

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

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

LIST OF AUTHORITIES

**AFILIAS DOMAINS NO. 3 LIMITED'S
REPLY IN SUPPORT OF ITS ARTICLE 33 APPLICATION
FOR AN ADDITIONAL DECISION AND INTERPRETATION**

30 September 2021

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LIST OF AUTHORITIES

Exhibit No.	Description
CA-165	<i>Cadogan Maritime Shipping Inc v. Turner Shipping Inc.</i> [2013] EWHC 138 (Comm)
CA-166	<i>Union Marine Classification Services LLC v. Gov't of the Union Comoros</i> [2015] EWHC 508 (Comm)
CA-167	<i>ICM Registry, LLC v. ICANN</i> , ICDR Case No. 50-117-T-00224-08, ICANN's Response to Request for Independent Review (8 Sep. 2008)

Neutral Citation Number: [2013] EWHC 138 (Comm)

Case No: 2012 1080

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 05/02/2013

Before :

MR JUSTICE HAMBLLEN

IN AN ARBITRATION CLAIM

BETWEEN :

(1) CADOGAN MARITIME INC

Claimant

- and -

(2) TURNER SHIPPING INC

Defendant

Vernon Flynn QC (instructed by **Jones Day**) for the **Claimant**
Michael Swainston QC and Jawdat Khurshid (instructed by **Davis & Co**) for the **Defendant**
Hearing dates: 25 January 2013

Judgment

Mr Justice Hamblen:

Introduction

1. The Claimant (“Cadogan”) seeks a declaration under section 68(3) (c) of the Arbitration Act 1996 (“the Act”) that an Additional Arbitration Award of Mr Robert Gaisford dated 16 July 2012 (the “Additional Award”) is of no effect and permission to appeal against the Additional Award under section 69 and (should its application for leave to appeal succeed) an order that the Additional Award be set aside under section 69(7) (d).
2. The Additional Award was the second award to be made in an arbitration between Cadogan (the Respondent in the arbitration) and the Defendant to these proceedings (“Turner”, the Claimant in the arbitration). The Additional Award was purportedly made pursuant to the Tribunal’s powers under section 57 of the Act, following an application by Turner under this provision.

3. It is Cadogan's case that, by making the Additional Award, the Tribunal:
 - (a) acted in excess of its powers under section 57 of the Act. This was a serious irregularity, contrary to section 68;
 - (b) misinterpreted those powers, causing it to commit an error of law under section 69.

Factual background

4. The underlying dispute between the parties arose out of the sale of a new-build vessel ("Hull 3029") by Turner to Cadogan, pursuant to a memorandum of agreement dated 21 June 2007 (the "MOA"). The first instalment of the purchase price, in the sum of US\$7.7 million, was paid to Turner by or on behalf of Cadogan on 5 July 2007. In return, Turner provided Cadogan with a refund guarantee for the same sum (the "Refund Guarantee"). The Refund Guarantee was issued by Banque Degroof, and dated 2 July 2007.
5. In October 2009, Cadogan contended that Turner was in repudiatory breach of the MOA, and made a demand under the Refund Guarantee. In November 2009, and pursuant to a joint instruction from the parties, Banque Degroof paid the US\$7.7 million, plus the interest on that sum that had by that time accrued (in the sum of US\$923,520.77; the "Accrued Interest") into an escrow account (the "Escrow Account"), pending the resolution of the arbitration proceedings that had since been commenced by Turner. Additional sums were later paid into the Escrow Account by way of security for costs.
6. In the arbitration proceedings, Turner claimed a declaration that Cadogan had not been entitled to make any demand under the Refund Guarantee. It further contended that Cadogan had committed repudiatory breaches of the MOA, which it had accepted. In relation to that claim Turner sought a declaration that it was entitled to retain the US\$7.7 million purchase price paid by or on behalf of Cadogan. Further or alternatively, Turner claimed damages for loss of bargain, in the sum of US\$6 million.
7. Cadogan denied Turner's claims. Cadogan's primary case was that it was entitled to avoid the MOA on the grounds of fraudulent or negligent misrepresentation, alternatively to treat it as having been repudiated by Turner, which repudiation Cadogan accepted. In the event that it lost on these issues and Turner's claim for breach of contract succeeded, Cadogan claimed restitution of the first instalment of the purchase price, less any damages awarded to Turner.
8. The Tribunal comprised Mr Mark Templeman Q.C. and Professor Marco Lopez de Gonzalo as arbitrators, and Mr Robert Gaisford as umpire. Following the evidentiary hearing, Mr Templeman Q.C. and Professor Lopez were unable to agree, with the result that it fell to Mr Gaisford to determine the issues in dispute. References to the "Tribunal" in this judgment are, in consequence, references to Mr Gaisford alone.
9. The Tribunal published its First Final Arbitration Award (the "First Award") on 8 June 2012. In the First Award, the Tribunal rejected Cadogan's claims for both

misrepresentation and breach of contract, and held that Cadogan had committed repudiatory breaches of the MOA, which Turner had accepted.

10. The Tribunal rejected Turner's claim to retain the US\$7.7 million purchase price, but granted its claim for damages in the sum of US\$6 million, with interest thereon to run from 30 November 2009. It ordered that these sums, together with any costs later awarded to Turner (this issue being reserved for future determination) be paid from the Escrow Account but that Cadogan was entitled to claim any balance in the Escrow Account in restitution.
11. Following publication of the First Award, Turner made an application to the Tribunal under section 57 of the Act. Turner claimed that it, and not Cadogan, was entitled to the sum of the Accrued Interest, and that the First Award should be corrected, or an additional award made, in order to reflect this.
12. On 16 July 2012, the Tribunal published the Additional Award, which acceded to Turner's application. It ordered that the sum of the Accrued Interest, US\$923,520.77, be paid to Turner out of the Escrow Account.

The First Award

13. The formal, dispositive parts of the First Award were expressed as follows:
 1. **"I HEREBY DECLARE** that Cadogan was not entitled to make any demand under the Refund Guarantee and/or in relation to the Vessel on the basis of the breaches of the MOA that it has alleged.
 2. **I FIND AND HOLD** that the claim of Turner against Cadogan succeeds in the amount of US\$6,000,000.00 and no more.
 3. **I AWARD AND DIRECT** that Cadogan shall forthwith pay to Turner damages in the sum of US\$6,000,000 together with interest thereon at the rate of the three-month US\$ LIBOR plus 2.5%, compounded at three-monthly rests, from 30 November 2009 until the date of payment, which sums are to be paid out of the Escrow Account, and Cadogan shall do all such matters, acts and things as may be necessary to procure the said payment therefrom.
 4. **I FURTHER FIND AND HOLD** that Cadogan's claim in restitution succeeds to the extent only that there is any balance in the Escrow Account after payment out to Turner of the said sum of US\$6,000,000, interest thereon as awarded above and such costs as may hereafter be awarded to Turner.
 5. **I HEREBY RESERVE** all questions of costs for future determination including liability for the costs of the Tribunal.
 6. **I HEREBY DECLARE** that this my First Final Arbitration Award is final as to all matters determined herein."
14. In the Reasons forming part of the First Award the Tribunal's conclusion on liability was:

"116. In the circumstances, therefore, I reject the argument that Turner were in repudiatory breach when Cadogan purported to accept it and it follows that

Cadogan were themselves in repudiatory breach and Turner were entitled to accept the same when they did on 23 December 2009. Consequently, they are entitled to damages for Cadogan's repudiation."

15. The Tribunal's findings on damages were:

"117. Turner claimed that they were entitled to retain the US\$7.7m, representing the first instalment of the purchase price but, alternatively, maintained that they had suffered loss and damage by way of loss of bargaining in the amount of US\$6m. This is based on the difference between the purchase price for the vessel of US\$38.5m and the price achieved when the vessel was sold to a third party, Spar Shipping AS, for US\$32.5m.

118. Cadogan, for their part, contended that in such circumstances (i.e. where they were found liable for repudiatory breach) Turner were entitled to be compensated in the amount of US\$6m but were not entitled to keep the balance of the first instalment and that the sums held in escrow should be paid out as follows:-

- (1) US\$6,000,000.00 to Turner
- (2) US\$1,700,000.00 to Cadogan; and
- (3) Accrued interest paid out pro-rata

119. The circumstances in which Turner would be entitled to retain the instalment of US\$7.7m are set out in clause 13 of the MOA which provides as follows:-

Buyers' default

Should the payments under Clause 17 not be paid in accordance with Clause 17, the Sellers have the right to cancel this Agreement and Bank Refund Guarantee, referred to in Clause 17 herein, in which case the Buyers shall forfeit all payments made under Clause 17. If these payments do not cover their losses the Sellers shall be entitled to claim compensation for their losses and for all expenses incurred together with interest from the Buyers and their guarantors.

Those circumstances do not apply here since Cadogan had paid the first instalment in accordance with clause 17 and the next instalment was not due until March 2010 and consequently, there is no contractual right for Turner to retain the first instalment. Turner are, however, entitled to damages and I agree that the quantum of those damages is US\$6m being the difference between the purchase under the MOA and the price for which the vessel was sold to Spar Shipping AS. However, they are also entitled to interest on that sum and I consider that interest should be awarded to run from 30 November 2009 (by which date the amount of the first instalment had presumably been paid into the escrow account) at the rate of the three-month US\$ LIBOR plus 2.5%, compounded at three-monthly rests, which I consider to be a fair commercial rate of interest for the period in question, up to the date of payment.

120. Since the amount of US\$7.7m was paid in accordance with clause 17 of the MOA as “security for the correct fulfilment” of that agreement, the said principle sum of US\$6m together with the said interest should be paid out of the first instalment which is now in the Escrow Account. Any balance remaining in the Escrow Account after payment of these sums, is to remain there until determination of the question of liability for and quantum of costs. Thereafter, any remaining balance is to be paid to Cadogan by way of restitution.”

The Additional Award

16. The Tribunal held that it had power to make an additional award under section 57 as the Accrued Interest claim had been overlooked. It was found as follows:

“I. Having considered the parties’ arguments there is no doubt in my mind but that I must accede to Turner’s application and I regard Cadogan’s position as more than a little opportunistic. The bare facts of the position are these:-

- (1) Cadogan made a wrongful demand under the Refund Guarantee established by Turner in respect of the first instalment of the purchase price on 20 October 2009 demanding payment in the sum of US\$7,700,000.00 “together with interest calculated at the rate stipulated in the Shipbuilding Contract ... from the date of the payment of the said instalment to the date of remittance of such refund ...”.
- (2) Court proceeding ensued and the parties made the Escrow Agreement pursuant to which US\$7,700,000.00 together with the Accrued Interest was paid into the Escrow Account.

J. In a way, it might be said that it is implicit in my First Award that, as a result of my findings, the Accrued Interest should plainly be returned to Turner, being interest to which they were at all times entitled but was only paid into the Escrow Account as a result of the wrongful demand on Banque de Groof. However, I am aware, as author of my First Award, that regrettably I overlooked dealing with the Accrued Interest. Cadogan argued that Turner never claimed it but I cannot accept that argument. For example, paragraph 77 of Turner’s outline closing submissions contained an application for a declaration that Turner is entitled now to all sums in the Escrow Account and asked for an order that Cadogan do all things necessary to procure payment of those sums to Turner. Given my determinations in my Final Award it must follow that the Accrued Interest should be returned to Turner and I can see no conceivable basis on which Cadogan could or should be entitled to it. The Accrued Interest belonged to Turner; it was paid into the Escrow Account as a result of Cadogan’s wrongful demand under the Refund Guarantee; Cadogan has no entitlement to it whatsoever and it should accordingly be returned to Turner together with interest. As to the latter, while I am tempted to award it from 18 November 2009 when, it now appears, the sum was actually paid into the Escrow Account, I do not consider that I can properly do so since this would be based on evidence adduced by Turner after my award was made, which I do not consider is strictly admissible. I therefore consider that it should be treated in the same way as the interest on damages that I have awarded.

K. I therefore consider that this is a case where I should make an additional award in this respect, since I failed to deal with it in my First Award.”

17. The Tribunal commented that Cadogan’s claim was “more than a little opportunistic”. That was fair comment in the light of his conclusion that he could see “no conceivable basis upon which Cadogan could or should be entitled” to the Accrued Interest and that it had “no entitlement to it whatsoever”. Cadogan’s application to seek permission to appeal from that conclusion was dismissed on the grounds that the Tribunal’s decision was not “even open to serious doubt”. I agree. Up until the termination of the MOA Turner had a contractual entitlement to the US\$7.7 million and could deal with it as it wished. In the event it was prevented from doing so by Cadogan’s wrongful demand under the Refund Guarantee which resulted in the principal sum and the Accrued Interest being paid into the Escrow Account. Cadogan itself only had a claim in restitution because in the event Turner’s damages claim was for a lesser sum than US\$7.7 million. That claim did not accrue until termination of the MOA, by which time all the Accrued Interest had been earned. Although Cadogan submits that it is irrelevant to its application, it is striking that no legal justification for a substantive claim by it for the Accrued Interest has been identified.

Section 57

18. Cadogan’s applications under sections 68 and 69 of the Act both relate to the scope of the Tribunal’s powers under section 57, and specifically section 57(3). This provides as follows:
- “The tribunal may on its own initiative or on the application of a party –
- (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or
 - (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.”
19. Cadogan contends that the Tribunal acted in excess of its powers under section 57 and/or misinterpreted those powers by making the Additional Award.
20. Cadogan’s primary case is that Turner did not make a claim in the arbitration for the Accrued Interest. In consequence, the Tribunal had no power to make the Additional Award under section 57(3) (b) of the Act.
21. Alternatively, even if Turner did make a claim in the arbitration for the Accrued Interest, Cadogan submits that the claim for the Accrued Interest was dealt with in the First Award. In consequence, the Tribunal had no power to make the Additional Award under section 57(3) (b).

Whether a claim for Accrued Interest was “presented to the tribunal”

22. Section 57(3)(b) covers claims “presented” to the tribunal; no particular formality is required. Provided that the claim is before the tribunal and would reasonably be

expected to be determined it does not matter how the claim has been placed before the tribunal. It does not, for example, have to be a claim set out in written pleadings or submissions.

23. In the present case, in its Particulars of Claim Turner recorded at paragraph 38:

“The purported demand for payment under the 3029 Refund Guarantee claimed the amount of US\$7,700,000 plus interest of US\$923,520.77, viz. a total of US\$8,623,520.77.”
24. The demand was therefore for both the principal sum of US\$7.7 million and the Accrued Interest. At paragraph 48 of its Particulars of Claim, Turner claimed “a declaration that the Respondent is not and was not entitled to make any demand under the 3029 Refund Guarantee”. That declaration covered Cadogan’s claim to both the principal sum and the Accrued Interest. Turner also claimed consequential “further and/or other relief”. It therefore made a claim for relief in respect of Cadogan’s allegedly wrongful demand for principal and Accrued Interest under the Refund Guarantee.
25. By paragraph 17 of its Reply and Defence to Counterclaim served on 23 December 2009, Turner contended that the wrongful demand constituted a repudiatory breach of the MOA by which Turner had agreed to sell and Cadogan had agreed to buy the Vessel for a purchase price of US\$38.5 million, which repudiatory breach Turner accepted as bringing the MOA to an end.
26. By paragraphs 169 and 170 of their Opening Submissions at the arbitration, Turner contended that Cadogan was in manifest and continuing repudiatory breach of contract and that it had accepted the same as bringing the MOA to an end, and Turner sought declaratory relief accordingly. Turner maintained this case at paragraphs 2 to 25 of its Closing Submissions.
27. At paragraph 77 of its Closing Submissions it claimed a declaration that it was “entitled now to all sums in the escrow account”.
28. Turner submits that paragraph 77 alone showed that its claims included a claim for the Accrued Interest. However, this is all the clearer when considered against the background of its claim for a declaration that the Refund Guarantee demand for both principal and Accrued Interest was wrongful and for consequential further and other relief.
29. Cadogan submits that it was not sufficient for Turner simply to claim “further or other relief”. If it intended that relief to relate specifically to Accrued Interest, it had to so specify. It further submits that, when construed in its proper context, the claim made in paragraph 77 of the Closing Submissions was limited to the principal sum and monies provided for security for costs.
30. The immediate context of paragraph 77 was as follows:

“76. Turner thus seeks a declaration at this stage that it is entitled to retain the US\$7.7 million representing the first instalment of the purchase price.

77. The escrow account contains this money and monies provided by way of security for costs. The declaration should make clear that Turner is entitled now to all sums in the escrow account, and it would be prudent further to order that Cadogan do all things necessary to procure payment of those sums to Turner.
78. Further or alternatively, Turner has suffered loss and damage by way of loss of bargain in the amount of US\$6 million, and with costs and interest, the amount in the escrow account may be insufficient.”
31. It is Cadogan’s case that:
- (a) Paragraph 76 sets out the first of the two remedies claimed by Turner, namely a declaration that it was entitled to retain the US\$7.7 million, representing the first instalment of the purchase price.
 - (b) The first sentence of paragraph 77 then explains that the Escrow Account contains “this money”, in addition to monies provided by way of security for costs. It makes no mention of the Accrued Interest.
 - (c) Although the second sentence of paragraph 77 goes on to ask that the declaration make clear that Turner is entitled to “all sums” in the Escrow Account, this sentence must be read in light of the first sentence of paragraph 77, which defines the contents of the Escrow Account as being only the sum of the first instalment, and monies provided as security for costs. Turner did not have the Accrued Interest in mind as a component of the Escrow Account when it made its claim for a declaration. Its request for “all sums” cannot, in consequence, be regarded as extending to the Accrued Interest.
32. In my judgment this is an unduly narrow and technical construction of the claims being made. This was an arbitration rather than court proceedings. Arbitration is rightly a less formal process and concentrates on substance rather than form.
33. In the present case, Turner’s claims included a claim for “all sums” in the Escrow Account. That is literally sufficient to embrace a claim for the Accrued Interest. Further, Turner had always had a claim for a declaration and further and other relief in respect of the consequences of the wrongful demand on the Refund Guarantee, which demand covered both the principal sum and the Accrued Interest. Yet further, if Turner was entitled to the US\$7.7 million then, as Cadogan would have well understood and did not challenge, it was necessarily entitled to the Accrued Interest. There can have been no sensible reason for Turner not pursuing that claim, or, to put it another way, excluding it from its claim for “all sums” in the Escrow Account. Both a literal and a purposive construction leads to the same conclusion: the claim for Accrued Interest was included, as the Tribunal concluded.
34. Further, Cadogan’s own case acknowledged that Turner had a claim in respect of the Accrued Interest if Cadogan’s case on repudiation succeeded.
35. In paragraphs 54.1 and 56 of Cadogan’s Closing Submissions, Cadogan submitted that, if the Tribunal accepted that there had been a fraudulent misrepresentation, it should

dismiss Turner's claim and declare that (1) Cadogan was entitled to and has rescinded the MOA for misrepresentation, and (2) the sums paid into the Escrow Account, "consisting of the deposit of US\$7,700,000 and interest of US\$923,520.77," plus any interest accrued in escrow, be paid to Cadogan. If, however, there was no misrepresentation, but Cadogan was nonetheless entitled to terminate the MOA, Cadogan submitted that it was entitled to "restitution of the sum paid plus interest" – i.e. the same result.

36. By way of an alternative case, if it was not entitled to avoid or terminate the MOA, and Turner was entitled to terminate it on account of breach by Cadogan, Cadogan argued that it was nonetheless entitled to restitution of the sum of US\$1.7 million, being the difference between the amount of the first instalment of the purchase price and the loss incurred by Turner in the resale of the Vessel, and also to a pro-rata share of the interest accrued on the first instalment. Specifically, at paragraph 57.3 of their Closing Submissions, Cadogan submitted that:
 - "In this scenario, the sums held in escrow should be paid out as follows:
 - (1) US\$6,000,000 to Turner;
 - (2) US\$1,700,000 to Cadogan; and
 - (3) Accrued interest paid out pro-rata."
37. This alternative case was recorded by the Tribunal in paragraph 118 of the First Award.
38. Cadogan submits that that submission was only referring to interest accrued after payment into the Escrow Account and not to the Accrued Interest. If so, it would follow that it was making no claim itself for the Accrued Interest, thereby acknowledging Turner's entitlement to it. If that is the case then the Additional Award would reflect what was common ground between the parties.
39. In any event, I reject Cadogan's submission. In my judgment the submission was referring to all accrued interest, including the Accrued Interest. The submission is expressed in general rather than limited terms. Those general terms are not only wide enough to cover all accrued interest, but must sensibly be construed as so doing since otherwise the prior accrued interest is not being addressed at all. Further, there is no obvious reason for Turner treating the interest differently before and after the setting up of the escrow account, unless it was conceding Turner's entitlement to the prior interest.
40. On Cadogan's own case Turner therefore had a claim for the Accrued Interest "in this scenario", albeit one which it contended should be limited to a pro-rata share of that interest.
41. The issue of who was entitled to the Accrued Interest, in what proportion and on what basis was therefore on any view a matter before the Tribunal and one that had to be determined.
42. For all these reasons I find that the claim for Accrued Interest was one which was "presented to the tribunal" within section 57(3) (b) and that the Tribunal was correct so to conclude.

