. HAMILTON: Okay. Thank you.

20 MR. RODENBAUGH: If I may respond on that?

21 MR. HAMILTON: Yes.

22 MR. RODENBAUGH: So that's -- that's the key.

23 When the Board went back to the GAC, it did not go back  
24 to the GAC, and that was made very clear by the Chair  
25 of GAC and by two Board members who were objecting to

1 the process at that time.

2 It was a meeting only of concerned members of  
3 the GAC because, well, GAC had already, quote, resolved  
4 its -- resolved the issue and didn't want to issue any  
5 more advice, but that was the problem. The Board was  
6 bound by its own procedure to communicate with the full  
7 GAC, not just the several members of the GAC, and it  
8 never did that.

9 There's no evidence that the full GAC was  
10 ever made aware of what transpired in that 32-minute  
11 Durban meeting. There was simply never any further  
12 word from the GAC after that. Moreover, the whole GAC  
13 wasn't even notified of that meeting. This evidence is  
14 in the record.

15 MR. HAMILTON: Okay. Thank you for that.

16 Another question. The --

17 MR. ENSON: I'm sorry. Mr. Hamilton, may I just  
18 briefly respond on that point?

19 MR. HAMILTON: Yes, please. Go ahead.

20 MR. ENSON: The entire GAC was certainly aware  
21 that the Board requested a meeting regarding these  
22 issues to better understand the GAC advice. The Board  
23 has a resolution in its score card on the Beijing  
24 communique saying that the ICANN Board stands ready to  
25 meet with the GAC to better understand the concern.

1           The GAC then scheduled the meeting. The  
2 meeting was open to every GAC member that wanted to  
3 attend, and a number of them did. The entire GAC did  
4 not attend. Those who had no interest in the issue  
5 apparently or had no voice on the issue did not attend.  
6 Those who were either in favor of the application or  
7 those who were opposed to the application did attend  
8 that meeting.

9           MR. HAMILTON: Would that -- would that then have  
10 constituted the GAC? I think that's what Claimant is  
11 concerned about.

12           MR. ENSON: The -- the -- the requirement is that  
13 the Board meet with the GAC to better understand the  
14 concerns as for the -- it would make no sense for a  
15 country that has no concerns or has no care about this  
16 issue whatsoever to attend such a meeting. It cannot  
17 inform the Board of those concerns because it has none.

18           Only those who either are opposed to the  
19 invite or are in favor of the invite has some relevance  
20 to that discussion, and they were all invited. And as  
21 I said, the representative from Iran who was in favor  
22 of these applications did attend that meeting and did  
23 make some favorable comment regarding the application.

24           MR. HAMILTON: Okay. All right.

25           MR. RODENBAUGH: Not true.

1 MR. HAMILTON: I've got another issue with -- with  
2 respect to what was discussed, and that is the question  
3 of the OIC's timeliness with respect to their  
4 objections. Now, I've listened to the comments, and it  
5 would seem that while Mr. Cremades, in his independent  
6 expert process, the -- the OIC, they were given an  
7 opportunity to participate and -- and decided for A or  
8 B reasons not to.

9 After the -- the decision from Mr. Cremades,  
10 which was, I think, October 24, some 10 days or 12 days  
11 later, OIC comes along and says, "Hey, I've got an  
12 objection."

13 And my question then is, is there anywhere in  
14 the guidelines we apply a statute of limitation  
15 standard? In other words, is it -- when is it too late  
16 for an objector to object in the context of  
17 Mr. Cremades' expert advice or -- or -- or decision?

18 MR. RODENBAUGH: May I start on that?

19 MR. HAMILTON: Yes. Is that Mr. Rodenbaugh?

20 MR. RODENBAUGH: Yes, it is.

21 MR. HAMILTON: Go ahead.

22 MR. RODENBAUGH: And the answer to your question  
23 is yes, there is a defined objection window that is  
24 made public to everybody, in particular to the GAC, and  
25 so the OIC had a chance to file an objection at that

1 point. Then they got a second timeline because  
2 Mr. Cremades, through a request from the UAE, allowed  
3 that in the UAE's objection proceeding.

4 So they've literally had two chances, both  
5 were time limited, and they decided not to formally  
6 participate, other than through the UAE, until they got  
7 the adverse decision and then -- and then immediately  
8 called ICANN's staff asking them what to do about it.  
9 There's an e-mail to that effect that just came out in  
10 discovery. And -- and then, you know, suddenly we have  
11 a letter from the OIC saying that everybody objects.

12 MR. HAMILTON: Mr. Enson?

13 MR. ENSON: Thank you very much. Just a few quick  
14 points on that.

15 First of all, I don't know that the OIC  
16 decided not to participate in a community objection or  
17 decided not to file its own community objections. I'm  
18 not sure why they did what they did. But, again, I  
19 think what it was, was getting a -- 57 Member States  
20 together to unify in one point of time, and eventually  
21 it did come to pass.

22 But the issue is not -- the -- again, we've  
23 got to keep these different objection mechanisms  
24 separate. There's community objection. There's GAC  
25 advice. There is public comment. There are others.

1 There is no time line. There's no deadline for GAC  
2 advice. There's no deadline for public comment. The  
3 Guidebook specifically says in Section 1.123 that the  
4 general public comment will remain open for the -- for  
5 the application lifecycle.

6 So the OI -- sorry, go ahead.

7 MR. HAMILTON: Go ahead. Go ahead. I didn't mean  
8 to interrupt. Go ahead.

9 MR. ENSON: And the other point is, what we should  
10 really be evaluating is not what the OIC did and when.  
11 What we should be evaluating is what the Board did.  
12 And was the Board in a position in February of 2014 to  
13 simply say, "We're going to ignore the voices of 1.6  
14 billion people because their organization didn't file a  
15 community objection"?

16 If the Board had done that, then some would  
17 argue the Board would be violating the bylaws by  
18 failing to consider material information. The Board  
19 had an objection from the sole voice of the community  
20 that the Claimant was trying to represent, and that  
21 voice was saying, "We object."

22 The Board had to consider it in connection  
23 with and in context with the GAC advice that it had  
24 received as well. In taking all of that together, the  
25 Board made the decision it made.

1 MR. HAMILTON: All right. If -- if for the sake  
2 of argument we decide that the GAC advice is no such  
3 thing, that, indeed, that's a violation of the bylaws,  
4 then you're -- you're -- you're left here with the  
5 question of the OIC and the community objection; isn't  
6 that correct?

7 MR. ENSON: I'm sorry, Mr. Hamilton. I just want  
8 to make sure I understand your question.

9 You said if the GAC --

10 MR. HAMILTON: If, for the sake of argument, we  
11 understand that what you're considering GAC advice, the  
12 Tribunal decides that that's not GAC advice, that the  
13 GAC as a whole did not provide that advice, let's just  
14 say for argument's sake, you're left with OIC community  
15 objection; isn't that so?

16 MR. ENSON: Well, certainly, yes. We have the  
17 objection in the letters from the OIC --

18 MR. HAMILTON: Right.

19 MR. ENSON: -- and objections from other  
20 governments. But I just want to say again,  
21 Mr. Hamilton, there's no question that the Beijing  
22 communique is GAC advice. It is non-consensus advice  
23 that is specifically provided for in the Guidebook.

24 MR. HAMILTON: No, I get that. I get that. I get  
25 that. That's -- that's -- that's -- I understand that.

1 What I'm trying to get -- what I want to talk about now  
2 is the OIC and when they applied -- or when they  
3 provided that objection. I'm trying to figure out  
4 whether or not they could have waited four months or  
5 five months after Mr. Cremades' decision.

6 Could they have made it a year and would that  
7 still have been a timely objection? That's -- that's  
8 the question I'm asking.