Whether the claim was "dealt with in the award"

43. A claim is “dealt with” in an award if it has been finally determined by it. Although the dispositive part of the award is likely to be the most important part of the award for the purpose of considering that issue, where, as is almost invariably the case, the written reasons form part of the award, the whole of the award needs to be considered, and the dispositive part of the award considered in the context of the written reasons.
44. Cadogan submits firstly that Turner’s primary claim for relief – which included a declaration that it was entitled to “all sums in the escrow account” – was rejected by the Tribunal. As a result, and even if Turner could be said to have made a claim for the Accrued Interest by these words, that alleged claim was dealt with, and dismissed, in the First Award. It was not open to the Tribunal, pursuant to section 57(3) (b), to reopen this aspect of its judgment.
45. Secondly, Cadogan submits that the relief which the Tribunal did afford to Turner and Cadogan made clear how the contents of the Escrow Account – including the Accrued Interest – should be allocated between the parties:
- (a) Item 2 of the First Award found and held that “the claim of Turner against Cadogan succeeds in the amount of US\$6,000,000.00 and no more.” (emphasis added)
 - (b) Item 4 of the First Award found and held that “Cadogan’s claim in restitution succeeds to the extent only that there is any balance in the Escrow Account after payment out to Turner of the said sum of US\$6,000,000, interest thereon as awarded above and such costs as may hereafter be awarded to Turner.” (emphasis added)
46. The sums to be awarded to Turner were thus capped at US\$6 million in damages, interest on that sum, and any costs later awarded to it. Cadogan, in turn, was awarded “any balance in the Escrow Account” after payment of these sums to Turner. The Tribunal chose not to narrow the meaning of “balance” in this context to, for example, “the balance of the first instalment”. The Tribunal’s words can, in consequence, only have one meaning: namely, that Cadogan was entitled to the entirety – including the Accrued Interest – of the balance in the Escrow Account.
47. In relation to Cadogan’s first point, it is correct that Turner’s claim for a declaration that it was entitled to retain the US\$7.7 million failed. Any claim for Accrued Interest consequential upon that claim accordingly also failed. However, as already found, Turner had a claim for a declaration and for other relief in respect of the wrongful demand under the Refund Guarantee for both the principal sum and the Accrued Interest and was claiming “all sums” in the Escrow Account. Further, the fact that Turner had a claim to some or all of the Accrued Interest even if its retention claim failed was recognized and acknowledged by Cadogan’s own submissions. That claim, and Cadogan’s mirror image claim, was not determined as a result of the dismissal of Cadogan’s retention claim. Who was entitled to the Accrued Interest, in what proportion and on what basis therefore remained a matter to be determined by the Tribunal notwithstanding the dismissal of the retention claim.

48. In relation to Cadogan's second point, despite the fact that the issue of who was entitled to the Accrued Interest, in what proportion and on what basis remained a matter to be determined by the Tribunal, it was not dealt with expressly in the dispositive parts of the Award. Although the Tribunal found that Cadogan was entitled to a declaration that the demand on the Refund Guarantee was wrongful, in dealing with consequential relief it only expressly addressed the principal sum demanded. This is reflected in the Reasons and in particular paragraph 120 where what is to happen to the "balance" held in the Escrow Account is addressed solely by reference to the principal sums. In my judgment, properly construed the dispositive parts of the Award deal with the "balance" of the Escrow Account in relation to the principal sum, but not the Accrued Interest. Further, to construe the dispositive parts of the Award as implicitly determining that Cadogan was entitled to the Accrued Interest would mean construing it as awarding Cadogan a sum which, on the Tribunal's findings, it not only had no entitlement to, but was not even claiming (since its claim was for a pro-rata share only), a result which cannot sensibly have been intended. This is all the more so when one considers the plain inconsistency that would be created thereby with the declaration made in the same section of the Award that the demand under the Refund Guarantee was wrongful.
49. For all these reasons I find that the claim for Accrued Interest was not "dealt with" in the Award and that the Tribunal was correct so to conclude. As Mr Gaisford stated, it was "overlooked".
50. It follows that the Tribunal did have power to make the Additional Award under section 57(3)(b). If so then both the section 68 and the section 69 applications must fail.

Substantial Injustice

51. Turner had a further point that even if there was no section 57 power and therefore a serious irregularity under section 68(2)(b) no substantial injustice had been caused thereby since Cadogan has no legal entitlement to the Accrued Interest.
52. Section 68 of the Act is only engaged by "serious irregularity", defined in section 68(2) as an irregularity "which the court considers has caused or will cause substantial injustice to the applicant". In *Lesotho Highlands v Impregilo SpA* [2005] UKHL 43, [2005] 3 All ER 789, at paragraphs 28 and 35, Lord Steyn observed that section 68 impose on an applicant a requirement to establish that an irregularity has caused or would cause substantial injustice to the applicant, and that this "pre-condition" was "designed to eliminate technical and unmeritorious challenges". The requirement was not satisfied on the facts of the case before the House (with respect to pre-award interest), as the applicant in that case could not show that the outcome might realistically have been a different in the absence of any irregularity.
53. Turner submits that Cadogan's challenge in the present case is a technical and unmeritorious one to which section 68 does not apply. In the circumstances, it has caused no injustice to Cadogan that the Tribunal has now addressed the specific status of interest accrued on the first instalment and held in the Escrow Account, which was set up to abide the arbitration before him. Cadogan can advance no substantive basis of entitlement to this interest in light of the conclusions of the Tribunal in the First Award.

54. It is not necessary to decide this further question. However, whilst I agree that Cadogan's challenge is unmeritorious, if the Tribunal had no power to make the Additional Award I am not sure that it is an answer to the section 68 claim to say that the award should not be set aside because it was rightly decided on the substantive merits. No award should have been made at all, rightly or wrongly. Further, if the reason that section 57 did not apply was that the matter had been dealt with in the First Award the effect of setting the Additional Award aside would be to leave Cadogan with a right to enforce its claim to the balance of the sums in the Escrow Account in accordance with the terms of the First Award. To deprive it of the right to seek to do so could be said to involve substantial injustice.
55. The answer in such a case would be for Turner to make an application for the First Award to be set aside and remitted so that the Tribunal could redress what has been admitted to be a mistake. There has long been a jurisdiction to remit in cases of admitted mistake – see, for example, *The Montan* [1985] 1 Lloyd's Rep. 189. That jurisdiction is reflected in section 68(2)(i) of the Act. Turner would no doubt have a strong case for such relief but unless and until it was obtained Cadogan would be entitled to rely on the First Award as it presently stood.

Conclusion

56. For the reasons outlined out above both Cadogan's applications must be dismissed.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 March 2015

Before :

MR JUSTICE EDER

Between :

**UNION MARINE CLASSIFICATION SERVICES
LLC**

Applicant

- and -

**THE GOVERNMENT OF THE UNION OF
COMOROS**

Defendant

MR JAMES CUTRESS and MR VARUN ZAIWALLA (instructed by **Zaiwalla & Co**) for the **Applicant**

MR RICHARD JACOBS QC and MR JOHN ROBB (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: 26 February 2015

Judgment

Mr Justice Eder:

Introduction

1. On 25 February 2015, I heard an application by the claimant (“UM”) under s67(1)(a) and/or (b) of the Arbitration Act 1996 (the “1996 Act”) for an order setting aside and/or declaring to be of no effect a “Correction and Addition to Award” of Mr Bruce Harris as sole arbitrator (the “Arbitrator”) dated 31 August 2014 (the “Amended Award”). Following that hearing, I informed the parties of my decision dismissing the application. These are my reasons for that decision.
2. The arbitration proceedings concerned disputes arising under a commercial outsourcing contract (the “Agreement”) between UM and the defendant (the “Government”) dated 15 February 2007, under which UM was authorised to act and accomplish on the Government’s behalf all acts and functions relating to the maritime administration of Comoros (Article 1), including the registration of vessels under the Comoros flag. By Articles 4 and 5, UM agreed monthly to pay Comoros 50% of the taxes and other income generated by registration of each vessel, subject to a guaranteed minimum of \$11,000 per month. Article 6 specified the term of the Agreement. However, there was apparently a dispute as to the effect of Article 6. In summary, UM’s case was that the Agreement was for a fixed 25-year term, with a

guaranteed minimum of 10 years. The Government's case was that the effect of Article 6 was that, after 25 years, the Agreement would renew automatically unless it had previously been "denounced" by either party; and that denunciation could only take place 10 years after the commencement of the Agreement. This dispute remains unresolved and is irrelevant for present purposes.

3. On 17 April 2012, the Government purported to terminate the Agreement. UM contended that it was not entitled to do so. That dispute was referred to arbitration and, after certain procedural wrangling, Mr Harris was appointed as sole arbitrator. It is common ground that the arbitration was subject to and conducted on the terms of the London Maritime Arbitrators Association (the "LMAA").
4. By the arbitration proceedings, UM sought a declaration that the termination notice was invalid and damages. The Government alleged that it was entitled to terminate for various breaches by UM, including in particular alleged breaches of UM's payment obligations. It counterclaimed for damages for those breaches, including for breach of UM's payment obligations. It also claimed (i) what it said was the minimum monthly payment of US\$ 11,000 per month for a certain period; (ii) an order for an account; and (iii) damages for the sums found to be due on the taking of the account.
5. During the course of the arbitration proceedings, it was ordered and/or agreed that liability on the counterclaim was to be determined at the substantive hearing on 2-4 July 2014, "*leaving over (if it be relevant) quantum*". This three day hearing duly took place during which there were extensive submissions (by way of opening, closing and post hearing submissions) and extensive cross examination.

The (original) Award

6. Following the hearing, the Arbitrator published his award dated 22 July 2014 (the "original Award" or, for short, the "Award"). The Award (including Reasons) extends to 35 pages. In order to understand it properly, it needs to be read in full. However, for present purposes, it is sufficient to note the following:
 - i) Paragraphs 1-34 contain certain introductory material and set out the background.
 - ii) Under the heading "The issues", paragraphs 34-35 state as follows:

"34. Counsel for Union Marine said that (leaving on one side the question of the validity of the arbitration agreement) the following issues arose, and it seems to me that the summary is a fair one:

1. *Did the Government validly terminate the Agreement on 17th April 2012?*
2. *Did the government breach the Agreement? If the termination notice was invalid, the Government plainly did so, but there was a separate question whether it had also done so by its conduct from January 2011.*
3. *If the government breached the Agreement, what damages is Union Marine entitled to as a result? If*

Union Marine breached the agreement, what damages is the Government entitled to as a result?

35. I directed that the quantum of the Government's counterclaim should be deferred until after the question of liability had been determined. The claim by Union Marine, for some \$3.9 million by way of alleged losses over the life of the agreement, was however for determination at the hearing."

- iii) Following certain general comments which are not directly relevant and under the heading "The claims and counterclaims", paragraphs 52-53 state as follows:

"52. Union Marine claimed damages for what they said was the wrongful termination by the government in April 2012 of the Agreement. They also claimed damages for breach by the government of the arbitration clause in relation to the commencement and pursuit of the proceedings in Ajman. They further claimed damages on the basis that the government was in breach by appointing Mr Fahim and setting up the NTA, the argument being that by so doing the Government appointed someone else to perform the acts and functions of the Maritime Administration which were granted exclusively to Union Marine under the Agreement, and that there was an implied term that the Government would not interfere with or prevent them from exercising their powers or performing their obligations under the Agreement.

53. For its part, the government denied liability and counterclaimed damages for what it said were repudiatory breaches of contract by Union Marine."

- iv) Following two further paragraphs dealing with matters which are not directly relevant, there is a long section in the Award under the heading "Was termination justified?" This starts with paragraph 58 which states:

"58. I examine here the grounds on which the Government said it was entitled to terminate the Agreement."

This is then followed by a number of sub-sections, the first of which is headed "Shortfall in payments". At the beginning of this sub-section, paragraph 59 states:

"59. The essence of the Government's case in this respect was, as Counsel for Union Marine pointed out, the question whether the latter had fraudulently declared its income from the Registry business. I accept very cogent evidence to support the Government's case would be needed if I were to

be satisfied as to this, given the seriousness of the allegation.”

After a number of paragraphs where the Arbitrator considers the facts and makes certain findings, his overall conclusion in this sub-section is set out in paragraph 72 as follows:

“72. Against this background, and particularly bearing in mind again that very cogent evidence would be required to justify me in accepting a serious allegation such as was made against [UM], I am unable to find that, on the balance of probabilities, [UM] did not meet their payment obligations under the Agreement. This does not mean that my conclusion is that they did fulfil those obligations: as the parties’ lawyers at least will appreciate, I would have had to be persuaded that it was more likely than not that [UM] were in breach (“the balance of probabilities”), and the evidence is not sufficiently weighty to enable me to come to that conclusion. Moreover, I am far from persuaded that there was here any case of bribery.”

- v) Following further sub-sections which are not directly relevant for present purposes, there is a section under the heading “Conclusion on breaches by Union Marine” which states in material part as follows:

“92. For the above reasons I have come to the conclusion that the Government has failed to show a sufficiently serious breach or breaches by Union Marine of the Agreement to justify it in terminating as it did in April 2010 ...

94 ... In the result ... my conclusion is clearly that the Government was not entitled to terminate the Agreement, and accordingly that it was in fact the Government which was in repudiatory breach itself...”

- vi) There is then a section under the heading “Damages” which is not directly relevant save that I note in passing the following comments and conclusion of the Arbitrator in paragraphs 97 and 99:

“97 ... Further, just as there was no sufficiently solid evidence to shown that [UM] had not paid all that was due to the Government (see paragraphs 60-68 above), there was no adequate evidence to show what they had in fact earned ...

99 ... All in all, and always on a balance of probabilities, I am not able safely to conclude that [UM] suffered any loss as a result of the Government’s wrongful termination of the Agreement. Accordingly, their claim has to fail.”

vii) The Award concludes as follows:

“I THEREFORE AWARD, DECLARE AND ADJUDGE that Union Marine’s claims and the Government’s counterclaims referred to me all fail and I reserve to myself jurisdiction to determine liability for the costs of the reference, including the costs of this award as separately notified to the parties, and to make a further award or award in respect thereof.”

Subsequent events

7. Following publication of the Award, the Government then applied to the Arbitrator by letter dated 20 August 2014 for correction or clarification of two matters.

8. That application was made pursuant to paragraph 25(a) of the LMAA terms and/or s57(3) of the 1996 Act. Paragraph 25(a) of the LMAA Terms (2012) provides:

“(a) In addition to the powers set out in section 57 of the Act, the tribunal shall have the following powers to correct an award or to make an additional award:

(i) The tribunal may on its own initiative or on the application of a party correct any accidental mistake, omission or error of calculation in its award.

(ii) The tribunal may on the application of a party give an explanation of a specific point or part of the award.”

S57(3) of the 1996 Act provides:

“(3) The tribunal may on its own initiative or on the application of a party—

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.”

9. The first matter sought to be corrected or clarified under these provisions was in respect of the Government’s counterclaim for US\$11,000 minimum monthly payment under the Agreement. In that context, the Government submitted to the Arbitrator as follows:

“Government’s First Application: \$11,000pm Minimum Monthly Payments

The Government submitted (DCC §31; Government’s Skeleton §57 and Appendix 1; Transcript Day 3 pp. 124-126) that Union Marine failed to pay the minimum \$11,000 per month required

by Article 4 of the Contract. It was apparently common ground that there was a falling off in payments during and after 2011: see Transcript Day 1 p.57 and Union Marine supplemental Closing Submissions §8.2.

It appears that the Tribunal has omitted to decide this issue in the Award; although we believe that it follows from the Tribunal's conclusions at §96 and indeed at §§97-99 that Union Marine had no justification for not making payments. Accordingly, the government applies either for correction of an accidental omission under paragraph 25(a)(i) or for an explanation under paragraph 25(a)(ii) of the LMAA Terms as to the Tribunal's conclusions in answer to the following questions:

- 1. Did Union Marine cease making payments after August 2011?*
- 2. If so, was this a breach by Union Marine of Article 4 of the Contract?*
- 3. If so, did Union Marine remain in breach of Article 4 of the Contract until 17 April 2012?*
- 4. Was this a failure by Union Marine to carry out its obligations for the purposes of Article 7 of the Contract, thereby justifying termination of the Contract by the Government on 17 April 2012?*
- 5. If so, is the Government entitled to damages pursuant to Paragraph 76 of the Counterclaim, for failure to pay the minimum \$11,000 per month between September 2011 and April 2012?"*

10. The second matter sought to be corrected or clarified was in respect of the Government's counterclaim for an account. In summary, the Government drew attention to its pleaded counterclaim and then stated in material part as follows:

"... The Tribunal found (§72) that the Government failed to establish that [UM] had breached its obligation to pay 50% of its income to the Government pursuant to Article 4 of the Contract. However, it does not appear to have determined the separate question of whether [UM] was liable to account to the Government as pleaded ... We therefore request clarification as to whether or not the Tribunal intended to dismiss the Government's claim for an account, and if so why ..."

The Amended Award and Reasons

11. Following further exchanges which are not directly relevant (including an application by UM itself for correction of the Award), the Arbitrator published the Amended

Award. In that Amended Award, he set out the various applications he had considered and in paragraphs 6-8 stated as follows:

“6. I hold, by way of addition and/or correction to paragraph 72 of my original award, that Union Marine ceased making the minimum \$11,000 monthly payments under Article 4 of the contract after August 2011, that this was a breach of that Article and that Union Marine continued to be in breach in this respect until 17 April 2012. I do not, however, consider that this entitled the Government to terminate the contract as it did on that date, but it is entitled to damages for this breach, to be assessed.

7. I further hold, again by way of addition and/or correction to my original award, that the Government is entitled to an account as sought in paragraph 77, 77.1 and 77.2 of its Counterclaim, and to damages as claimed in paragraph 77.3 thereof.

8. Accordingly the dispositive paragraph following paragraph 100 of my award is to be amended to read:

I THEREFORE AWARD, DECLARE AND ADJUDGE that Union Marine’s claims fail and that the Government’s counterclaims referred to me fail, save that the Government is entitled to:

(i) an account of all “taxes charged per vessel for its registration and ... other income generated by the registration” received by Union Marine between 15 February 2007 and 17 April 2012, and

(ii) an account of all payments transferred by Union Marine to the bank account of the Government in accordance with Article 5 of the contract, and

(iii) damages being the difference between (a) 50% of the total calculated under (i) above and (b) the total calculated under (ii) above, and

(iv) damages to be assessed for Union Marine’s failure to pay the minimum \$11,000 monthly payments under Article 4 of the contract after August 2011 ...”

12. The Arbitrator’s Reasons for such Amended Award were set out in a separate document, but stated to form part of the original Award (the “Reasons”). In order to understand these Reasons properly, it is again important to read the whole of that document; but for present purposes, it is sufficient to quote the following extracts:

i) *“2 ... the Government was on much firmer ground, because the applications they made were in relation to matters that, I must confess, I had inadvertently not dealt with ...”*

- ii) “4 ... *Even if the matter [of non-payment of \$11,000 per month] was not pressed forcefully, it was on the table, I omitted to deal with it and it is right that I should do so now.*”
- iii) “5 ... *this (and the Government’s other application) plainly relate to a “claim ... which was presented to the tribunal but was not dealt with in the award.”*
- iv) “6 ... *I failed to deal with either [sic] the \$11,000 issue just as I failed to deal with the claim for an account.*”
- v) “10 ... *I am not making a further award or dealing with anything that was not pleaded and addressed at the hearing: I am making corrections and additions to my award to deal with points that were incorrect in the award or which had been raised but not dealt with there.*”
- vi) “13. *I turn now to deal with Union Marine’s submissions of 29 August 2012 (see paragraph 6 above). They said I have no jurisdiction under s57 to deal with the claim for an account because it was not made at all at the hearing, unsurprisingly (they said) because the issue an account would determine would be the same as that I determined at the hearing, namely whether there was a payment breach by Union Marine. This premise is false: I did not determine that there had been no payment breach at all, though paragraph 72 of the award may read that way. But that was due to an error on my part in overlooking the claim concerning the \$11,000 per month minimum, which I am here correcting.*

14. The fact is that, as the skeletons, transcripts, written closings and my award all show, attention was focused almost entirely during the hearing on matters related essentially to the question whether Union Marine were in repudiatory breach or not, and there was little, if any, focus on the matters the subject of the present document. But they remained in issue, and any failure on the part of those representing the Government to highlight them cannot mean that they were given up or that I should not or can not deal with them.

15. The argument that the issue of “payment breach” had been determined in truth lay at the heart of Union Marine’s 29 August submissions. It was suggested that an order for an account would appear to result in a number of issues (though it was not clear precisely what those issues are) having to be argued, heard and determined all over again. I am afraid I simply do not see that.

16. It was also suggested that an account might lead to inconsistent awards, because if it results in substantial sums being found due, this might be inconsistent with my conclusion that the Government had failed to show a breach or breaches justifying termination. That seems to me an extremely unlikely possibility, but in any event my conclusion has been reached and, subject to any review by the Court, must surely now be immutable.”

13. I would also refer to paragraph 17 of these Reasons where the Arbitrator deals with the question of costs with regard to the Amended Award, states that he did not intend to charge for that document and explains: “... *Essentially it is necessary because of my own failure to deal with everything originally.*”

UM's submissions

14. As stated above, the application by UM was made pursuant to s67(1) and/or(b) of the 1996 Act which provides in material part as follows:

“67(1) A party to arbitral proceedings may ... apply to the court (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.”

15. In summary, Mr Cutress on behalf of UM submitted that under s58(1) of the 1996 Act, an award is final and binding on both parties; that the Arbitrator was *functus* on making the original Award; that he therefore had no jurisdiction under s.57(3)(b) (or otherwise) to change his Award in the manner that he did; that therefore, the Amended Award is a nullity; and that UM should be entitled to the relief sought. In support of such submissions, he relied upon a number of authorities and textbooks including *Russell on Arbitration* at [6-166]; *Mustill and Boyd, the Law and Practice of Arbitration* at pp404-405 and the *2001 Companion* referring to pp404-414, as cited and approved in *Five Oceans Salvage v Wenzhou Timber* [2011] EWHC 3282 at [24].

16. As to s57(3)(b), Mr Cutress submitted as follows:

i) The power (and power under the s57(3)(a) slip rule) is not “*intended to enable the arbitrator to change his mind on any matter which has been decided by the award, and attempts to use the section for this purpose should be firmly resisted*”: *Mustill and Boyd, 2001 Companion* at p.340-341, approved in *Al-Hadha v Tradigrain* [2002] 2 Lloyd’s Rep 512 at [66] and *Torch Offshore v Cable Shipping* [2004] 2 All ER (Comm) 365 at [26] per Cooke J..

ii) As stated in *Torch Offshore v Cable Shipping* [2004] 2 All ER (Comm) 365 at [27] per Cooke J, where an arbitrator had rejected a claim for rescission for misrepresentation but it was said to be unclear whether he had considered the issue of inducement in relation to one of the alleged misrepresentations:

“s.57(3)(b), which uses the word ‘claim’, only applies to a claim which has been presented to a tribunal but has not been dealt with, as opposed to an issue which remains undetermined as part of a claim ... the terms of s 57(3)(b) are apt to refer to a head of claim for damages or some other remedy (including specifically claims for interest or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims. As counsel for Torch pointed out, Torch had claimed rescission and that claim had been rejected by the arbitrator. He could not change his award on that point and there was no room for an application for him to decide that claim, even if he had failed to decide whether there was inducement ...”

iii) Similarly, as stated in *World Trade Corporation v. Czarnikow* [2005] 1 Lloyd’s Rep 422 at [14] per Colman J:

“An argument that by reason of the tribunal’s making no mention of certain evidence relied on by a party as supporting a relevant finding of fact, there has been a failure to deal with a “claim” would be untenable. The word “claim” in that context does not mean a submission in support of a relevant question of fact. It means a claim for relief by way of damages, declaration or otherwise, such as would have to be pleaded.”

- iv) As regards whether a claim has been “dealt with” in an award, as stated in *Cadogan v Turner* [2013] 1 Lloyd’s Rep 630 at [43] per Hamblen J:

“A claim is “dealt with” in an award if it has been finally determined by it. Although the dispositive part of the award is likely to be the most important part of the award for the purposes of considering that issue, where, as is almost invariably the case, the written reasons form part of the award, the whole of the award needs to be considered, and the dispositive part of the award considered in the context of the written reasons.”

- v) However, the tribunal does not have to set out each step by which it reaches its conclusion or deal with each point made by a party; it may deal with issues in a composite way; and the approach of the court is to read the award in a reasonable and commercial way; which may involve taking into account the parties’ submissions, since often awards respond to parties’ submissions and are not to be interpreted in a vacuum: *Petrochemical v The Dow Chemical Company* [2012] 2 Lloyd’s Rep 691 at [26]).
- vi) The fact that a claim may have been dealt with incorrectly or without giving reasons does not mean that it has not been “dealt with”; it is in those cases where the award expresses no conclusions as to a specific claim that it has not been dealt with: *Margulead v Excide* [2004] 2 All ER 727 at [43].

17. Against that background, Mr Cutress submitted that here the claim for US\$11,000 per month and the claim for an account were both “dealt with” in the Award within the meaning of s57(3)(b) and that this was not a case which fell within s57(3)(a). In that context, Mr Cutress submitted as follows:

- i) By order and/or agreement the question whether there was a “payment breach” fell to be determined at the hearing;
- ii) The question whether there was a payment breach was therefore the subject of disclosure, extensive cross examination and extensive submissions at and after the substantive hearing by way of opening submissions, oral submissions and post hearing written submissions;
- iii) Paragraph 72 of the Award states expressly that the Government had, in effect, failed to establish that there had been a payment breach; and the final dispositive paragraph of the Award states expressly: “...the Government’s counterclaims referred to me all fail”.

18. Further, Mr Cutress submitted that (i) the Amended Award gives rise to the real injustice to UM that it seems to permit the Government to re-open and re-litigate the claim for payment breach all over again; (ii) permitting the claim for an account gives

rise to the risk of inconsistent awards as the Arbitrator himself acknowledged in paragraph 16 of his Reasons for the Amended Award; and (iii) it is plain from the terms of the Amended Award as quoted above that he was intending to change his decision in his original Award rather than to make an additional award in relation to a claim not dealt with.

19. In addition with regard to the claim for US\$11,000 per month, Mr Cutress submitted that as stated in paragraph 13 of his Reasons for the Amended Award, the only qualification the Arbitrator gave for his finding in paragraph 72 of his original Award that there had been no payment breach was that he had made an error in overlooking “*the claim concerning the \$11,000 per month minimum*”; that therefore, even on the basis of the Amended Award, the claim for payment breach had already been determined, except for the \$11,000 minimum “point”; that this “point” did not fall within s.57(3)(b) because it was not “a claim” (but rather was only an argument or at most issue arising on the claim for payment breach) and in any event had in fact already been “dealt with” in the Award (since the payment breach counterclaim had been dismissed and the Arbitrator had concluded that the Government had failed to make out a payment breach); that the reality is that the Arbitrator was seeking on reflection to change his conclusion that the Government had not established any payment breach, on the basis of a second thought at the time of the Amended Award that he had got his initial conclusion wrong because he had overlooked an argument that was made to him; that seeking to change a conclusion already made is not permissible under s.57(3)(b) which only permits the making of an additional award in relation to a claim not dealt with; that, in any event, the \$11,000 per month point is not a good one because that would amount to only \$77,000, in the circumstances where the Government itself accepts that payments of over \$73,500 were made (albeit late) in 2012; and that the payment shortfall could not therefore be more than \$3,500 and even that is disputed by UM.

A threshold point

20. Before examining Mr Cutress’ submissions with regard to the scope and effect of s57(3) of the 1996 Act, it is necessary to consider a threshold objection made by Mr Jacobs QC on behalf of the Government viz. that UM’s complaint here is not one that can properly be made under s67 of the 1996 Act and that therefore this application fails *in limine*. In particular, he submitted as follows:
- i) It is wrong to say that the Amended Award is a “nullity”. On the contrary, the Amended Award is, on its face, a valid award unless and until it is set aside by the court.
 - ii) S67 enables a party to apply to the court to challenge an arbitral tribunal’s award on the grounds that the tribunal has/had no “*substantive jurisdiction*”.
 - iii) This expression is defined in s82(1) of the 1996 Act by reference back to s30(1)(a)-(c) of the 1996 Act viz:

“‘substantive jurisdiction’, in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.”
 - iv) The matters specified in S30(1) are:

“(a) whether there is a valid arbitration agreement,
(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.”

- v) None of these matters is in issue on this application. UM does not challenge the Arbitrator’s ability to make an Award finding that it was liable to account and to pay damages to the Government, as per paragraphs 6-8 of the Amended Award. Instead it disputes the Arbitrator’s ability to do so by way of a corrected/additional award rather than in his Original Award. This is not a challenge to the Arbitrator’s substantive jurisdiction.
- vi) That conclusion is supported by two previous decisions of this Court to the effect that a challenge to a tribunal’s correction of its award is not a challenge within s67 of the Act; and that erroneous correction of an award under s57 is remediable by a court under s.68(2)(b) (i.e. the tribunal exceeding its powers otherwise than by exceeding its substantive jurisdiction) or not at all. See: *CNH Global v PGN Logistics Ltd* [2009] 1 CLC 807 (Burton J) at [17]-[19]; *Lesotho Highlands Development Authority v Impregilo SpA* [2003] 1 All ER (Comm) 22 (Morrison J) at 25. As to the latter, the House of Lords affirmed (obiter) the correctness of Morrison J’s conclusion as to the unavailability of s67: see [2006] 1 AC 221, 229A (Lord Steyn).
- vii) In particular, this application is covered precisely by Burton J.’s conclusion in *CNH Global* at [19]:

“I have no doubt whatever that s. 67 relates to situations in which it is alleged that the arbitral tribunal lacks substantive jurisdiction, i.e. that there was in fact no arbitration clause at all, and no jurisdiction for the arbitrators to act at all at any rate in relation to the relevant dispute, and not to situations in which arbitrators properly appointed were alleged to have exceeded their powers.”

- 21. In response, Mr Cutress reiterated his general submission that the Amended Award is a nullity. As to the authorities, he submitted that *Lesotho* was distinguishable because it was not concerned with the present type of case i.e. where, after the tribunal has become *functus*, it purports to correct the award. As for *CNH Global*, Mr Cutress accepted that it was on all fours with the present case but submitted that Burton J. was simply wrong as a matter of law; and that I should not follow his Judgment in that case. Mr Cutress also sought to rely upon a passage in the leading textbook *Arbitration Act 1996* (5th Edition) Merkin & Flannery (*“Merkin & Flannery”*) at p104 which suggests that an “expansive approach” to s30 is the correct one.
- 22. As to these submissions, the description of the Amended Award as a “nullity” requires, at the very least, some caution – not least because it begs (at least in part) the question to be determined. If the Arbitrator was entitled to correct and/or to clarify the original Award, then there can be no question of describing the Amended Award as a “nullity”. On the other hand, if the Arbitrator was not entitled to issue the Amended Award and the Court so determines, then I agree that it might be described as a “nullity”; but unless and until the Court so determines, I would not myself describe the Amended Award as a “nullity”. However, I do not consider that this debate is of crucial significance.

23. Rather, it seems to me that Mr Jacobs' threshold objection is correct for the following reasons. First, it is, in my view, more consistent with the ordinary language of s30(1)(c) i.e. the only question in that context is to identify what matters have been submitted to arbitration. Here, it is common ground that the matters the subject of the Amended Award had been referred to arbitration. Second, I do not consider that the suggested "expansive approach" urged by Mr Cutress is supported by the cases referred to in *Merkin & Flannery*. Moreover, in my view, such suggested "expansive approach" is contrary to the general principle as stated in s1(c) of the 1996 Act ("... *in matters governed by this Part the court should not intervene except as provided in this Part*") as well as the underlying thrust of the decision of the House of Lords in *Lesotho*. Third, I do not accept that this reading of s30(1)(c) is somehow "unfair" or "uncommercial" as Mr Cutress suggested. This would perhaps be so if there were no other remedy available to an applicant in circumstances such as these apart from s67 of the 1996 Act. However, as Mr Jacobs submitted, it seems to me that there is an available remedy under s68(2)(b) of the 1996 Act. Mr Cutress countered by submitting, in effect, that this was not a sufficient or satisfactory remedy in particular because s68 places additional hurdles in way of an applicant – including the requirement of showing "substantial injustice". However, I do not consider that this renders the remedy under s68 insufficient or inadequate. Fourth, as Mr Cutress accepted, his case on this point is inconsistent with the decision of Burton J in *CNH*. Although that decision is, of course, not binding on me, it strongly supports the case in this respect advanced by Mr Jacobs; and I would not be minded to disagree with that decision unless I was persuaded that it was wrong which I am not.
24. For all these reasons, it is my conclusion that the complaint now raised on behalf of UM is not one that properly falls within s67 of the 1996 Act; and for this reason alone, I would reject the application.
25. In the course of the hearing and recognising the writing on the wall, Mr Cutress applied to make a new application under s68(2)(b) of the 1996 Act. However, in my view, it was both too late and inappropriate to permit such application at such late stage. The 1996 Act lays down strict time limits for applications under the 1996 Act including any application under s68. Although I accept, of course, that the court has a jurisdiction to extend time, I do not consider that there is any good or sufficient reason to grant such extension in particular where the applicant has not complied with the important procedural requirement of providing evidence to show "substantial injustice". For these brief reasons, I would reject that application.
26. In any event, even if I were wrong on Mr Jacobs' threshold point i.e. as to the ambit of s67 of the 1996 Act or even if I had been persuaded to permit Mr Cutress to make a new application under s68(2)(b) of the 1996 Act, it is my clear conclusion that the application should be rejected on its merits for the following reasons.
27. First, as submitted by Mr Jacobs, the question before the court simply involves, both in relation to s57 of the 1996 Act and the LMAA terms, "applying the words used to the context": see *Gannet v Eastrade* [2002] 1 Lloyd's Rep 713, para [23] (predecessor LMAA Terms), and [18] (s57). In considering s57, I also bear in mind that "one of the objectives of the 1996 Act was to limit the rights of parties to arbitration agreements to resort to the Courts and so to ensure greater autonomy for their chosen tribunal": see *Gannet* [17]. Further, as Cooke J. commented in *Torch Offshore LLC v Cable Shipping Inc* [2004] 2 Lloyd's Rep. 446 at [28], "*The policy which underlies the*

[1996] *Act is one of enabling the arbitral process to correct itself where possible, without the intervention of the court.*” The decision in *Gannet* also shows that where an arbitrator is entitled to correct an error, he is then entitled to make changes to the dispositive parts of the award in order to reflect the correction: see *Gannet* para [22].

28. Second, in considering what was “dealt with” in the original Award, it is important to look at the Award as a whole. Here, the highpoint of Mr Cutress’ case is what the Arbitrator stated in paragraph 72 and also in the dispositive part at the end of his original Award. I agree that viewed in isolation, it appears that the Arbitrator was saying in paragraph 72 that there was no payment breach at all – as the Arbitrator himself recognises very fairly in the Amended Award – and in the dispositive part that he was dismissing all the counterclaims.
29. However, it is important to bear in mind that paragraph 72 appears in a section headed “Was termination justified?” which begins with the Arbitrator stating in paragraph 58 that he was examining “... *the grounds on which the Government said it was entitled to terminate the Agreement*”. The opening of the following paragraph is also important because the Arbitrator emphasises that the essence of the Government’s case was, as Counsel for UM pointed out, the question whether the latter had fraudulently declared its income from the Registry business. The Arbitrator then states: “*I accept that very cogent evidence to support the Government’s case would be needed if I were to be satisfied as to this, given the seriousness of the allegation*”. Thus, in my judgment, when read in context and looking at the language of paragraph 72, it is plain that what the Arbitrator was there considering and rejecting was, in effect, the central allegation of repudiatory breach of Article 4 (the payment provision of the Contract) i.e. on the evidence before him, he was not prepared to accept that there had been a serious and dishonest breach of Article 4. In effect, that was the central point of “liability” that the Arbitrator had ordered (or it had been agreed) would be determined at that hearing. That interpretation is also consistent with (i) what is stated in paragraphs 92 and 94 of the Award; and (ii) what the Arbitrator himself states in the Amended Award in particular as quoted in paragraph 12 above. For these reasons and although I fully accept that the language of paragraph 72 is perhaps unfortunate, I do not read it as “dealing with” the precise amounts due and payable under the Contract including not only the minimum monthly payment but also whatever amounts might be found to be due on the taking of an account. In my view, these were matters of “quantum” and not really the focus of that hearing at all.
30. More problematic is the dispositive wording at the end of the original Award. On its face, it does indeed appear to “deal with” the Government’s counterclaims by rejecting them all. I also agree that the fact that the Arbitrator states that he is reserving to himself only the question of costs would appear, on its face, to indicate that he had indeed “dealt with” all of the Government’s counterclaims including the minimum monthly payment and the claim for an account and that the only matter outstanding was costs. However, as stated by Hamblen J in *Cadogan v Turner* in the passage quoted above, it is always important to read the dispositive part of any award in its proper context in particular in the context of the reasons stated. On this basis, there is perhaps an argument that the dispositive part of the original Award should be read in the light of what I consider to be the true objective intent of the earlier sections including paragraph 72 (as I understand it); and that it should therefore be read in a more limited way. In effect, that would seem to be the approach (at least in part)

adopted by the Arbitrator in his Amended Award i.e. he appears to be saying that he is correcting his original Award under s57(3)(b) – although I do not read what the Arbitrator there states as meaning that he was relying solely on his power under that subsection and ignoring s57(3)(a). In that context, there was some debate before me as to the interrelationship between s57(3)(a) and (b) in particular with regard to the correctness or otherwise of what Cooke J. stated in paragraph [25] in *Torch*. There was also some debate in the context of s57(3)(a) as to the distinction between “... *an error affecting the expression of the arbitrator’s thought*...” and “... *an error in the thought process itself* ...”: see per Lloyd LJ in *The Trade Fortitude* [1987] 1 WLR 134 at p147D citing Rowlatt J in *Sutherland & Co v Hannevig Bros Ltd* [1921] 1 KB 336, 341; and whether such latter debate has survived the 1996 Act.

31. However, in my view, it is unnecessary to engage in either debate. As submitted by Mr Jacobs, this is not a case where the arbitrator subsequently decided to evaluate the evidence differently nor of the arbitrator having “second thoughts”. Nor am I persuaded that there is the risk of any inconsistent awards. Here, I am satisfied that the arbitrator was only ever intending to address the issue of whether or not there had been a very serious breach of contract – one that he considered required “cogent evidence” – that would justify termination; and that he was clearly not addressing what Mr Jacobs described as “the more humdrum accounting claims” which had slipped his mind, and which he later addressed in the Amended Award. In my view, what happened here was an accidental slip (mistake) or omission by the Arbitrator which he was entitled to correct under s57(3)(a) or under paragraph 25 of the LMAA terms if not under s57(3)(b).
32. By way of footnote, I should mention that I was initially troubled by Mr Cutress’ detailed argument on the figures with regard to the minimum monthly payment and, in particular, his submission in that context that the overall payment shortfall could not be more than US\$3,500 and even that is disputed by UM. However, it seems to me that any such outstanding dispute will fall within the terms of the account to be taken pursuant to the Amended Award and any damages that might be awarded thereafter.

Conclusion

33. It is for these reasons that I rejected UM’s application. Counsel are accordingly requested to prepare a draft order to reflect the terms of this Judgment (including costs) failing which I will deal with any outstanding issues.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

In the Matter of the Independent Review Process:

ICM Registry, LLC,

Claimant,

v.

Internet Corporation For Assigned Names and
Numbers ("ICANN"),

Respondent.

CASE MANAGER: Carolina Cardenas

ICDR Case No. 50 117 T 00224 08

**ICANN'S RESPONSE TO
REQUEST FOR INDEPENDENT REVIEW**

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Pursuant to Article IV, Section 3 of the Bylaws for the Internet Corporation for Assigned Names and Numbers (“ICANN”), and the International Centre for Dispute Resolution’s (“ICDR”) Rules as supplemented by ICANN’s Bylaws, ICANN hereby submits this Response to ICM Registry, LLC’s (“ICM”) Request for Independent Review.

I. INTRODUCTION

1. ICANN is a not-for-profit public benefit corporation that administers certain features of the Internet’s domain name system pursuant to a contract with the United States Government. Since its formation in 1998, ICANN has been responsible for, among other things, promoting competition with respect to the Internet’s domain name system. For example, ICANN has accredited hundreds of companies to sell domain name subscriptions to consumers.

2. ICANN also has facilitated the creation of a modest number of new generic Top Level Domains (“TLDs”) to supplement the TLDs that were originally available on the Internet, such as “.COM,” “.NET” and “.ORG.” The entities that operate TLDs for the benefit of the Internet community are known as “Registries.” The dispute that gives rise to these proceedings relates to a proposal by ICM to operate a new TLD known as “.XXX.”

3. The Independent Review Process that ICM has invoked here is specifically provided for in ICANN’s Bylaws. The process serves as a means by which entities that deal with ICANN can have a further check-and-balance with respect to decisions of ICANN’s Board of Directors and, specifically, whether the Board’s actions are consistent with ICANN’s Bylaws and Articles of Incorporation. The process seeks the advice of either one or three neutral panelists, which employ(s) a deferential standard of review, following which the Board considers that advice. The advice is not binding on the ICANN Board but, of course, ICANN takes the process quite seriously. This is the first time the process has been invoked.