9 MR. ENSON: Understood.

10 Yes, I think if -- if timely an objection is  
11 made during the evaluation process, and that's what the  
12 public comment section of the Guidebooks say. So as  
13 Mr. Rodenbaugh joked earlier, if they had gotten a  
14 contract and gone to get delegation and then the OIC  
15 objected, nothing -- there would be no -- there would  
16 be no -- that objection would have no force because  
17 the -- the -- the TLD would already be in operation.

18 The point was, in an evaluation process,  
19 concerned entities and organizations and individuals  
20 could make comments and let the Board know their views.  
21 That is what happened during the evaluation process.

22 MR. HAMILTON: Okay. Now -- go ahead. Somebody  
23 wants to comment?

24 MR. RODENBAUGH: If I could. It's  
25 Mike Rodenbaugh.



1           But there were defined time frames for  
2 community objections to be filed. There was a defined  
3 time frame for GAC advice and for GAC early warnings.  
4 Those were all defined.

5           The OIC was well aware of them from the very  
6 beginning because the independent objector was working  
7 directly with the GAC (sic) and said specifically at  
8 the end of his report that the OIC was fully aware of  
9 the issues with my client's applications and had an  
10 opportunity to object.

11           They then waited, I think, some 18 months.  
12 I -- I -- I don't recall the exact date of the report,  
13 but from that date to the date of December 2013, they  
14 basically did nothing when they could have participated  
15 in the GAC. They could have filed a community  
16 objection.

17           MR. HAMILTON: Okay.

18           MR. ENSON: And this is Mr. Enson.

19           I would just say one more time that this IRP  
20 is not about the OIC. This IRP is not whether the OIC  
21 could have moved faster or -- or complied better with  
22 ICANN mechanism. This is about whether or not the  
23 Board complied with the articles and bylaws, and the  
24 Board had to consider that type of information whether  
25 it could have been filed months before or not.

1 MR. HAMILTON: Right.

2 MR. RODENBAUGH: But the Board is also bound to  
3 follow its documented policies and procedures and to  
4 make its decisions based on expert advice, which those  
5 documented procedures were specifically designed to  
6 elicit.

7 MR. ENSON: Yeah, one of those procedures in the  
8 Guidebook allows public comment anytime during the  
9 evaluation process, and that's what happened here.

10 MR. RODENBAUGH: Yeah, but that's not supposed to  
11 supersede everything else.

12 MR. HAMILTON: Okay. All right. Okay. Now, let  
13 me just move on with another question that I have.

14 The guidelines, I think, in -- the guidelines  
15 in -- just bear with me a second now -- in  
16 Section 3.5 -- 3.5.4, the community objections, they  
17 provide for -- when they talk about -- there are four  
18 standards and they're cumulative. In other words, you  
19 must satisfy all four of them.

20 And in the detriment part it says, "An  
21 allegation of detriment that consists only of the  
22 applicant being delegated the string instead of the  
23 objector will not be sufficient for a finding of  
24 material detriment," and I think the spirit of that is  
25 you can't just allege. You've got to prove this.

1 You've got to prove that there are -- there is a  
2 detriment as one of the conditions.

3 Now, with respect to the bylaws and the  
4 standard and the criteria under the bylaws and the  
5 guidelines, where is the proof that, indeed, there was  
6 a -- a detriment to the community if these strings were  
7 awarded to the -- the Claimant?

8 MR. ENSON: Thank you, Mr. Hamilton. This is --  
9 this is Eric. Perhaps I will start.

10 First of all, the -- this standard in 3.5.4  
11 of the Guidebook relates to community objections.

12 MR. HAMILTON: Yes.

13 MR. ENSON: The Board does not decide community  
14 objection. Individual Panelists do that, like  
15 Mr. Cremades. The standard does not apply to the Board  
16 when it makes decisions either in evaluating GAC advice  
17 or not.

18 MR. HAMILTON: Right.

19 MR. ENSON: But the true detriment is the level of  
20 objection that the Board received from multiple Muslim  
21 countries, as well as multiple Muslim organizations,  
22 and they all objected to this application proceeding.