4. Since ICANN was formed in 1998, ICANN has been slowly adding TLDs to the Internet in order to confirm that the expansion of TLDs would not endanger the security or stability of the Internet. Thus, for example, in the year 2000, ICANN approved “.BIZ,” “.INFO,” “.MUSEUM,” and a few other TLDs to be added to the Internet.

5. ICM's .XXX proposal, submitted during 2004 in conjunction with ICANN's second attempt to add TLDs to the Internet, was by far the most controversial proposal ICANN has ever seriously considered. ICM anticipated that the proposal would be controversial, and ICM was correct. While ICM insisted that its proposal was not going to result in the proliferation of pornography on the Internet, many across the world were concerned about this possibility and how ICM would monitor and regulate activity in the proposed TLD.

6. Ultimately, ICANN's Board of Directors – which debated ICM's proposal extensively and was not of one mind during most of the debate – decided to turn down ICM's proposal. But the notion that, in so doing, ICANN's Board in some way violated its Bylaws or Articles of Incorporation is absurd. Instead, the Board's debate of the ICM proposal was done publicly, extensively, with great commitment; throughout the process, the Board acted in good faith and adhered rigorously to its Bylaws and Articles of Incorporation. In short, there is no basis for ICM's Request for Independent Review ("Request"), and the Request should be summarily denied.¹

II. SUMMARY OF ICANN'S POSITION

7. ICANN's review, evaluation, and ultimate rejection of ICM's application for the .XXX TLD was entirely consistent with ICANN's Mission Statement, Articles of Incorporation, and Bylaws.

- (a) ICANN's evaluation of ICM's proposal, as well as ICANN's negotiations with ICM, were at all times open, transparent, and in good faith. Indeed, as this Independent Review Panel ("IRP") considers the evidence that the parties submit in this proceeding, we believe that the IRP will be struck by the fact that ICANN's consideration of ICM's proposal was *more* open and transparent than one would find in virtually any other context in conjunction with any other organization. ICANN is unique in its openness and transparency, and those features were on display during ICANN's consideration of ICM's proposal for the .XXX TLD.
- (b) ICM knew that its proposal would be controversial, and that the Board would need substantial time to evaluate the proposed TLD. ICM even requested periodically that the Board defer votes on the proposal so that ICM could provide additional information to the Board and respond to

¹ ICM has also asserted that ICANN somehow violated "ICM's rights under international law and applicable international conventions, and local law." See ICM's Request, ¶1. Although ICM provides no support for this assertion, the Independent Review Panel need not consider this claim because the scope of the Independent Review Process, as set forth in ICANN's Bylaws and as discussed below, is limited to ensuring that ICANN operated in a manner that is consistent with its Bylaws and Articles of Incorporation.

concerns that had been expressed. The Board welcomed and evaluated ICM's additional submissions.

- (c) ICANN's Bylaws *require* the Board to consider the opinion of ICANN's Governmental Advisory Committee ("GAC") where ICANN's actions implicate public policy concerns. Thus, when the GAC expressed concerns about ICM's proposal, ICANN was bound by its own Bylaws to consider those concerns.
- (d) ICANN retained at all times the discretion to reject ICM's proposal. At no time did ICANN commit – contractually or otherwise – to approve ICM's proposal, a fact that ICM knew quite clearly. Indeed, although ICM argues in this Request that ICANN had "committed" at some stage of the process to award ICM a registry agreement for the .XXX TLD, ICM did not assert any such "commitment" during the actual evaluation of ICM's proposal. Instead, ICM always knew that no commitment had been made.
- (e) ICANN could have rejected the ICM proposal based solely on the strong recommendation of ICANN's Independent Evaluation Panel that the proposal be denied because it did not comply with the "sponsorship" criteria that applied to this process. Nonetheless, ICANN worked closely and in good faith with ICM in an attempt to cure the apparent problems with the application. While the Board elected to proceed to "the next step" via contract negotiations, that vote was *not* a decision that ICM's proposal for the .XXX sTLD had been approved. To the contrary, everyone understood that the ICANN Board continued to have serious concerns regarding the "sponsorship" aspect of ICM's proposal – easily the most critical and controversial aspect of the proposal – and many on the Board were attempting to determine if the "sponsorship" issue could be addressed via the proposed registry agreement, i.e., "the next step." Thus, the entire premise of ICM's Request – that proceeding to contract negotiations amounted to a guarantee that ICM would obtain a contract for the .XXX TLD – is simply false.

8. ICANN's Bylaws support a deferential standard of review be applied to the Independent Review Process, particularly with respect to the nature of ICM's claims. Indeed, as long as the Board's discussions are open and transparent, its decisions are made in good faith, and the relevant parties have been given an opportunity to be heard, there is a strong presumption that the Board's decisions are appropriate. This Panel is not being asked to substitute its judgment for that of the Board. Instead, this Panel is tasked with reviewing the record and determining whether the evidence provides adequate support for the Board's actions with respect to some of ICANN's most important core values. This Response will make clear that the Board's conduct and ultimate decisions were more than amply supported by the facts.

9. In this Response to ICM's Request for Independent Review, ICANN will:
- (a) Describe the history and function of ICANN (Section III);
 - (b) Explain ICANN's decision-making processes, including the process for Independent Review (Section IV);
 - (c) Explain the purpose and function of ICANN's Governmental Advisory Committee (Section V);
 - (d) Address the relevant facts that give rise to this dispute (Section VI);
 - (e) Address the relevant standard of review for these proceedings (Section VII);
 - (f) Respond to ICM's claims that ICANN's Board violated ICANN's Bylaws and Articles of Incorporation (Section VIII); and
 - (g) Propose next steps for these proceedings (Section IX).

Because of the length of ICM's Request for Independent Review, this Response will provide a similar level of detail. The procedures that govern this Independent Review Process also provide that, in order to keep the costs and burdens of the process to a minimum, this Panel should conduct, to the extent possible, its proceedings via the Internet and hold meetings via telephone where necessary.² Accordingly, the detailed record that the parties already have provided to the Panel, via ICM's Request and this Response, should facilitate the orderly resolution of these proceedings, as ICANN discusses in Section IX.

III. ICANN'S HISTORY AND FUNCTION

10. ICANN is a not-for-profit public benefit corporation that was organized under California law in 1998.³ ICANN's mission is to protect the stability, integrity and utility of the

² See Bylaws for Internet Corporation for Assigned Names and Numbers, Article IV, § 3.10, *available at* <http://www.icann.org/en/general/bylaws.htm> (last modified May 29, 2008) [Hereinafter ICANN Bylaws]; Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process, § 4, *available at* <http://www.adr.org/sp.asp?id=32197> (last visited Sept. 5, 2008) [Hereinafter ICDR Supplementary Procedures]. Although the majority of materials cited in this Response are publicly available on the Internet at www.icann.org and other Internet sites, for ease of reference, ICANN has provided the Panel with copies of all materials cited herein. ICANN Bylaws and ICDR Supplementary Procedures are attached hereto as ICANN Exhibits A and B, respectively.

³ Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, *available at* <http://www.icann.org/en/general/articles.htm> (last modified Nov. 21, 1998), attached hereto as ICANN Exhibit C.

domain name system on behalf of the global Internet community.⁴ Pursuant to a series of agreements with the United States Department of Commerce (“DOC”), ICANN is responsible for administering certain aspects of the Internet’s domain name system (“DNS”).⁵

11. The Internet’s DNS allows users of the Internet to refer to websites using easier-to-remember domain names (such as “google.com”) rather than the all-numeric Internet Protocol (IP) addresses (such as “192.0.34.65”) assigned to each computer on the Internet. Each domain name is made up of a series of character strings (called “labels”) separated by dots. The right-most label in a domain name is referred to as its “top-level domain” or TLD.

12. As part of ICANN’s mission, ICANN designates the ability to run top-level domain name “registries” (such as “.COM” and “.ORG”) to qualified entities, and enters into contracts with those entities to operate the Internet registries. Each TLD is operated by a single registry that functions similar in some ways to a phone book, making sure that each name registered in that domain is unique. Registries offer a variety of services that, for example, permit consumers to check to see if a particular domain name has already been registered and when the subscription for a name is set to expire.

13. ICANN also accredits companies known as “registrars” that make Internet “domain names” – such as “cnn.com” or “pbs.org” – available to consumers. Each registrar enters into an agreement with the registry for a particular TLD, as well as an agreement with ICANN that permits the registrar to sell the right to use domain names in a particular TLD, i.e., .COM, .ORG, etc. Registrars, in turn, contract with consumers and businesses (“registrants”) that wish to register Internet domain names.

14. There are several types of TLDs within the DNS. The TLDs with three or more characters often are referred to as “generic” TLDs, or “gTLDs.” They can be subdivided into two types, “unsponsored” TLDS (uTLDs) or “sponsored” TLDs (sTLDs). Generally speaking, a uTLD operates for the benefit of the global Internet community, while an sTLD is a specialized TLD that has a “Sponsor” representing a specified community that wishes to operate the TLD for the benefit of that community. Examples of sTLDs include “.museum,” and “.aero.” Although a

⁴ ICANN Bylaws, *supra* note 2, Article 1, § 1 (Mission).

⁵ *Id.*

sTLD represents a specified community, members of that community are not forced to migrate their Internet domain names from a uTLD – a member of the specified sTLD community may choose to continue to operate a domain name in the uTLD in addition to the sTLD.

15. A “Sponsor” is an organization that is delegated with the authority to define the manner in which a particular sTLD is operated. The sTLD has a “Charter,” which defines the purpose for which the sTLD has been created and will be operated. The Sponsor is responsible for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders, known as the “Sponsored TLD Community,” that are most directly interested in the operation of the TLD. The Sponsor also is responsible for selecting the registry that will operate the sTLD and for establishing the roles played by registrars. The Sponsor must exercise its delegated authority according to fairness standards and in a manner that is representative of the sTLD Community.⁶

IV. ICANN’S DECISION-MAKING AND INDEPENDENT REVIEW PROCESS

16. ICANN is a complex organization that facilitates input from a wide variety of Internet stakeholders. ICANN has a Board of Directors, a Staff, an Ombudsman, a Nominating Committee for Directors, three Supporting Organizations, and six Advisory Committees that make policy recommendations to the Board on specific topics.⁷ ICANN’s Board of Directors consists of fifteen volunteer, voting directors,⁸ two-thirds of whom presently reside outside of the United States. In addition, a volunteer, non-voting liaison is appointed by each Advisory Committee to sit on the Board and to take part in Board discussions and deliberations.⁹

17. The current Chairman of the ICANN Board is Peter Dengate Thrush, a New Zealand barrister. ICANN’s President and Chief Executive Officer is Paul Twomey, who

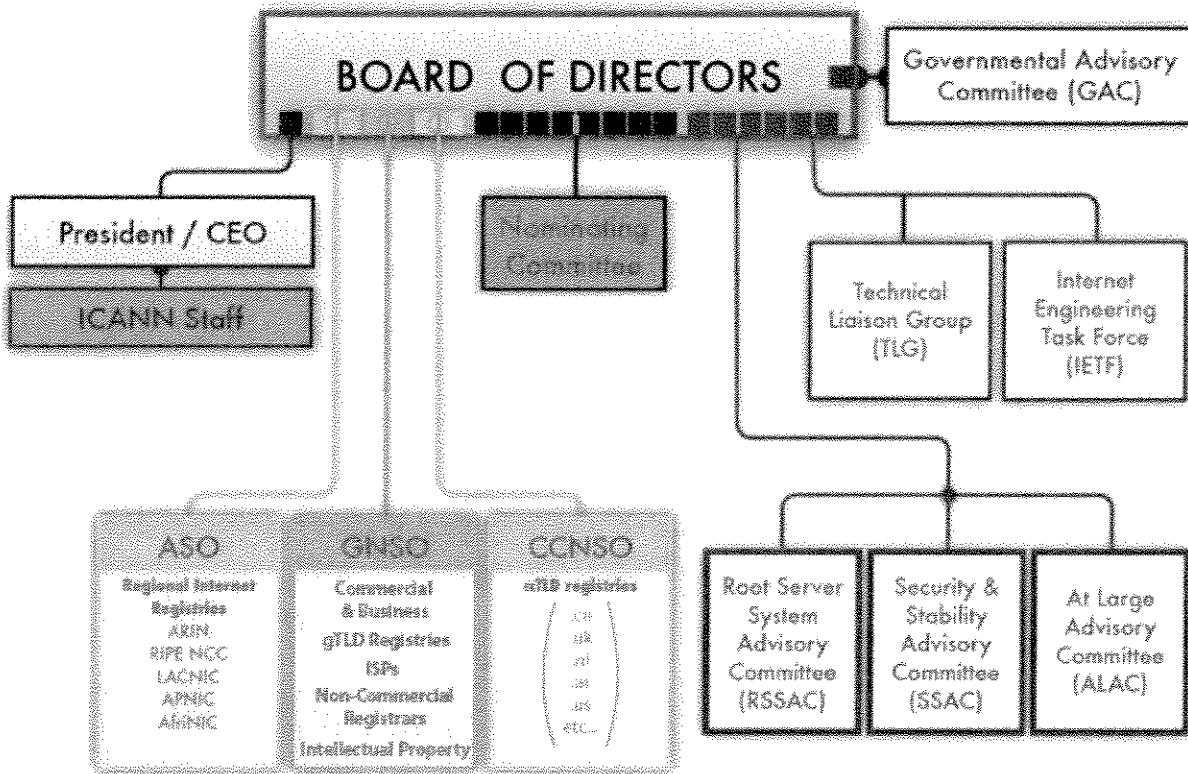
⁶ The purpose and function of uTLDs and sTLDs are subject to change as ICANN continues to add new TLDs to the DNS.

⁷ ICANN Bylaws, *supra* note 2, Articles V-XI. ICANN’s Bylaws specifically provide for four Advisory Committees – the Governmental Advisory Committee, the Security and Stability Advisory Committee, the Root Server System Advisory Committee, and the At-Large Advisory Committee. The Bylaws also provide that the ICANN Board may create additional Advisory Committees, which it has with the creation of the Technical Liaison Group and the Internet Engineering Task Force. *Id.* at Article XI, §§ 1-2 (Advisory Committees).

⁸ *Id.* at Article VI., § 1 (Board of Directors). Eight directors are selected by ICANN’s Nominating Committee and another six directors are selected by ICANN’s three Supporting Organizations (each selecting two). The ICANN President also serves as a voting director. *Id.* at Article VI., § 2.

⁹ *Id.* at Article VI., § 9 (Non-Voting Liaisons).

previously chaired ICANN's Government Advisory Committee and worked in a variety of government and private positions in Australia. Nearly all of those who work with the Board and its various committees, other than ICANN Staff, consist of volunteers. A graphic depiction of ICANN's organization is found on ICANN's website and is reproduced here:



18. In carrying out its mission, ICANN is held accountable to the Internet community for operating in a manner that is consistent with its Bylaws. The Bylaws provide for three unique processes to serve as a form of “Accountability and Review” of ICANN’s actions.¹⁰ Specifically, the Bylaws provide for: (1) “Reconsideration” of the Board’s actions – a review process administered by the Board; (2) “Independent Review of Board Actions” (at issue here) – defined as a “separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws;” and (3) “Periodic Review of ICANN Structure and Operations” – a periodic review administered by the Board.¹¹

¹⁰ *Id.* at Article IV, § 1 (Accountability and Review).

¹¹ *Id.* at Article IV, §§ 2-4.

19. The Independent Review Process is not a form of traditional dispute resolution, i.e., mediation or arbitration, but rather, is intended to provide the community with a formal process for reviewing specific decisions of the ICANN Board. The ICDR has been appointed as ICANN's Independent Review Provider.¹² The ICDR Rules, as supplemented by ICANN's Bylaws and Supplementary Procedures that the ICDR has adopted specially for Independent Review proceedings, apply here.¹³ Unlike a traditional arbitration or mediation through the ICDR, the Independent Review Process does not specifically contemplate the need for a live hearing. To the contrary, the Bylaws expressly provide that the Independent Review should be conducted via "email and otherwise via the Internet to the maximum extent feasible." The IRP may also hold meetings via telephone where necessary.¹⁴

20. Consistent with ICANN's Bylaws, the IRP is supposed to issue a written declaration designating, among other things, the prevailing party.¹⁵ The Board, "where feasible," shall consider the IRP's declaration at the Board's next meeting.¹⁶

21. The IRP's declaration is not binding on the parties. However, because the Independent Review Process is provided for in ICANN's Bylaws and is intended to provide an ultimate check on the decisions of the Board, ICANN takes the process quite seriously. ICANN's Board is committed to being held at all times accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation.

V. ICANN'S GOVERNMENTAL ADVISORY COMMITTEE

22. As noted above, there are six advisory committees that serve the ICANN Board, four of which are specifically provided for in ICANN's Bylaws. The Governmental Advisory Committee ("GAC") is one of those advisory committees.¹⁷ ICANN receives input from governments throughout the world through the GAC. The GAC's key role is to provide advice

¹² *Id.* at Article IV, § 3.4.

¹³ In the event of any inconsistency between the Supplementary Procedures and the ICDR's Rules, the Supplementary Procedures shall govern. *Id.* at Article IV, § 3.5; *see also* ICDR Supplementary Procedures, *supra* note 2, § 2.

¹⁴ ICANN Bylaws, *supra* note 2, at Article IV, § 3.10

¹⁵ *Id.* at Article IV, § 3.12; ICDR Supplementary Procedures, *supra* note 2, § 7.

¹⁶ ICANN Bylaws, *supra* note 2, at Article IV, § 3.15.

¹⁷ *Id.* at Article XI, § 2.

to ICANN on issues of public policy. In particular, the GAC considers ICANN's activities and policies as they relate to the concerns of governments, particularly in matters where there may be an interaction between ICANN's policies and national laws or international agreements.¹⁸

23. Given the global nature of the Internet, the GAC seeks to incorporate the diversity among varying countries and economies – many with different laws, perspectives and policies – in its advice to ICANN. Participation in the GAC allows countries and distinct economies to influence policies concerning the management of the DNS and related functions, which are important to the overall operation of the Internet.¹⁹

24. The GAC's meetings are usually held three or four times a year in conjunction with ICANN Board meetings. GAC membership is open-ended and is drawn from all regions of the world. GAC meetings are regularly attended by over 30 national governments, distinct economies, and multinational governmental organizations such as the ITU and the World Intellectual Property Organization (WIPO).²⁰

25. ICANN's Bylaws provide that the Board shall notify the Chair of the GAC in a timely manner of any proposal raising public policy issues.²¹ The GAC may also choose to “put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.”²²

26. The Bylaws make clear that the ICANN Board is **required** to take into account the advice from the GAC on public policy matters, both in formulation and adoption of policies.²³ In those situations where the Board seeks to take actions that are inconsistent with the GAC's

¹⁸ *Id.* at Article XI, § 2.1(a); *see also* The Internet Domain Name System and the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN), *available at* http://gac.icann.org/web/about/gac-outreach_English.htm (last visited Sept. 5, 2008) [Hereinafter GAC General Information], attached hereto as ICANN Exhibit D; ICANN Governmental Advisory Committee, Operating Principles, *available at* http://gac.icann.org/web/home/GAC_Operating_Principles.pdf (last visited on Sept. 5, 2008) [Hereinafter GAC's Operating Principles], attached hereto as ICANN Exhibit E.

¹⁹ GAC General Information, *supra* note 18.

²⁰ *Id.*

²¹ ICANN Bylaws, *supra* note 2, at Article XI, § 2.1(h) (Advisory Committees).

²² *Id.* at Article XI, § 2.1(i).

²³ *Id.* at Article XI, § 2.1(j); *see also* GAC's Operating Principles, *supra* note 18: “The Governmental Advisory Committee shall consider and provide advice on the activities of ICANN as they relate to concerns of governments and where they may affect public policy issues. The Advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account by ICANN, both in formulation and adoption of policies.”

advice, the Board is required to inform the GAC and state the reasons why the Board has decided not to follow the GAC's advice. The GAC and the ICANN Board must then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.²⁴

VI. SUMMARY OF RELEVANT FACTS

A. **ICANN'S ROLE IN THE INTRODUCTION OF NEW TLDS AND THE 2000-2001 NEW TLD SELECTION PROCESS.**

27. ICANN's role in the delegation of new TLDs can be traced to the U.S. Government's June 5, 1998 White Paper entitled "Statement of Policy, Management of Internet Names and Addresses."²⁵ In that White Paper, the U.S. Government, which controlled the Internet's domain name system, declared its willingness to recognize a new, not-for-profit corporation formed by private sector Internet stakeholders to administer policy for the DNS. The White Paper envisioned a transition process during which the not-for-profit corporation would enter various agreements to facilitate the transition to the private sector of the U.S. Government's role in the Internet names and numbers address system in a manner that ensured the stability of the Internet.²⁶

28. The White Paper provided that the new corporation – ultimately determined to be ICANN – should ultimately have the authority to manage and perform a specific set of functions related to coordination of the domain name system. This included the authority necessary to "*oversee policy for determining the circumstances under which new TLDs are added to the root system.*"²⁷ Thus, the introduction of new TLDs has been a central focus of ICANN's operation and policy development work since ICANN's founding.²⁸

²⁴ ICANN Bylaws, *supra* note 2, at Article XI, § 2.1(j).

²⁵ Management of Internet Names and Address, 63 Fed. Reg. 31741-01 (June 10 1998), <http://www.icann.org/en/general/white-paper-05jun98.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit F.

²⁶ *Id.* at 31749.

²⁷ *Id.* (emphasis added).

²⁸ Notably, the Internet community has declared ICANN's efforts in this regard to be successful. For example, in 2004, the Organisation for Economic Co-Operation and Development (OECD) issued a report entitled "Generic Top Level Domain Names: Market Development and Allocation Issues." The OECD report reviewed the historical results of ICANN's introduction of new TLDs and concluded that "ICANN's reform of the market structure for the registration of generic Top Level Domain Names has been very successful. The division between registry and registrar functions has created a competitive market that has lowered prices and encouraged innovation." Working Paper on Telecommunication and Information Services Policies, Generic Top Level Domain Names: Market Development and Allocation Issues (July 13, 2004) *available at* <http://www.oecd.org/dataoecd/56/34/32996948.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit G.

29. Shortly after its formation, ICANN began to explore the possibility of adding new TLDs to the DNS. After much deliberation and public comment, on July 16, 2000, the ICANN Board adopted a policy for the introduction of new TLDs in “a measured and responsible manner.”²⁹ The policy involved a process in which those interested in operating or sponsoring new TLDs could apply directly to ICANN.³⁰ Venturing into uncharted territory, on August 15, 2000, ICANN posted the selection criteria for assessing a new set of TLD applications.³¹ Although ICANN anticipated receiving many applications for new TLDs, ICANN was clear that only a few would be selected.³² ICANN further stated that it would consider the extent to which the new TLD would provide for the following: (1) Maintain the Internet’s stability; (2) Promote effective evaluation of the new TLD; (3) Enhance competition for registration services; (4) Enhance the utility of the DNS; (5) Meet previously unmet types of needs; (6) Enhance the diversity of the DNS and of registration services generally; (7) Promote effective evaluation of the policy-formulation functions; (8) Protect the rights of others in connection with the operation of the TLD; and (9) Demonstrate realistic business, financial, technical, and operational plans and sound analysis of market needs.³³

30. Forty-seven TLD proposals were submitted to ICANN. In November 2000, the ICANN Board authorized seven of those proposals to become new gTLDs to be added to the DNS upon U.S. Department of Commerce approval.³⁴ The new gTLDs consisted of four unsponsored or uTLDs (.biz, .info, .name, and .pro) and three sponsored or sTLDs (.museum, .aero, and .coop). These seven new gTLDs were authorized as a “proof of concept” to gain an

²⁹ ICANN TLD Application Process: Information for Applicants, *available at* <http://www.icann.org/en/tlds/tld-application-process.htm> (last visited Sept. 5, 2008) [Hereinafter TLD Application Process], attached hereto as ICANN Exhibit H; *see also* Resolutions of the ICANN Board, 16 July 2000, *available at* <http://www.icann.org/en/tlds/new-tld-resolutions-16jul00.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit I.

³⁰ TLD Application Process, *supra* note 29.

³¹ ICANN Criteria for Assessing TLD Proposals, 15 August 2000, *available at* <http://www.icann.org/en/tlds/tld-criteria-15aug00.htm> (last visited Sept. 5, 2008) [Hereinafter Criteria for Assessing TLDs], attached hereto as ICANN Exhibit J.

³² *Id.*

³³ *Id.*

³⁴ ICANN Preliminary Report, Second Annual Meeting and Organizational Meeting of the ICANN Board, 19 February 2003, *available at* <http://www.icann.org/en/minutes/prelim-report-16nov00.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit K.

understanding of the practical and policy issues involved in adding new TLDs to the DNS.³⁵ The seven were selected following extensive input from ICANN Staff, outside advisors, and the Internet community as a whole.³⁶

31. Among the 47 proposals received by ICANN was an unsponsored or uTLD application from ICM for the creation of a .XXX TLD. .XXX was not selected during the “proof of concept” round for three reasons: (1) “it did not appear to meet unmet needs;” (2) “the controversy surrounding” .XXX was great; and (3) the application included a “poor definition of the hoped-for benefits of [] .XXX.”³⁷ In short, “[t]he evaluation team concluded that at this early ‘proof of concept’ stage with a limited number of new TLDs contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs.”³⁸

32. After the “proof of concept” round, ICM filed a Request for Reconsideration requesting the Board clarify certain statements made during the TLD selection process. Specifically, ICM requested clarification of “mischaracterizations that appeared in the final staff report that were further reinforced during the ICANN Public Forum and Board meeting [and] have impeded ICM Registry’s effort to build consensus in connection with this top-level domain.”³⁹ The Board did not recommend any action in response to ICM’s Request for

³⁵ Criteria for Assessing TLDs, *supra* note 31: “The current program of establishing new TLDs is intended to allow the Internet community to evaluate possible additions and enhancements to the DNS and possible methods of implementing them. Stated differently, the current program is intended to serve as a ‘proof of concept’ for ways in which the DNS might evolve in the longer term.” To further this purpose, on June 4, 2001, the ICANN Board convened a New TLD Evaluation Planning Process Task Force (“NTEPPTF”). The goal of the NTEPPTF was to recommend to the ICANN Board and the broader Internet community a plan for monitoring the introduction of the seven new gTLDs and for evaluating their performance and impact on the DNS. ICANN Minutes, Preliminary Report, Regular Meeting of the ICANN Board in Stockholm, 4 June 2001, *available at* <http://www.icann.org/en/minutes/prelim-report-04jun01.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit L.

³⁶ As anticipated, in conjunction with the Board’s adoption of the seven new gTLDs, the GAC published an opinion on the establishment of the new gTLDs. *See* Opinion of the Governmental Advisory Committee on New Generic Top Level Domains, 16 November 2000, *available at* <http://www.icann.org/en/committees/gac/new-tld-opinion-16nov00.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit M. The GAC expressed its opinion on the objectives of creating new gTLDs, advised ICANN on necessary provisions to be included in the registry agreements with the new gTLDs, and addressed public policy considerations. *Id.*

³⁷ ICANN Report on TLD Applications: Application of the August 15 Criteria of Each Category or Group, 9 November 2000, *available at* <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm> (last visited Sept. 5, 2008) [Hereinafter Report on .XXX uTLD], attached hereto as ICANN Exhibit N.

³⁸ *Id.*

³⁹ Reconsideration Request 00-15, Recommendation of the Committee, *available at* <http://www.icann.org/en/committees/reconsideration/rc00-15-1.htm> (last visited Sept. 5, 2008) [Hereinafter Reconsideration Request Recommendation], attached hereto as ICANN Exhibit O; *see also* Reconsideration Request

Reconsideration because ICM had not sought reconsideration of the Board's decision (which is required before a Request for Reconsideration is to be filed), but the Board did reiterate that proposals that were not selected in the proof of concept round did not constitute a rejection of the proposed TLD.⁴⁰ Interestingly, in the Board's Recommendation, the Board noted that "ICM Registry has uniformly acknowledged that its proposal should stand the tests of community support and the public interest, rather than embarking on a pseudo 'top-level domain' or so-called 'experimental root' .XXX effort that would cast aside the global Internet's community's open DNS coordination process."⁴¹

B. ICANN'S sTLD SELECTION PROCESS.

33. Nearly two years after the Board authorized the seven new gTLDs in the proof of concept round, the ICANN Board continued to think about expanding the domain space with additional TLDs. At the behest of the ICANN Board, on October 18, 2002, then President Stuart Lynn drafted "A Plan for Action Regarding New gTLDs."⁴² Lynn recommended that the ICANN Board consider immediately initiating a new round of proposals for up to three "sponsored" TLDs. He proposed the round be launched as an extension of the original proof of concept round, following similar, streamlined criteria.⁴³ Lynn also suggested that applicants that submitted unsuccessful proposals for new sponsored TLDs in the original proof of concept round be invited to update and resubmit their proposals.⁴⁴

34. Over the next eight months, ICANN, in keeping with its mandate to be open and transparent, developed the proposed criteria and process for evaluating sTLD proposals and posted the criteria and draft RFP for public comment.⁴⁵ Upon much deliberation and

(continued...)

00-15, Received 16 December 2000, *available at* <http://www.icann.org/en/committees/reconsideration/icm-request-16dec00.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit P.

⁴⁰ Reconsideration Request Recommendation, *supra* note 39.

⁴¹ *Id.*

⁴² A Plan for Action Regarding New gTLDs, Stuart Lynn, ICANN President, October 18, 2002 (Appendix A. Background), *available at* <http://www.icann.org/committees/ntepptf/new-gtld-action-plan-18cot02.htm> (last visited Sept. 5, 2008) posted for public comment on November 8, 2002, attached hereto as ICANN Exhibit Q.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ On December 15, 2002, the ICANN Board directed Lynn to develop a draft RFP for the purpose of soliciting proposals for a limited number of additional new sTLDs. *See* ICANN Minutes, Fourth Annual Meeting of

consultation with its supporting organizations and advisory committees,⁴⁶ on December 15, 2003, ICANN launched the next round of the TLD selection process by posting an open request for proposals for any interested party to apply for the delegation of a new sTLD.⁴⁷ Unlike the “proof of concept” round, this new round was expressly limited to “sponsored” TLDs; as a result, the question of sponsorship was critical to the application, which contained numerous questions that an applicant was required to address. If a proposed TLD was not truly “sponsored,” it would be rejected in this round but could be approved in later rounds where sponsorship was not an element of the application.

C. NEW sTLD APPLICATIONS/REQUEST FOR PROPOSALS.

35. The Request for Proposal for new sTLD applications included a full description of the selection process and criteria. The RFP was divided into six parts. The first part (Part A) provided explanatory notes on the process, as well as the selection criteria and the type of information requested by ICANN. The selection process was described as follows:

(continued...)

the Board, 15 December 2002, *available at* <http://www.icann.org/en/minutes/minutes-annual-meeting-15dec02.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit R. On March 25, 2003, ICANN Staff posted for public comment the proposed criteria and the proposed process for evaluating sTLD proposals. *See* ICANN Rio de Janeiro Meeting Topic: Criteria to be Used in the Selection of New Sponsored TLDs, 25 March 2003, *available at* <http://www.icann.org/meetings/riodejaneiro/stdl-rfp-topic.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit S. Three months later, on June 24, 2003, ICANN posted for public comment a draft RFP and invited further comment through August 25, 2003. *See* Establishment of new sTLDs: Request for Proposals (Draft for Public Comment), 24 June 2003, *available at* <http://www.icann.org/tlds/new-stdl-rfp/new-stdl-rfp-24jun03.htm> (last visited Sept. 5, 2008) [Hereinafter Draft RFP for new sTLDs], attached hereto as ICANN Exhibit T.

⁴⁶ The draft RFP received significant input via ICANN’s online public forum. ICANN’s At Large Advisory Committee or “ALAC,” a community of individual Internet users who participate in the policy development work of ICANN, also drafted and posted its “Response to the Proposed sTLD RFP and Suggested Principles for New TLD Processes.” October 9, 2003, *available at* <http://alac.icann.org/correspondence/response-stdl-process-09oct03.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit U. ICANN’s Generic Names Supporting Organization or “GNSO,” the successor to the gTLD responsibilities of the Domain Name Supporting Organization, shortly after provided its comment and called upon the ICANN Board to move forward with the process for an interim round of sTLDs. GNSO Council Carthage Meeting Minutes, 29 October 2003, *available at* <http://gnso.icann.org/meetings/minutes-gnso-29oct03.shtml> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit V. The ICANN Board reviewed the public comments received on the draft RFP and noted in particular, “an appreciation of the importance to the community of this topic, and the intent to seek further input and open communication with the community on this topic” before arriving at any decision. ICANN Minutes, Special Board Meeting, 13 October 2003, *available at* <http://www.icann.org/en/minutes/minutes-13oct03.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit W.

⁴⁷ *See* New sTLD Application, 15 December 2003, *available at* <http://www.icann.org/en/tlds/new-stdl-rfp/new-stdl-application-part-a-15dec03.htm> (last visited Sept. 5, 2008) [Hereinafter New sTLD Application], attached hereto as ICANN Exhibit X. Although Lynn’s Action Plan suggested limiting the number of sTLDs in this round of proposals to three, community comment encouraged ICANN not to limit that number. *See* Draft RFP for New sTLDs, *supra* note 45.

- (a) The selection procedure is based on principles of objectivity, non-discrimination and transparency.
- (b) An independent team of evaluators will perform the evaluation process. The evaluation team will make recommendations about the select applications, if any applications are successful in meeting the selection criteria.
- (c) **Based on the evaluator's recommendations**, ICANN staff will proceed with contract negotiations and develop an agreement. ICANN will negotiate specific terms and conditions with each Registry Operator.⁴⁸

36. The sTLD application also provided the selection criteria that would be used to evaluate all proposals. The criteria were designed as “objective criteria” to enable the independent evaluators to determine which applications “best” met ICANN’s requirements.⁴⁹ The selection criteria consisted of four categories: (1) Sponsorship Information; (2) Business Plan Information; (3) Technical Standards; and (4) Community Value.⁵⁰

37. The application defined the Sponsorship Criteria as follows:

- (a) The proposed sTLD must address the needs and interest of a “**clearly defined community**” (the Sponsored TLD Community), which can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate.
- (b) Accordingly, Applicants must demonstrate that the Sponsored TLD Community is:
 - (i) **Precisely defined, so it can readily be determined which persons or entities make up that community**; and
 - (ii) Comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community.⁵¹

38. The application further required Applicants to provide an explanation of the Sponsoring Organization’s policy-formulation procedures, demonstrating that the proposed TLD:

⁴⁸ New sTLD Application, *supra* note 47 (Part A. Explanatory Notes).

⁴⁹ *Id.* (Part A. Explanatory Notes – Selection Criteria).

⁵⁰ *Id.*

⁵¹ *Id.* (Part A. Explanatory Notes – Sponsorship Information – Definition of Sponsored TLD Community).

- (a) Operates primarily in the interests of the Sponsored TLD Community;
- (b) Has a clearly defined delegated policy-formulation role and is appropriate to the needs of the Sponsored TLD Community;
- (c) Has defined mechanisms to ensure that approved policies are primarily in the interests of the Sponsored TLD Community and the public interest; and
- (d) Is *tailored to meet the particular needs of the defined Sponsored TLD Community* and the characteristics of the policy formulation environment.⁵²

39. Finally, the application provided that the applicant must demonstrate support required from the Sponsored TLD Community. It provided that “[a] key requirement of a sTLD proposal is that it demonstrates *broad-based support* from the community it is intended to represent.”⁵³ Accordingly, applicants were required to “demonstrate that there is” (present tense) the following:

- (a) Evidence of *broad-based support* from the Sponsored TLD Community for the sTLD, for the Sponsoring Organization, and for the proposed policy-formulation process; and
- (b) An outreach program that illustrates the Sponsoring Organization’s capacity to represent a wide range of interests within the community.⁵⁴

D. ICM’S APPLICATION FOR THE .XXX sTLD.

40. On March 16, 2004, ICM submitted an application for the introduction of a .XXX sTLD.⁵⁵ The application stated that Afilias Limited would act as the registry infrastructure provider, and that policy would be managed by a new Canadian non-profit Sponsor called the International Foundation for Online Responsibility (“IFFOR”).⁵⁶ Stewart Lawley, who was the

⁵² *Id.* (Part A. Explanatory Notes – Sponsorship Information – Appropriateness of the Sponsoring Organization and the policy formulation environment).

⁵³ *Id.* (Part A. Explanatory Notes – Sponsorship Information –Level of Support From the Community) (emphasis added).

⁵⁴ *Id.* (emphasis added).

⁵⁵ New sTLD RFP Application, .XXX, Part B. Application Form, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/xxx.htm> (last visited Sept. 5, 2008) [Hereinafter .XXX sTLD RFP Application], attached hereto as ICANN Exhibit Y.

⁵⁶ *Id.*

president of ICM, also was the president of IFFOR, an entity that was created specifically for the purpose of supporting the .XXX sTLD application.⁵⁷

41. ICM's .XXX sTLD purported to serve "the needs of the global online adult-entertainment community." The online adult-entertainment community was defined as "those individuals, businesses, and entities that provide sexually-orientated information, services, or products intended for consenting adults or for the community itself."⁵⁸ The terms "adult-entertainment" and "sexually-oriented" were intended to be understood "broadly for a global medium," and were "not to be construed as legal or regulatory categories." Rather, "the referenced community consists generally of websites that convey sexually-orientated information and for which a system of self-identification would be beneficial."⁵⁹

42. ICANN received a total of ten sTLD applications.⁶⁰ ICM's application was easily the most controversial. Indeed, ICM had previously applied in the proof of concept round in 2000 for an "unsponsored" TLD for the .XXX domain, and it was now applying for a "sponsored" TLD for the exact same Top Level Domain. Clearly, there was going to be a question of whether ICM could establish the requisite "community," whereas previously it was proposing a generic, broader TLD with no restrictions. And even in the proof of concept round with a unsponsored TLD, the stated reason for rejecting ICM's application was, in part, because "the controversy surrounding" .XXX was great.⁶¹

⁵⁷ See IFFOR Charter, available at <http://www.iffor.org/index.html> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit Z. IFFOR was incorporated in Canada just days before ICM submitted its application. See Federal Corporation Data Online, available at http://strategis.ic.gc.ca/cgi-bin/sc_mrksv/corpdir/dataOnline/corps_re?company_select=4225783 (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit AA.

⁵⁸ .XXX sTLD RFP Application, *supra* note 55.

⁵⁹ *Id.*

⁶⁰ See Announcement, ICANN: Progress in Process for Introducing New Sponsored Top-Level Domains, 19 March 2004, available at <http://www.icann.org/en/announcements/announcement-19mar04.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit BB. In addition to an application for .XXX, ICANN received applications for .asia, .cat, .jobs, .mail, .mobi, .post, and two applications for .travel. The sponsoring communities for these other applications were quite obvious and less complex compared to ICM's proposed .XXX community. For example, .asia and .cat intended to serve specific cultural communities, i.e., .asia was to serve the Pan-Asia and Asia Pacific community, and .cat was to serve the Catalan linguistic and cultural community. Other applicants proposed to serve communities that provided an easily discernable business product or function, such as, .mobi, which intended to serve mobile Internet service, equipment and content providers, .post, which sought to serve the worldwide postal community, including public and private operators, organizations and government agencies, and .travel, which proposed to serve businesses, organizations, associations, and governmental and non-governmental agencies operating in the travel industry.

⁶¹ Report on .XXX uTLD, *supra* note 37.

43. ICM knew that its application would be controversial with respect to whether it could meet the sponsorship criteria of the RFP. Thus, in its application, ICM proposed a relatively detailed mechanism to deal with a “community” that would support the .XXX TLD. Specifically, ICM proposed a “hybrid charter compliance process, combining automated and manual procedures, prior to any domain name being added to the .XXX zone file.”⁶² The potential registrant would be required to provide supplementary information that would allow ICM to verify automatically the registrant’s status as a member of the proposed community. If ICM could not verify the registrant’s status automatically, ICM would then “refer to the details of ICM’s in-house administration staff who will perform a manual verification process.” ICM claimed this process would be one of many mechanisms designed to minimize abusive registrations and to protect the intellectual property rights of owners.⁶³

E. THE INDEPENDENT EVALUATION PANEL AND ITS REVIEW OF ICM’S APPLICATION.

44. In April 2004, an independent panel of experts was convened to review and recommend those sTLD applications that best met the selection criteria detailed in the final RFP. The Independent Evaluation Panel (or “Panel”) was comprised of a program manager and the following three independent panels: (1) technical panel; (2) business and financial panel; and (3) sponsorship panel. Each panel represented an internationally diverse group of experts. In total, there were nine panelists from eight different countries representing nearly every region of the globe.⁶⁴

45. Each panel conducted a blind, independent review, and the evaluation program manager was the conduit for all communications between either ICANN and the evaluators, or the evaluators and the applicants. As part of the evaluation process, there was an initial evaluation and then the evaluators submitted a list of clarifying questions to each applicant in order to confirm that the application was fully understood by the panelists.

⁶² .XXX sTLD RFP Application, *supra* note 55.

⁶³ *Id.*

⁶⁴ See ICANN Meeting in Kuala Lumpur, ICANN Public Forum, Thursday, 22 July 2004, Real-Time Captioning, available at <http://www.icann.org/en/meetings/kualalumpur/captioning-public-forum-23jul04.htm> (last visited Sept. 5, 2008) (Kurt Pritz’s Report on the “sTLD Status”), attached hereto as ICANN Exhibit CC.