23 The Board is not required to specifically  
24 determine what the detriment is, but it has to evaluate  
25 and consider these type of objections, unlike a -- a

1 Panelist evaluating a community objection.

2 MR. RODENBAUGH: May I respond?

3 MR. HAMILTON: Yes.

4 MR. RODENBAUGH: The -- that's just completely  
5 untrue. Everything that the Board does has to be in  
6 the public interest, very specifically in the  
7 Guidebook, not just in that provision of the community  
8 objection process, but in the, you know,  
9 ICANN-has-whatever-discretion-it-wants provision that  
10 ICANN has completely hung its hat on in the Guidebook,  
11 you know, the 400-plus pages, it picks on those two  
12 sentences.

13 And even those two sentences, one of them is  
14 ICANN has to make a determination about what is the  
15 public interest in evaluating their decision. They  
16 didn't do it. The objectors never provided it. ICANN  
17 experts denied it. And ICANN has made no effort  
18 whatsoever to point out any detriment or any harm to  
19 public interest or the Muslim community for my client's  
20 operation of these TLDs.

21 MR. HAMILTON: Okay. Gentlemen, I -- those are my  
22 questions. You've responded to them. I'm happy with  
23 that.

24 My colleagues have any other questions?

25 JUDGE CAHILL: If you're talking to Bill Cahill,

1 no.

2 MR. HAMILTON: Okay.

3 JUDGE CAHILL: I'm ready to take it under  
4 submission and think about it.

5 MR. HAMILTON: Okay. Thanks.

6 MR. REICHERT: Klaus Reichert. No further  
7 questions for me.

8 MR. HAMILTON: Okay. Very good.

9 Now, with respect then -- this question is  
10 for both parties and it has to do with actual procedure  
11 and due process and the like, and I just wanted to  
12 know -- well, the Panel wants to know whether or not  
13 they have been treated fairly throughout this process  
14 thus far.

15 MR. RODENBAUGH: Well, I certainly believe so. I  
16 certainly appreciate the Panel's consideration of the  
17 matter. I think all the procedures so far have been  
18 fair, yes. Thank you.

19 MR. ENSON: ICANN also does thank the Panel for  
20 its work, and certainly does agree that it's been  
21 treated fair in being given an opportunity to present  
22 its case, and we appreciate that.

23 MR. HAMILTON: Perfect. Okay. Should we --  
24 should we then postpone the closing of these  
25 proceedings until we receive the transcript?

1 MR. RODENBAUGH: I think we should. I think  
2 Mr. Enson said at the outset that we, of course, have a  
3 chance to review them and make sure that we agree  
4 they're accurate. And, otherwise, at that point I  
5 think the proceedings would be closed, unless the Panel  
6 decides otherwise. And, for example, there may be an  
7 issue around the prevailing party, which in some IRPs  
8 has been handled subsequent to the final declaration.

9 MR. HAMILTON: Okay. Sounds fair to me.

10 MR. ENSON: I'm fine to keep the -- the  
11 proceedings open for the purpose of reviewing the  
12 transcript and then moving from there and then closing.

13 MR. HAMILTON: Okay. I think we'll do that. All  
14 right. So then unless there are no further issues,  
15 procedures or otherwise, I thank you both, Counsel. I  
16 thank my colleagues on the Panel, and I bid you  
17 farewell.

18 MR. ENSON: Thank you very much.

19 MR. RODENBAUGH: Thank you very much, gentlemen.

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21 (End of proceedings at 12:34 p.m.)

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CERTIFICATION  
OF  
CERTIFIED SHORTHAND REPORTER

I, the undersigned, a Certified Shorthand Reporter of the State of California do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand, which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name this 11th day of May, 2017.



Jana Bommarito, CSR

CSR No. 10880

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[california - client's]

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[irp - leading]

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[leaves - meeting]

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[meeting - never]

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[rodenbaugh - sits]

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