46. Each panel then supplied a report regarding each application and made a preliminary determination as to whether the application met the baseline criteria set out in the RFP. Where an applicant did not meet the baseline criteria in any one or more of the three sets of criteria, the applicant was afforded the opportunity to clarify its application in order to attempt to demonstrate its compliance with the criteria in question.⁶⁵ Each of the independent panels was then asked to reconvene as necessary to consider the clarifying information. The process continued until it was clear that all clarifications to the application had been exhausted.⁶⁶

47. In May 2004, the Independent Evaluation Panel began its review of the .XXX sTLD Application. In June 2004, the Panel issued a request to ICM and IFFOR for responses to supplemental questions posed by each of the three panels.⁶⁷ Among the various questions, the sponsorship panel asked ICM and IFFOR to elaborate on how its .XXX sTLD would “create a new and clearly differentiated space, and satisfy needs that cannot be readily met through the existing TLDs” and how ICM planned to reconcile “various culturally-based definitions.”⁶⁸ In June 2004, ICM and IFFOR submitted a joint response to each of the panel’s requests.⁶⁹

⁶⁵ In order to expedite this process, rather than exchange letters or other documents, ICANN hosted teleconferences, so that applicants and panelists could engage in virtual face-to-face communication. The panelists, however, remained anonymous throughout the entire process. Status Report on sTLD Evaluation Process, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/stld-status-report.pdf> (last modified Dec. 3, 2005) [Hereinafter sTLD Status Report], attached hereto as ICANN Exhibit DD.

⁶⁶ *Id.*

⁶⁷ Throughout the sTLD application and evaluation process, applicants were asked to indicate whether any information provided to ICANN and/or the Independent Evaluation Panel was deemed confidential and should not be made available to the public. Confidential materials were then redacted prior to being posted by ICANN. In order to provide this Panel with a complete record and to maintain the confidentiality of these materials, ICANN has provided this Panel with a separate appendix of materials that were designated as confidential pursuant to the applicant’s request. These materials are hereinafter referred to as “Confidential” Exhibits. *See* Evaluation Team Questions for ICM and IFFOR, attached hereto as Confidential Ex. A; *see also* Appendix B, Evaluators’ Questions for Applicants, to sTLD Status Report, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppB.pdf> (last visited Sept. 8, 2008) (Confidential Information Redacted Per Applicant’s Request), attached hereto as ICANN Exhibit EE.

⁶⁸ *Id.* (Sponsorship)

⁶⁹ ICM and IFFOR’s Joint Response to Evaluation Team Questions, attached hereto as Confidential Ex. B; *see also* Appendix C, Applicants’ Responses to Questions, to sTLD Status Report, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppC.pdf> (last visited Sept. 8, 2008) (Confidential Information Redacted Per Applicant’s Request), attached hereto as ICANN Exhibit FF.

48. By the end of August 2004,⁷⁰ the Independent Evaluation Panel had submitted to ICANN evaluations for all ten sTLD applicants. The Independent Evaluation Panel concluded that only two of the ten applicants – .cat and .post – met all of the selection criteria prescribed in the sTLD RFP. The Panel determined that three applicants – .asia, .jobs and .travel – did not presently meet all of the selection criteria but, for reasons described in the evaluation reports merited further discussions. The remaining four applicants – .mail, .mobi, .tel, and .XXX – did not meet all of the selection criteria and, according to the Panel, had “deficiencies [that] cannot be remedied within the applicant’s proposed framework;” the Panel recommended that ICANN not consider these applications further.⁷¹

49. The Panel concluded that ICM’s application met both the technical and business selection criteria set forth in the RFP but determined that ICM did not meet the sponsorship selection criteria in the RFP, on several grounds. First, the Panel did not believe ICM’s .XXX sTLD represented a clearly defined community.⁷² Specifically, the Panel recognized that the sTLD RFP selection criteria expressly required a “precisely defined” community that can readily determine which persons or entities make up that community.⁷³ The Panel determined that the “extreme variability in definitions of what constitutes the content which defines this community makes it difficult to establish which content and associated persons or services would be in or out of that community.” “[T]here can be no disagreement about the fact that the definition of such content and the scope of this content category varies considerably depending on one’s moral, religious, national or cultural perspective.”⁷⁴

⁷⁰ The ten sTLD applicants were consistently kept informed of the evaluation process. Prior to receiving the final evaluation report, ICANN sent letters to all sTLD applicants providing each applicant with a status update of the independent evaluation process. Letter from Kurt Pritz, ICANN, to Stuart Lawley, IFFOR, July 31, 2004, attached hereto as Confidential Ex. C; *see also* Appendix E, Supplemental Documents, to sTLD Status Report, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/AppE-30nov05.pdf> (last visited Sept. 5, 2008) [Hereinafter Appendix E – Supplemental Documents] (Includes compilation of materials relating to each sTLD Applicant, including copies of July 31, 2004 correspondence from ICANN), attached hereto as ICANN Exhibit GG.

⁷¹ Appendix D, Evaluation Reports, to sTLD Status Report, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf> (last visited Sept. 5, 2008) (Confidential Information Redacted Per Applicants’ Request), attached hereto as ICANN Exhibit HH.

⁷² Cover Letter from Kurt Pritz, ICANN, to Stuart Lawley, IFFOR, August 31, 2004 (incorrectly dated July 31, 2004) and Independent Evaluation Report for .XXX, Prepared for ICANN, Compiled Aug. 27, 2004, attached hereto as Confidential Ex. D (Non-Redacted Version) [Hereinafter .XXX Evaluation Report].

⁷³ *Id.*

⁷⁴ *Id.* The Panel also recognized that as evaluators, they “should not be drawn into the debate as to the propriety of such content or how best to keep it from those who seek to avoid it, but [] must recognize the widely held view that this content category is simply not susceptible to objective, globally-applicable definition. *Id.* The ICANN Board later struggled with the same issues.

50. Second, the Panel determined that the interests of ICM's proposed .XXX sTLD community were "unclear," and that the application lacked support from the constituents it intended to represent. In particular, the Panel reasoned that ICM "hypothesizes a set of interests on behalf of a community (whose definitional coherence is in doubt) but little testimony from that community that has been provided in support of either its interests or cohesiveness." Further, although there was some support from North American representatives of the adult industry at this time, the Panel could not identify any support from the rest of the world, or from users or other members of this community.⁷⁵

51. Finally, the Panel believed that the proposed .XXX sTLD did not add new community value – globally – to the Internet name space. Indeed, the Panel opined that the proposed benefits of the domain were already available with existing TLDs.⁷⁶

F. ICANN'S RESPONSE TO THE PANEL'S RECOMMENDATIONS.

52. The ICANN Board was a bit surprised by the Panel's rejection of all but two sTLD applications. In fact, six of the ten applicants, according to the Panel, failed to satisfy the sponsorship criteria set forth in the sTLD RFP.⁷⁷ Given the fact that more than half of the applicants were rejected on this basis, the Board was concerned that the Panel may have taken too narrow of a view of the sponsorship criteria and gave the Panel another opportunity to review the applications. The Panel, however, confirmed its initial recommendations.

53. With respect to ICM's application, the ICANN Board noted that the sponsoring community was, in each instance, described by ICM in the *future* tense. Unlike the other sTLD applicants, it was clear that a community did not yet exist separate and apart from the proposed sTLD itself. Instead, ICM asserted that the sponsoring community would "come out" once the .XXX sTLD was approved.⁷⁸

54. Nevertheless, because the Panel had only approved two applicants, the ICANN Board decided to give *all* of the sTLD applicants a further opportunity to respond to the Panel's

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ This included .asia, .jobs, .mobi, .tel, .travel, and .XXX.

⁷⁸ See .XXX sTLD RFP Application, *supra* note 55.

specific concerns.⁷⁹ All applicants were encouraged to review the contents of the reports carefully and to respond in writing to ICANN.⁸⁰

55. ICM responded aggressively to the Board's request for more information. Within weeks of receiving the Panel's Report, ICM expressed its disappointment with the views of the sponsorship evaluation team and stated that it looked forward to demonstrating to the Board how its proposal did in fact meet the sponsorship criteria.⁸¹ Shortly thereafter, ICM and IFFOR provided ICANN Staff with a formal response to the Panel's report, providing a list of reasons for why the sponsorship panel's recommendation was mistaken.⁸² ICANN appreciated ICM's aggressive response, and after extensive board discussions regarding ICM's application – particularly focusing on the issue of sponsorship – various Board members suggested that it might be helpful for ICM to make a presentation to the Board on this issue.⁸³ On April 3, 2005, ICM and IFFOR met with the ICANN Board and gave a presentation on its proposed .XXX sTLD.⁸⁴

56. At the time of ICM and IFFOR's presentation, the Board was still actively considering three other sTLD applicants – .asia, .mail, and .tel.⁸⁵ The Board sought to resolve the

⁷⁹ sTLD Status Report, *supra* note 65.

⁸⁰ .XXX Evaluation Report, *supra* note 72.

⁸¹ Letter from Stuart Lawley, ICM, to Kurt Pritz, September 16, 2004, attached hereto as Confidential Ex. E.

⁸² Formal Response to ICANN's Independent Evaluation Report on .XXX sTLD, from Stuart Lawley, ICM, to Kurt Pritz, ICANN, October 9, 2004, attached hereto as Confidential Ex. F; *see also* Appendix E – Supplemental Documents, *supra* note 70. ICM and IFFOR later provided the ICANN Board with a memorandum similar to its formal response to ICANN Staff, outlining the reasons for why they believed the ICANN Board should allow the .XXX sTLD to proceed despite the recommendation of the sponsorship panel. Memorandum to the ICANN Board of Directors, November 2, 2004, Revised December 7, 2004 [Hereinafter Memorandum to ICANN Board], attached hereto as Confidential Ex. G. ICM and IFFOR further noted that the "Applicants fully understand that the topic of adult entertainment on the Internet is controversial. The Applicants also understand that the Board might be criticized where it approves or disproves the Proposal. At the same time, [the Applicants] believe that the Proposal represents a historic opportunity to make a positive contribution to the responsible growth of the Internet" *Id.*

⁸³ *See* Special Meeting of the Board, Minutes, 24 January 24, 2005, *available at*: <http://www.icann.org/minutes/minutes-24jan05.htm> (last visited Sept. 8, 2008), attached hereto as ICANN Exhibit II.

⁸⁴ *See* ICM Slide Presentation, attached hereto as Confidential Ex. H.

⁸⁵ At ICANN's Public Forum in Mar Del Plata on April 7, 2005, ICANN Staff commented on how ICANN was "working with [.asia, .mail, .tel, and .XXX] still actively to determine if the application can be configured in a way so that baseline criteria can be met." ICANN Staff further stated that "in order to complete these things in a timely a basis as possible, we've been working with each of the applicants individually at their pace, and the negotiations with them have happened at a pace governed by the communication between us." ICANN Meetings in Mar Del Plata, Public Forum, Part 2, Wednesday, April 7, 2005, Real-Time Captioning, *available at*

.asia and .XXX applications quickly and noted in its April 8, 2005 meeting that it had hoped to come to a conclusion on .asia and .XXX within the next 30 days.⁸⁶ In an effort to stick to its own timeline, the Board engaged in broad discussions of the .XXX sTLD and whether ICM's application met the requisite sponsorship criteria during the next Board Meeting, but ultimately decided to discuss the issue further at its June 1, 2005 Meeting.⁸⁷

G. THE BOARD'S FIRST VOTE ON ICM'S .XXX APPLICATION.

57. In a teleconference on June 1, 2005, the Board, in a split vote, decided to allow ICM to proceed to contract negotiations.⁸⁸ Contrary to ICM's position today, however, the Board's vote was in no way an "approval" of ICM's .XXX sTLD. Indeed, the Board could not and would not have approved the proposed sTLD in view of the number of unanswered questions that still remained regarding ICM's ability to satisfy the requisite sponsorship criteria. As the adopted Resolution made clear, the Board's vote was intended only to permit ICM to proceed with contract negotiations, *not* that ICM had satisfied the sponsorship criteria set forth in the RFP.⁸⁹ In fact, some members of the Board remained quite skeptical that ICM would satisfy the sponsorship criteria but believed that the best way to test that question was to determine whether the concerns respecting sponsorship could be addressed in the registry agreement with ICM (as opposed to simply rejecting the ICM application at that time).⁹⁰ In all events, the Board

(continued...)

<http://www.icann.org/en/meetings/mardelplata/captioning-public-forum-2-07apr05.htm> (last visited Sept. 5, 2008) [Hereinafter April 7, 2005 Mar Del Plata Public Forum], attached hereto as ICANN Exhibit JJ.

⁸⁶ See ICANN Regular Meeting of the Board, Minutes, 8 April 2005, *available at* <http://www.icann.org/en/minutes/minutes-08apr05.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit KK.

⁸⁷ See Special Meeting of the Board, Minutes, 3 May 2005, *available at* <http://www.icann.org/minutes/minutes-03may05.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit LL.

⁸⁸ See Special Meeting of the Board, Minutes, 1 June 2005, *available at* <http://www.icann.org/minutes/minutes-01jun05.htm> (last visited Sept. 5, 2008) [Hereinafter June 1, 2005 Board Minutes], attached hereto as ICANN Exhibit MM.

⁸⁹ The Board resolution provided the following: (1) The President and General Counsel were authorized "to enter into negotiations relating to proposed commercial and technical terms for the .XXX sTLD with the applicant;" and (2) "if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to [the] Board, for *approval and authorization* to enter into an agreement relating to the delegation of the sTLD." *Id.* (emphasis added).

⁹⁰ The Board's discussion "surrounded the adequacy of the application with particular focus on the '*sponsored community*' issues." *Id.* (emphasis added).

clearly retained the right to vote against ICM's proposed .XXX sTLD should the Board find deficiencies in ICM's proposed registry agreement or in the .XXX sTLD proposal as a whole.⁹¹

58. In short, given the difficulty of determining whether ICM satisfied the requisite sponsorship criteria in a hypothetical world (as presented by ICM), the Board, as a demonstration of good faith, determined that there was no harm in going forward to see whether ICM could in fact satisfy the sponsorship criteria via the contract.⁹² Allowing ICM to proceed to contract negotiations allowed the Board to focus on the relevant issues and to determine whether ICM could satisfy the selection criteria in real world operations.⁹³ And ICM was not alone. The Board also allowed other applicants – namely, .jobs and .mobi – to proceed despite open questions relating to the RFP selection criteria.⁹⁴

⁹¹ *Id.*; see also July 2004 Kuala Lumpur ICANN Public Forum, *supra* note 64: ICANN Staff stating that “[u]pon completion of the technical and commercial negotiations, successful applications will be presented to the ICANN Board with all the associated information, so the Board can independently review the findings along with the information and make their own adjustments. And then final decisions will be made by the Board, and they’ll authorize Staff to complete or execute the agreements with the sponsoring organizations, thereby designated in the registries;” Letter from Paul Twomey, ICANN, to Mohamed Sharil Tarmizi, GAC Chair, 4 May 2006, *available at* <http://www.icann.org/correspondence/twomey-to-tarmizi-04may06.pdf> (last visited Sept. 5, 2008) [Hereinafter May 4, 2006 Letter to Tarmizi], attached hereto as ICANN Exhibit NN: “The decision by the ICANN Board during its 1 June 2005 Special Board Meeting reviewed the criteria against the materials supplied and the results of the independent evaluations. After additional consultations with ICM, the board voted to authorize staff to enter into contractual negotiations *without prejudicing the Board’s right to evaluate the resulting contract and to decide whether it meets all of the criteria before the Board including public policy advice such as might be offered by the GAC.*” (emphasis added).

⁹² May 4, 2006 Letter to Tarmizi, *supra* note 91: With .XXX, while the supplemental materials presented to the Board provided additional clarification, “the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be addressed by contractual obligations to be stated in a registry agreement;” see also April 7, 2005 Mar Del Plata Public Forum, *supra* note 85: “Other applicants have not yet been determined to meet the baseline criteria. We are working with them still actively to determine if the application can be configured in a way so that baseline criteria can be met.”

⁹³ See, e.g., ICANN Meetings in Lisbon Portugal, Transcript – ICANN Board of Directors Meeting, 30 March 2007, Real-Time Captioning, *available at* <http://www.icann.org/meetings/lisbon/transcript-board-30mar07.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit OO: Chairman Cerf stating that the reason he voted in favor of proceeding to contract negotiations with ICM was, in part, to “try to understand more deeply exactly how [ICM’s] proposal would be implemented, and seeing the contractual terms, it seemed to me, would put much more meat on the bones of the initial proposal.”

⁹⁴ See, e.g., ICANN Special Meeting of the Board, Minutes, 13 December 2004, *available at* <http://www.icann.org/en/minutes/minutes-13dec04.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit PP: The Board permitted .jobs to proceed to contract negotiations but specifically requested that during the negotiations, “special consideration be taken as to how broad-based policymaking would be created for the sponsored community, and how this sTLD would be differentiated in the name space.” With respect to .mobi, the Board also specifically requested that during contract negotiations “special consideration be taken as to confirm the sTLD applicant’s proposed community of content providers for mobile phone users, and confirmation that the sTLD applicant’s approach will not conflict with the current telephone numbering systems.”

59. ICANN never intended for the sTLD evaluation process to be divided into two concrete and inflexible “phases,” as ICM now contends.⁹⁵ There was no “commitment” by ICANN that the “sponsorship” issue could not be revisited simply because the Board had allowed ICM to proceed to contract negotiations. Indeed, there is nothing in the RFP or any formal documentation relating to the launch of the sTLD RFP that provides for such a rigid process, which would strip the Board of its final authority to evaluate the proposed sTLD as a whole prior to designating the domain space. Further, ICM knew that the “sponsorship” issue remained very much alive; despite the fact that the issue was the subject of discussion at numerous additional ICANN Board meetings, ICM did not contend (as it does today) that the Board lacked the ability to address the “sponsorship” issue as a result of the Board’s June 1, 2005 vote to proceed to contract negotiations.

H. THE GAC’S REVIEW OF ICM’S PROPOSED .XXX sTLD.

60. Prior to the Board’s June 1, 2005 vote on the ICM application, the GAC had been silent with respect to the .XXX application.⁹⁶ However, within days of ICANN posting ICM’s first draft/proposed registry agreement on ICANN’s website for public comment,⁹⁷ the GAC’s

⁹⁵ ICM cites only to status updates where ICANN Staff and Board members loosely refer to “two major steps” of the evaluation process. *See, e.g.*, ICANN Meetings in Rome, ICANN Public Forum, Part 1, Thursday, 4 March 2004, Real-Time Captioning, *available at* <http://www.icann.org/en/meetings/rome/captioning-forum1-04mar04.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit QQ (ICANN’s Kurt Pritz provided a summary of the anticipated sTLD evaluation process: “There’s two major steps to the process. The first is the application process as you see it now ... the process is to demonstrate involvement in the community, technical competence, financial viability, and a robust business model. After that, as I stated before, we’ll enter into this commercial and technical negotiation phase.”). The anticipated evaluation process was also altered to accommodate the sTLD applicants. *See, e.g.*, ICANN Meetings in Cape Town, Public Forum – Part 1, Friday, December 3, 2004, Real-Time Captioning, *available at* <http://www.icann.org/en/meetings/capetown/captioning-public-forum-1-03dec04.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit RR (ICANN’s Kurt Pritz provided another status update: “So this new iteration, this new – the one step independent evaluation step that you saw in the earlier chart was replaced by the sort of iterative process where, after the independent panel gave their written report, the applicant was afforded the opportunity to respond in writing.” “As these independent evaluation processes are completed, the proposals are being managed separately, one by one, based on the timing of when it gets through the process and based on how the applicant responds to questions. So each application is essentially on its own.”). Nowhere does ICANN Staff or the Board hint that ICANN was *required* to adhere strictly to a “two step process” whereby the advancement beyond “step one” prevented the Board ever from considering “step one” issues again.

⁹⁶ Indeed, the GAC’s non-voting liaison, Mohamed Sharil Tarmizi was not present for the Board’s June 1, 2005 vote. *See* June 1, 2005 Board Minutes, *supra* note 88.

⁹⁷ Following the Board’s June 1, 2005 Meeting, ICANN Staff, as directed, entered into contract negotiations with ICM for a proposed registry agreement. By August 9, 2005, ICM’s first draft/proposed .XXX sTLD Registry Agreement was posted on ICANN’s website for public comment and submitted to the Board for approval. ICANN’s next Board meeting was scheduled for August 16, 2005, at which time ICANN had planned on discussing ICM’s first draft/proposed .XXX sTLD Registry Agreement. *See* ICM Draft 1 August 2005, Sponsored TLD Registry Agreement, *available at* <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-09aug05.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit SS.

Chairman, Mohamed Sharil Tarmizi, sent a letter to the ICANN Board expressing concerns about ICM's .XXX agreement and requesting that the Board provide additional time for governments to express public policy concerns before reaching a decision on the proposed registry agreement.⁹⁸ The letter followed a meeting of the GAC in Luxembourg a month earlier (after the June 1, 2005 ICANN Board meeting), during which GAC members had expressed concerns about the creation of ICM's .XXX sTLD and the governments' ability to review/comment as a public policy issue.⁹⁹ The GAC also published a Communiqué at Luxembourg noting that "from recent experience [] the introduction of new TLDs can give rise to significant policy issues, including content." The GAC further stated that it "welcomes the initiative of ICANN to hold consultations with respect to the implementation of the new Top Level Domains strategy," "looks forward to providing advice to the process," and "encourages the Board to actively consult all constituencies with regard to the development of this strategy."¹⁰⁰

61. Individual countries also expressed concerns at this time. Michael Gallagher of the United States Department of Commerce ("DOC") wrote a letter to the ICANN Board urging it "to ensure that the concerns of all members of the Internet Community ... [are] adequately heard and resolved before the Board takes action on this application."¹⁰¹ Gallagher noted that, since the Board allowed ICM to proceed to contract negotiations for the .XXX sTLD in June 2005, "this issue has garnered widespread public attention and concern outside of the ICANN community." He described the volume of correspondence opposed to the creation of a .XXX TLD as "unprecedented." The DOC alone received nearly 6,000 letters and emails from individuals expressing concern and opposing the creation of the .XXX sTLD.¹⁰²

⁹⁸ See Correspondence from GAC Chairman to ICANN Board Regarding .XXX TLD, 12 August 2005, available at <http://www.icann.org/correspondence/tarmizi-to-board-12aug05.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit TT.

⁹⁹ See ICANN Governmental Advisory Committee Meeting XXII, Plenary Session, Luxemburg 11-12 July 2005, available at http://gac.icann.org/web/meetings/mtg22/LUX_MINUTES.doc (last visited Sept. 5, 2008) [Hereinafter July 2005 GAC Meeting in Luxemburg], attached hereto as ICANN Exhibit UU.

¹⁰⁰ GAC Communiqué – Luxemburg, 9-12 July 2005, available at <http://gac.icann.org/web/communiques/gac22com.rtf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit VV.

¹⁰¹ Letter from Michael D. Gallagher, U.S. DOC, to Vinton Cerf, ICANN, August 11, 2005, available at <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit WW.

¹⁰² *Id.*

62. The GAC and individual GAC members apparently did not comment on the .XXX TLD prior to the Board's June 1, 2005 Meeting for several reasons. Some countries believed (erroneously) that, because ICM's .XXX TLD had been rejected in the 2000 "proof of concept" round, it would not be considered in the new sTLD round. Other countries believed that, because the Independent Evaluation Panel's recommendations for ICM were so negative on the "sponsorship" issue, they did not think the application would be allowed to proceed.¹⁰³ Given how new the entire evaluation process was, and the fact that this was only the second time that ICANN was considering applications for new TLDs, it was not surprising that the GAC had questions as to the policies for reviewing proposed sTLDs.

63. Once the GAC voiced its concerns and specifically requested additional time to evaluate the public policy issues associated with ICM's proposal, ICANN was *required* by its Bylaws to listen,¹⁰⁴ which is precisely what the Board did.¹⁰⁵ Consistent with its Bylaws, the correspondence with the GAC was available to the public. ICM received copies of all the correspondence and was given the opportunity to respond to the Board and the GAC's specific concerns. Indeed, ICM frequently provided the Board with information that was intended to be specifically responsive to concerns expressed by the GAC.

64. ICM understood the appropriateness of the GAC's inclusion in the evaluation process.¹⁰⁶ ICM – recognizing, in its own words, the "need for all stakeholders to feel that they have had an adequate and meaningful opportunity to express their views" and in order to "preserve the integrity of the ICANN process" – specifically requested the ICANN Board defer final approval of the draft registry agreement in order to allow ICM to respond to the GAC's

¹⁰³ Several GAC Members – namely, the Netherlands, Brazil, the European Commission, and Egypt – expressed concern over what appeared to be a "change in policy" by ICANN with respect to the evaluation of the .XXX sTLD. July 2005 GAC Meeting in Luxemburg, *supra* note 99. The Netherlands specifically questioned the "new criteria to be retained for new TLDs as it seems there was a shift in policy during the evaluation process." *Id.*

¹⁰⁴ The GAC can initiate evaluation of public policy concerns and ICANN is required to consider the GAC's input on such concerns. ICANN Bylaws, *supra* note 2, at Article XI, § 2.1(i) and (j).

¹⁰⁵ At the Board's August 16, 2005 Meeting, consideration of ".XXX was deferred in response to requests from the applicant ICM, the Chairman of ICANN's [sic] Government Advisory Committee and the US Department of Commerce to allow for additional time for comments by interested parties." Special Meeting of the Board, Minutes, 16 August 2005, *available at* <http://www.icann.org/en/minutes/minutes-16aug05.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit XX.

¹⁰⁶ Letter from Stuart Lawley, ICM, to Paul Twomey, ICANN, August 15, 2005, *available at* <http://www.icann.org/correspondence/lawley-to-twomey-15aug05.pdf> (last revisited Sept. 5, 2008), attached hereto as ICANN Exhibit YY.

concerns.¹⁰⁷ Indeed, ICM knew that its application would be controversial and difficult for many governments to address.¹⁰⁸

65. Following communications with various governments and members of the Internet community,¹⁰⁹ at its September 15, 2005 meeting, the ICANN Board engaged in a lengthy discussion regarding the sponsorship criteria, the application and additional supplemental materials, and the specific terms of ICM's proposed agreement.¹¹⁰ Board members expressed real concerns that the proposed registry agreement did *not* match up to the promises of ICM's application. Additionally, many argued that ICM had failed to address the concerns of the Board and the GAC regarding compliance with the proposed agreement (including possible proposals for codes of conduct). Indeed, ICM had not provided the information that ICANN Staff had requested, instead insisting that the previously-negotiated proposed agreement be submitted to the Board for a vote.¹¹¹ In an attempt to obtain further clarification, the Board approved a resolution directing the ICANN President and General Counsel to discuss possible additional contractual provisions or modifications for inclusion in the .XXX registry agreement, to ensure that there were effective provisions requiring the development and implementation of policies consistent with the principles in the ICM application. Following such discussions, the

¹⁰⁷ *Id.*

¹⁰⁸ Memorandum to ICANN Board, *supra* note 82.

¹⁰⁹ ICANN received and posted correspondence from both governments and Internet stakeholders. One such letter was from the Brazilian Secretary of Information and Technology Policy, Marcelo de Carvalho Lopes, which in light of the "potential ethical problems" posed by .XXX, requested "careful analysis of the real need for such introduction with the Internet environment and due consultation with all parties that may be directly affected by them, particularly national governments." Letter from Marcelo de Carvalho Lopes, Brazil, to Mohamed Sharil Tarmizi, GAC Chair, 6 September 2005, *available at* <http://www.icann.org/correspondence/lopez-to-tarmizi-06sep05.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit ZZ. Another such letter was from Michelle Freridge, Executive Director of The Free Speech Coalition, a trade association of the adult entertainment industry, expressing the Coalition's "strong opposition to the creation of a .XXX TLD" and its concern that "important decisions are being made allegedly on behalf of the adult industry." The letter further stated that the Coalition believes that ICM "has consistent[ly] and knowingly distorted the support it has received from the adult industry." Letter from Michelle Freridge, Free Speech Coalition, to Vinton Cerf, ICANN, 30 August 2005, *available at* <http://www.icann.org/correspondence/freridge-to-cerf-30aug05.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit AAA.

¹¹⁰ Special Meeting of the Board, Minutes, 15 September 2005, *available at* <http://www.icann.org/minutes/minutes-15sep05.htm> (last visited Sept. 5, 2008) [Hereinafter September 15, 2005 Minutes], attached hereto as ICANN Exhibit BBB.

¹¹¹ *See, e.g.*, Letter from Stuart Lawley, ICM, to Vinton Cerf, ICANN, 15 September 2005, attached hereto as Confidential Ex. I: Hours before the September 15, 2005 Board Meeting ICM "request[ed] that the ICANN Board take the next step and approve the registry agreement without further delay."

Board requested the President and General Counsel return to the Board for additional approval, disapproval or advice.¹¹²

I. THE BOARD'S DECISION TO POSTPONE FORMAL CONSIDERATION OF ICM'S PROPOSED REGISTRY AGREEMENT.

66. Given the controversy that surrounded the .XXX sTLD (and continued correspondence from GAC members),¹¹³ the ICANN Board decided to postpone formal consideration of ICM's proposed registry agreement until such time that the GAC was able to review and comment on ICM's proposal. Even so, significant activity occurred. For example:

- (a) On November 28, 2005, in response to the GAC's request for additional information, ICANN published a Status Report on the sTLD Evaluation Process, detailing the independent evaluations, follow-up documentation and correspondence.¹¹⁴
- (b) During the GAC's November 28, 2005 through December 1, 2005 Meeting in Vancouver, both the ICANN Board and ICM, separately, made presentations to the GAC on the proposed .XXX sTLD. ICM's presentation to the GAC included a range of promised public interest benefits as part of its bid to operate the proposed .XXX sTLD.¹¹⁵
- (c) In January 2006, ICANN responded to the concerns of Deputy Director-General of the European Commission's Information Society and Media Directorate-General, Peter Zangl, specifically addressing Zangl's confusion as to why .XXX was rejected in the 2000 "proof of concept" round, but allowed to proceed in the sTLD round, and provided an explanation on the differences between the 2000 gTLD and 2004 sTLD rounds.¹¹⁶

¹¹² September 15, 2005 Minutes, *supra* note 110.

¹¹³ ICANN continued to receive correspondence from GAC members specifically requesting ICANN defer any decisions on the .XXX sTLD to allow for further comment. *See, e.g.*, Letter from Peter Zangl, European Commission, to Vinton Cerf, ICANN, 16 September 2005, *available at* <http://www.icann.org/correspondence/zangl-to-cerf-16sep05.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit CCC: Urging ICANN to reconsider any decision to proceed with the .XXX sTLD Application until the GAC has an opportunity to comment; Letter from Dr. Kai-Sheng Kao, GAC Representative to Taiwan, to ICANN Board, 30 September 2005, *available at* <http://www.icmregistry.com/ReconsiderationRequestComplete.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit DDD: Requesting the Board defer final decision on the .XXX sTLD to allow for further public comment; noting that ICANN should "consider all social and cultural aspects" of the TLD "to reduce the possible negative impacts and ill effects."

¹¹⁴ sTLD Status Report, *supra* note 65.

¹¹⁵ *See* GAC Communiqué – Wellington, New Zealand, 28 March 2006, *available at* <http://gac.icann.org/web/communiques/gac24com.pdf> (last visited Sept. 5, 2008) [2006 Wellington Communiqué], attached hereto as ICANN Exhibit EEE.

¹¹⁶ Letter from Vinton Cerf, ICANN, to Peter Zangl, European Commission, 17 January 2006, *available at* <http://www.icann.org/correspondence/cerf-to-zangl-30jan06.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit FFF. ICM also provided its own response to Zangl's letter. *See* Appendix E – Supplemental Documents, *supra* note 70.

- (d) In February 2006, ICANN sent a letter to the GAC's Chair, Mohamed Sharil Tarmizi, summarizing ICANN's activity to date responding to the GAC's specific concerns and further providing an overview of the sTLD evaluation process, particularly with respect to ICM's application.¹¹⁷

67. During this time, ICM and ICANN Staff also continued to negotiate the terms of the registry agreement. In March 2006, ICM and ICANN Staff finalized a second draft of the registry agreement.

J. THE GAC'S WELLINGTON COMMUNIQUÉ.

68. Shortly after ICM and ICANN finalized a second draft of the registry agreement, the GAC held a meeting in Wellington, New Zealand. On March 28, 2006, the GAC issued the "Wellington Communiqué" detailing its recent meeting and addressing the various responses it has received from both ICANN and ICM. The Communiqué specifically stated that the public interest benefits promised by ICM during its November 2005 presentation to the GAC had not yet been included as ICM's obligations in the proposed .XXX registry agreement. The GAC further outlined the public policy aspects and requested that the ICANN Board confirm that any agreement currently under negotiation with ICM contain enforceable provisions covering all of ICM's commitments. The Communiqué also stated that "without prejudice to the above, several members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .XXX sTLD."¹¹⁸

69. The specific public policy aspects identified by members of the GAC included the degree to which ICM's application/agreement would:

- (a) Take appropriate measures to restrict access to illegal and offensive content;
- (b) Support the development of tools and programs to protect vulnerable members of the [Internet] community;
- (c) Maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be; and

¹¹⁷ Letter from Paul Twomey, ICANN, to Mohamed Sharil Tarmizi, GAC Chair, 11 February 2006, available at <http://www.icann.org/correspondence/twomey-to-tarmizi-16feb06.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit GGG.

¹¹⁸ 2006 Wellington Communiqué, *supra* note 115.

- (d) Act to ensure the protection of intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers drawing on best practices in the development of registration and eligibility rules.¹¹⁹

70. In response to the Wellington Communiqué, a unanimous ICANN Board immediately approved a directive to ICANN's President and General Counsel to continue further negotiations with ICM and to return to the Board with any recommendations regarding amendments to the proposed .XXX sTLD registry agreement, particularly "to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor's policies."¹²⁰ The Board believed the resolution would allow ICANN Staff to work with ICM to further strengthen the proposed agreement, but also recognized that the Board would have to review any revised registry agreement to determine whether it in fact satisfied the Board and the GAC's expressed concerns.¹²¹

71. By the Board's next meeting on April 18, 2006, ICM submitted and ICANN posted for review on the Internet a revised draft of the .XXX registry agreement. The revised agreement provided that ICM would "monitor" registrant compliance with registry policies and establish registration requirements that complied with "all applicable law and regulation."¹²² Thus, in response to the GAC's concerns, ICM was now taking the position that *it* would monitor allegedly illegal and offensive content globally. But if ICM was going to monitor all illegal and offensive conduct globally, complaints about ICM's monitoring would inevitably be delivered to ICANN, which is neither equipped nor authorized to monitor (much less resolve) "content-based" objections to Internet sites.¹²³

¹¹⁹ *Id.*

¹²⁰ Regular Meeting of the Board, Minutes, 31 March 2006, *available at* <http://www.icann.org/minutes/minutes-31mar06.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit HHH.

¹²¹ ICANN Meetings in Wellington, New Zealand, Board Meeting, Real-Time Captioning, 31 March 2006, *available at* <http://www.icann.org/meetings/wellington/captioning-board-31mar06.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit III.

¹²² ICM Draft 18 April 2006, Sponsored TLD Registry Agreement, *available at* <http://www.icann.org/en/tlds/agreements/xxx/revised-proposed-xxx-agreement-clean-20060418.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit JJJ.

¹²³ The ICANN Board discussed their concerns about the manner in which ICM guaranteed compliance by the registry operator and whether the right level of policy enforcement processes were in place within the proposed agreement to respond to a community as complex as the adult entertainment community. Concerns were also expressed about how to implement the proposed compliance process and whether ICANN was structured to respond to the proposed process. ICANN Meeting Minutes for Special Meeting of the Board, 18 April 2006, *available at*

72. Although the ICANN Staff and Board continued to express concerns with ICM's proposed registry agreement, ICM insisted – once again – that the Board vote on the proposed registry agreement as it stood.¹²⁴

K. THE BOARD'S MAY 10, 2006 VOTE ON ICM'S DRAFT REGISTRY AGREEMENT.

73. On May 10, 2006, after a detailed discussion, the ICANN Board voted 9-5 against ICM's current draft of the proposed .XXX sTLD registry agreement.¹²⁵ The Board minutes reflect the difficult challenges this sTLD presented, with Board members expressing varying views of ICM's draft agreement.¹²⁶ For the most part, the majority believed that the contract negotiations with ICM did not produce the required or expected results, with a minority arguing that ICM had satisfied the "sponsorship" and other concerns (and thus should be allowed to proceed).¹²⁷ There is no way to read the minutes of the Board meeting as indicating bad faith on the part of this Board; to the contrary, the members of the Board, in good faith, were struggling with extremely difficult issues with no precedent on which to rely and with persons and governments from all over the world monitoring the Board's debate.

(continued...)

<http://www.icann.org/minutes/minutes-18apr06.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit KKK.

¹²⁴ *Id.* (Chairman Cerf noting ICM's desire to "have an up or down vote at the 10 May Meeting" on the proposed agreement); *see also* Letter from Stuart Lawley, ICM, to Vinton Cerf, ICANN, May 8, 2006 (held as Personal and Confidential), attached hereto as Confidential Ex. J (ICM stating that: "It is time, now for the ICANN Board to act.").

¹²⁵ Special Meeting of the Board, Minutes, 10 May 2006, *available at* <http://www.icann.org/en/minutes/minutes-10may06.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit LLL.

¹²⁶ After the Board vote, Chairman Vinton Cerf recognized the "diversity of views" and commented that the Board was "clearly quite polarized on this question". Voting Transcript of Board Meeting, 10 May 2006, *available at* <http://www.icann.org/minutes/voting-transcript-10may06.htm> (last visited Sept. 5, 2008) [Hereinafter May 2006 Transcript], attached hereto as ICANN Exhibit MMM.

¹²⁷ Board Member Hagen Hultzsich specifically stated that he voted against the proposed agreement because "the negotiations didn't produce the required and expected results." *Id.* Board Member Alejandro Pisanty also asserted that he did not believe "the agreement as stated [had] in-built structural guarantees that the conditions and representations made by ICM can be fulfilled. Many of them are not so because of any fault of ICM itself, but because the complexities of developing them further in an international, multilingual, and multicultural environment." *Id.* Chairman Vinton Cerf further commented that he was voting against the agreement because he "no longer believed it's possible for ICM to achieve the conditions and recommendations that the GAC has placed before [the Board] as a matter of public policy and that the terms of the contract do not assure any of those – the ability of ICM to provide the protections that are requested." *Id.* And Board Member Vanda Scartezini, who was at all times in favor of ICM's proposal, voted against the agreement because "the contract language did not come with the guarantee that [he had] expected." *Id.*

74. Some members of the Board expressed concerns about the proposed registry agreement. First, the proposed language would have been nearly impossible for ICM to implement. ICM was proposing to monitor illegal and offensive content according to all applicable law globally. This would surely give rise to enforcement and compliance issues for ICM.¹²⁸ Further, because ICANN monitors the activities of its registries, this language would force ICANN to assume an ongoing management and oversight role regarding content on the Internet, which is inconsistent with ICANN's mandate. ICANN's President, Paul Twomey, may have explained it best, stating that "the contractual terms put forward by ICM to meet the sorts of public-policy concerns raised by the [GAC] in my view are very difficult to implement, and I retain concerns about their ability to actually be implemented in an international environment where the important phrase, 'all applicable law,' would raise a very wide and variable test for enforcement and compliance. And I can't see how that will actually be achieved under the contract."¹²⁹ Twomey further stated that "the expectations of the international governmental community to ensure enforcement of these contractual terms as they each individually interpret them against their own law concerning pornographic content" will "put ICANN in an untenable position."¹³⁰

75. Second, the proposed registry agreement demonstrated that ICM was no longer representing a closed community. Indeed, it was increasingly evident that ICM was simply proposing a *gTLD* for adult entertainment, disguised as an *sTLD*. Thus, the passage of time was confirming the concerns originally expressed by the Independent Evaluation Panel that ICM's proposed .XXX was not a proper "sponsored" TLD.

76. Finally, the claimed support for ICM's .XXX *sTLD* was rapidly splintering. Some of the adult community that at one time supported the TLD no longer supported it. Further, ICANN had received numerous correspondences from leading members of the adult

¹²⁸ Board Member Hualin Quin voted against the agreement because he did not believe the commitment by ICM could be implemented. *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* Twomey was specifically responding to the UK Representative to the GAC's expectation that ICANN "ensure[] that the benefits and safeguards" proposed by ICM, including the monitoring of all .XXX content, be genuinely achieved and that ICANN "intervene promptly and effectively if for any reason failure on the part of ICM in any of these fundamental safeguards becomes apparent." Letter from Martin Boyle, UK GAC Representative, to Vinton Cerf, ICANN, 4 May 2006, available at <http://www.icann.org/correspondence/boyle-to-cerf-09may06.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit NNN.

entertainment industry expressing profound opposition to ICM's .XXX sTLD.¹³¹ Opposition within the sponsoring community was clearly evidence that the sponsorship criteria had not been met.¹³² The situation was complicated by the fact that "community support" for ICM's proposed .XXX was difficult to gauge in the first instance – particularly when compared to others of the sTLD applications that involved pre-existing communities as opposed to a community that would itself be created by the adoption of the new TLD.¹³³

77. ICM could not have been surprised by the Board's rejection of the revised .XXX sTLD registry agreement. ICANN Staff had expressed the above concerns, but ICM was again persistent that its revised agreement be put up for a vote by the Board anyway.¹³⁴ ICM immediately filed a Request for Reconsideration.¹³⁵ ICM also announced that it would begin pre-registration of the .XXX sTLD domain names while the review of ICANN's decision was pending.¹³⁶ In response to ICM's Request for Reconsideration, ICANN reiterated that (as ICM

¹³¹ See, e.g., Letter from Johan Gillborg, Private Media Group, to ICANN, 22 March 2006, available at <http://www.icann.org/correspondence/gillborg-to-board-22mar06.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit OOO: Expressing Private Media Group's opposition to the creation of the .XXX sTLD and its belief that there is no compelling reason to establish such a TLD; Letter from Steve Orenstein, Wicked Pictures, to ICANN, April 10, 2006, available at <http://www.icann.org/correspondence/orenstein-to-board-10apr06.jpg> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit PPP: Expressing Wicked Pictures' "profound opposition to the establishment of a .XXX" sTLD.

¹³² ICANN CEO Paul Twomey stated that he had always had concerns about the sponsorship criteria for ICM's .XXX sTLD, but recent opposition from significant members of the online adult entertainment community made him further doubtful about the sponsorship aspect of the proposed community. May 2006 Transcript, *supra* note 126.

¹³³ Indeed, unlike other sTLD applicants, it was difficult to even ascertain the size of ICM's proposed community as much of the community was likely "underground." Further, there was no existing organization that represented the proposed community. Instead, IFFOR was created specifically for the purpose of supporting the proposed .XXX community once it "came out."

¹³⁴ See fn. 124, *supra*.

¹³⁵ See Request for Reconsideration of Board Action, available at <http://www.icann.org/en/committees/reconsideration/icm-06-4/petition-20may06.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit QQQ; see also Amended Request for Reconsideration of Board Action, available at <http://www.icann.org/en/committees/reconsideration/icm-06-4/amended-petition-26may06.pdf> (last visited Sept. 5, 2008) [Hereinafter ICM's Amended Request for Reconsideration], attached hereto as ICANN Exhibit RRR. ICM's Amended Request for Reconsideration was based on four theories, none of which asserted that the Board violated its Bylaws or Articles of Incorporation: (1) Board Members voted against the ICM Agreement with inaccurate information about the written statements of various governments; (2) Board members voted against the ICM Agreement based on unfounded concern that it could put ICANN in a difficult position of having to enforce all of the world's law governing pornography, including the laws that might require sites containing pornography to use the domain; (3) Board members voted against ICM's Agreement without adequate information about the inappropriate U.S. Government involvement in this process; and (4) Contrary to the September 15, 2005 and March 31, 2006 directives, ICANN did not engage in negotiations with ICM regarding amendments to the proposed Registry Agreement, nor did they recommend changes to respond to concerns expressed by the Board and/or ICANN's GAC. *Id.*

¹³⁶ Letter from Stuart Lawley, ICM, to Vinton Cerf, ICANN, May 30, 2006, available at <http://www.icann.org/correspondence/lawley-to-cerf-30may06.pdf> (last visited Sept. 5, 2008), attached hereto as

had requested), the Board had voted only on the revised agreement before it, and had not yet made a final determination on ICM's application as a whole. As a result, in October 2006, ICM withdrew its Request for Reconsideration and decided to pursue further contract negotiations with ICANN.

78. ICANN Staff and ICM thereafter worked to negotiate additional revisions to the draft .XXX sTLD registry agreement that addressed the Board's and the GAC's expressed concerns. On January 5, 2007, the revised agreement was posted for public comment, which was open until February 5, 2007.¹³⁷ Prior to the close of the public comment period, the GAC requested the Board delay consideration of the revised agreement until after the GAC had an opportunity to review the agreement at its meeting in Lisbon in March 2007.¹³⁸ The GAC also requested an opportunity to meet with the ICANN Board in Lisbon to further discuss ICM's revised Agreement.¹³⁹

79. Subsequent to the posting of the agreement on January 5, 2007, ICANN Staff and ICM negotiated additional clarifying language to Appendix S of the revised agreement.¹⁴⁰ Appendix S was critical to the sponsorship analysis. It consisted of eight separate parts including

(continued...)

ICANN Exhibit SSS (referred to as ICM's free "Industry Reservation Service," "certain responsible members of the online adult entertainment community ('Community') would be permitted to submit a request to preserve a particular domain for their subsequent registration should ICANN authorize ICM to operate .XXX). ICM presumably began pre-registration of the .XXX sTLD to garner support for the domain, but independent commentator's immediately saw through ICM's strategy and argued that ICM's planned pre-registration will not be an adequate measure of support, as many parties – even if they are *not* in favor of the .XXX TLD – will reserve names defensively to alleviate any potential trademark issues arising in the future if the .XXX sTLD comes to fruition. *See* ICM Industry Reservation Now Open, FSC Dubious, Michael Hayes, 30 May 2006 *available at* http://xbiz.com/news_piece.php?id=15218&searchstring=.XXX (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit TTT.

¹³⁷ 5 January 2007 Draft Sponsored TLD Registry Agreement, *available at* <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-05jan07.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit UUU.

¹³⁸ *See* Letter from Mohamed Sharil Tarmizi, GAC Chair, and Janis Karklins, GAC Chair Elect, to Vinton Cerf, ICANN, 2 February 2007, *available at* <http://www.icann.org/correspondence/tarmizi-to-cerf-02feb07.pdf> (last visited Sept. 5, 2008) [Hereinafter February 2, 2007 GAC Letter], attached hereto as ICANN Exhibit VVV. In fact, the GAC's Chair expressed concerns at the Board's January 16, 2007 Meeting, that the current public comment period was an insufficient amount of time for all members of the GAC to review and comment on the revised agreement and believed the GAC was unlikely to have a complete response prior to the Lisbon meeting. ICANN Special Meeting of the Board, Minutes, 16 January 2007, *available at* <http://www.icann.org/en/minutes/minutes-17jan07.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit WWW.

¹³⁹ February 2, 2007 GAC Letter, *supra* note 138.

¹⁴⁰ *See* Revised ICM Appendix S, *available at* <http://www.icann.org/en/tlds/agreements/xxx/appendix-S-rev-16feb07.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit XXX.

the proposed .XXX Charter, which identified the purpose for which .XXX would be delegated and the community to be served by its delegation (Part 1), a description of the sTLD community (Part 3), and relevant information regarding how the .XXX Registry would be operated, specifically, its stated delegated authority, “start-up” plan, and commitments to the sponsorship community (Parts 2, 4 and 8, respectively).¹⁴¹ ICANN thereafter posted for public comment a revised Appendix S.¹⁴²

80. At its February 12, 2007 meeting, the Board, having reviewed the public comments that had already been received, expressed concerns as to whether ICM’s proposed .XXX sTLD had the broad-based support of the community ICM intended to represent. ICANN Staff had received over 600 public comments and more than 55,000 emails during the January 5, 2007 through February 5, 2007 comment period.¹⁴³ Of the comments posted to the public forum, 488 (or 77%) were opposed to ICM’s .XXX sTLD and only 107 (or 16%) expressed support, with the others not indicating a view. Of the various commentators, 88 identified themselves as “webmasters of adult content,” of whom 65 were opposed to the creation of ICM’s .XXX sTLD and only 23 were in favor. Nearly all of the email opposed the introduction of ICM’s .XXX sTLD.¹⁴⁴ But rather than reject the ICM application in the face of the “splintering” support in the adult on-line community, the Board unanimously approved a resolution directing ICANN Staff to consult with ICM and provide further information to the Board prior to its next meeting, “so as to inform a decision by the Board about whether sponsorship criteria [are] met for the creation of a new .XXX sTLD.”¹⁴⁵

¹⁴¹ *Id.*

¹⁴² Minutes for Special Meeting of the ICANN Board of Directors, 12 February 2007, available at <http://www.icann.org/minutes/minutes-12feb07.htm> (last visited Sept. 5, 2008) [Hereinafter February 12, 2007 Board Minutes], attached hereto as ICANN Exhibit YYY; see also ICANN Publishes Revised Proposal Agreement on .XXX, 5 January 2007, available at <http://www.icann.org/en/announcements/announcement-05jan07.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit ZZZ.

¹⁴³ February 12, 2007 Board Minutes, *supra* note 142. Indeed, since the filing of ICM’s sTLD application, more than 200,000 emails were sent to ICANN and over 1300 separate comments were received in the public comment forums established by ICANN relating to ICM’s proposed sTLD. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* Numerous members of the Board and liaisons had “serious concerns” about the level of support for the creation of the .XXX domain from the particular sponsoring community. Board Chair Vinton Cerf commented that he believed that over the last six months there seemed to be “a more negative reaction from members of the adult online community” to ICM’s Proposal. Board member Rita Rodin agreed, stating that the “splintering suggested there may not be widespread support within the adult online community.” Board member Roberto Gaetano stated that he believed that there was a “significant opposition from the adult entertainment industry as they come to understand the repercussions and operation of this domain” and also thought that a substantial number had changed their mind over the last six months. *Id.*

81. The GAC further discussed ICM's revised agreement at its March 24-28, 2007 meeting in Lisbon. On March 28, 2007, at the conclusion of the Lisbon meeting, the GAC issued a Communiqué, reaffirming the Wellington Communiqué as the position of the GAC on ICM's .XXX sTLD application, and stating that the GAC's sponsorship concerns still had not been adequately addressed. The Communiqué also stated that, by approving ICM's agreement as revised, ICANN could/would be assuming "an ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate."¹⁴⁶

L. THE BOARD'S MARCH 30, 2007 VOTE ON ICM'S PROPOSED sTLD.

82. On March 30, 2007, the Board approved (in a 9-5 vote) a resolution rejecting ICM's revised agreement *and* denying ICM's application for the .XXX sTLD.¹⁴⁷ This vote came after extensive review, analysis and debate among ICANN Board members.¹⁴⁸ Many Board members commented on how extremely difficult the decision was for them.¹⁴⁹ The Board's decision was based on the following:

- (a) ICM's application and revised agreement failed to meet, among other things, the "sponsored community" requirement of the RFP specification;
- (b) Based on the extensive public comment and the GAC's Communiqués, the agreement raised considerable public policy issues/concerns. The application and agreement did not resolve the issues raised by the GAC's Communiqués, and the Board did not believe the public policy concerns could be credibly resolved with the mechanisms proposed by ICM;
- (c) The application raised significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application; and

¹⁴⁶ GAC Communiqué – Lisbon, 28 March 2007, *available at* <http://gac.icann.org/web/communiques/gac27com.pdf> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit AAAA.

¹⁴⁷ Adopted Resolution from ICANN Board Meeting, 30 March 2007, *available at* <http://www.icann.org/minutes/resolutions-30mar07.htm> (last visited Sept. 5, 2008) [Hereinafter March 30, 2007 Board Resolution], attached hereto as ICANN Exhibit BBBB.

¹⁴⁸ Throughout the month of March, ICANN Staff diligently worked with ICM to give it every opportunity to respond to the Board's and the GAC's specific concerns. ICM was even given the opportunity to provide two, separate briefings to the Board in order to answer specific questions relating to the sponsorship criteria.

¹⁴⁹ As Board member Rita Rodin stated, "the board has had very rigorous discussion on this, as everyone has said. It's been an extremely difficult decision, and I want to assure the community that this is not the result of some secret sort of behind-the-scenes government action or any inadvertent pressure, but, indeed, a very robust and soul-searching debate among my fellow board members." ICANN Meetings in Lisbon Portugal, Transcript – ICANN Board of Directors Meeting, 30 March 2007, *available at* <http://www.icann.org/meetings/lisbon/transcript-board-30mar07.htm> (last visited Sept. 5, 2008) [Hereinafter March 30, 2007 Board Transcript], attached hereto as ICANN Exhibit CCCC.

- (d) The Board agreed with the GAC's Lisbon Communiqué, that under the revised agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding content on the Internet, which is inconsistent with its technical mandate.¹⁵⁰

83. In short, despite the good faith efforts of both ICANN and ICM, ICM simply could not overcome the hurdles of sponsorship with its proposed .XXX domain, which was the key issue identified with ICM's application at the outset (particularly given the fact that ICM had previously submitted an unsponsored TLD application). The parties negotiated contract terms in good faith, and the contracts were forwarded to the Board for its consideration. ICM was always kept informed of the status of negotiations/evaluations and was given numerous opportunities to respond to the concerns of the Board and the GAC. While ICANN regrets that the process took as long as it did, any perceived "delay" is not a basis to question the Board's decision and certainly does not amount to a violation of the ICANN's Bylaws.¹⁵¹

84. More than one year after the Board's decision, ICM filed this Request for Independent Review. As explained in the next two sections, ICM's Request should be denied.

VII. THE APPROPRIATE STANDARD OF REVIEW AFFORDS CONSIDERABLE DEFERENCE TO THE DECISIONS OF THE ICANN BOARD ABSENT A SHOWING OF BAD FAITH.

85. The ICANN Board is truly unique. As noted above, the Board is comprised of fifteen volunteer members, drawn from various constituencies that are particularly active within the Internet community. Two-thirds of the members of the Board reside in countries other than the United States, further demonstrating ICANN's commitment to represent the interests of the international community. The Board is frequently called upon to make difficult decisions concerning new and complex issues that affect multiple constituencies, nations and economies, nearly always with little or no precedent on which to rely.

86. ICANN recognizes that its unique place in the Internet community supports the opportunity for periodic review of its decisions, which is the reason that ICANN's Bylaws specifically provide for a means to review whether a particular action of the Board was contrary

¹⁵⁰ March 30, 2007 Board Resolution, *supra* note 147.

¹⁵¹ As the factual record herein makes clear, any "delay" was due in many respects to forces outside the Board's control, and the Board dealt with the issues in good faith and as promptly as reasonably possible.

to ICANN's Bylaws or Articles of Incorporation. This Independent Review Process is quite unique, and ICANN welcomes the opportunity to have this IRP evaluate the Board's decisions with respect to ICM's .XXX sTLD application.

87. Of course, the Board's decisions should not be questioned simply because a party is unhappy with the outcome, which appears to be the case with ICM's application. As long as the Board's discussions are open and transparent, its decisions are made in good faith, and the relevant parties have been given an opportunity to be heard, there must be a strong presumption that the Board's decisions are not at odds with the Bylaws or Articles. Indeed, this presumption is specifically provided for in ICANN's Bylaws:

[ICANN's] core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision ***shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.***¹⁵²

ICM has alleged that the Board violated seven of the eleven core values provided for in ICANN's Bylaws. The Bylaws make clear that the Board should exercise *its* best judgment and employ a "balancing" standard to determine which core values are most relevant to the specific issue before the Board. Thus, the Board may, in its discretion, determine that it must support one core value over another. Such conduct is entirely consistent with ICANN's Bylaws and should not be questioned absent a showing of bad faith, which ICM has not alleged (and truly could not allege) in these circumstances.

88. Further with respect to the nature of the IRP's review, ICANN clearly envisioned during the creation of the current Independent Review Process that the IRP would employ a deferential standard of review. The IRP was not intended to serve as the "Supreme Court of

¹⁵² ICANN's Bylaws, *supra* note 2, Article 1, § 2.

ICANN” with “power to revisit and potentially reverse or vacate decisions of the ICANN Board.”¹⁵³ Such an entity would itself raise difficult questions regarding who would execute this authority and the scope of this delegated power.¹⁵⁴ Instead, ICANN recognized that, given its diverse composition, the **Board** is the most appropriate body to make final decisions on ICANN policies, subject to review by this Panel with respect to claims that the Board violated its Bylaws or Articles of Incorporation.¹⁵⁵

89. The fact that ICANN’s Board consists of volunteers – often tasked with making decisions on matters of first impression affecting issues of global concern – further suggests that considerable deference to the Board is appropriate, particularly absent evidence of fraud or other misconduct. These volunteers are not permitted to have a financial stake in the outcome of the Board’s decisions and are duty bound to act consistent with ICANN’s Bylaws and Articles, and in the best interests of the Internet community worldwide.

90. In short, the very nature of ICANN and its Board, as established by ICANN’s Bylaws and Articles of Incorporation, supports a deferential standard of review with respect to the claims asserted in this proceeding.

91. The laws of the United States also provide guidance.¹⁵⁶ American jurisprudence has consistently applied a presumption of good faith to the decision-making process of a corporation’s board of directors.¹⁵⁷ Indeed, this presumption ordinarily “precludes judicial

¹⁵³ Final Implementation Report and Recommendation of the Committee on ICANN Evolution and Reform, 2 October 2002, *available at* <http://www.icann.org/en/committees/evol-reform/final-implementation-report-02oct02.htm> (last visited Sept. 5, 2008) (Section 5: Transparency and Accountability) [Hereinafter Final Implementation Report], attached hereto as ICANN Exhibit DDDD. The ICANN Board later adopted, with minor revisions, the Committee on Evolution and Reform’s proposed Independent Review Process. *See* ICANN Minutes, Regular Meeting of the Board, 31 October 2002, *available at* <http://www.icann.org/en/minutes/minutes-31oct02.htm> (last visited Sept. 5, 2008), attached hereto as ICANN Exhibit EEEE.

¹⁵⁴ Final Implementation Report, *supra* note 153.

¹⁵⁵ *Id.*; *see also* Committee on ICANN Evolution and Reform, First Interim Implementation Report, 1 August 2002, *available at* <http://www.icann.org/en/committees/evol-reform/first-implementation-report-01aug02.htm> (last visited Sept. 5, 2008) (Section 2: Accountability Issues), attached hereto as ICANN Exhibit FFFF: “We do not believe that ICANN should have either a Supreme Court or a ‘Super Board’ with the ability to nullify decisions reached by the ICANN Board, which will be the most broadly representative body within the ICANN structure. Nor do we believe that it is consistent with ICANN’s limited mission and financial structure to assume and facilitate a judicial review-like process under which all or most ICANN decisions could be subjected to costly, time-consuming delays.”

¹⁵⁶ ICM has argued previously to ICANN that U.S. law applies to this dispute. *See, e.g.*, ICM’s Amended Request for Reconsideration, *supra* note 135.

¹⁵⁷ *See, e.g.*, 18B Am. Jur. 2d Corporations § 1476 (2008); 19 C.J.S. Corporations § 568 (2008) (“[T]here is a presumption that directors of a corporation have acted in good faith and in the best interest of the corporation.”).

inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.”¹⁵⁸ If the good faith presumption is not rebutted, a court will not substitute its judgment for that of the board.¹⁵⁹

92. ICANN is incorporated in California, and its principal place of business is in California. The courts of California are clear that not-for-profit corporate decisions are protected from judicial scrutiny because of the good faith presumption that applies to the board’s activities. *See, e.g., Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 265 (1999) (courts should defer to a Board’s authority and presumed expertise where the Board “upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority”); *Lee v. Interinsurance Exchange of the Auto. Club of S. Cal.*, 50 Cal. App. 4th 694, 714 (1996) (the common law business judgment rule “insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization’s best interest”); *see also Frances T. v. Village Green Owners Ass’n*, 42 Cal. 3d 490, 507, fn. 14 (1986) (judicial deference to corporate decision-making “exists in one form or another in every American jurisdiction”). The nature of a court’s evaluation would be the same in other states of the United States as well.¹⁶⁰

93. Given the above, there is no basis to argue that the IRP should conduct some sort of “de novo” review and determine how it – rather than the Board – would have acted on a particular issue or voted on a particular day. And, to be clear, ICM does not contend in its Request that any sort of “de novo” review should apply. To the contrary, because the standard of review affords considerable deference to the decisions of the Board and is thus, equivalent to an

¹⁵⁸ 18B Am. Jur. 2d Corporations § 1476.

¹⁵⁹ *Id.*

¹⁶⁰ *See, e.g., Black v. Fox Hills N. Cmty. Ass’n*, 599 A.2d 1228, 1231 (Md. Ct. Spec. App. 1992) (“the ‘business judgment’ rule, therefore, precludes judicial review of a legitimate business decision of an organization, absent fraud or bad faith.”); *Unocal corp. v. Mesa Petroleum Co*, 493 A.2d 946, 954 (Del. 1985) (“The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. [A] court will not substitute its judgment for that of the board if the latter’s decision can be attributed to any rational business purpose.” (internal quotations and citations omitted); *Sonny Boy, LLC. v. Asnani*, 879 So. 2d 25, 27 (Fla. Dist. Ct. App. 2004) (“decisions of directors will not be questioned unless there is a showing of fraud, self-dealing, dishonesty or incompetency”).

“abuse of discretion” standard, this IRP, much like an appellate court, is tasked with reviewing the record and determining whether the evidence provides support for the Board’s actions.¹⁶¹

VIII. RESPONSE TO ICM’S CLAIMS OF INCONSISTENCIES AND VIOLATIONS

ICM’s Request provides four separate, but not distinct, bases for ICM’s contention that ICANN violated its Articles of Incorporation and Bylaws. Specifically, ICM contends:

- (1) ICANN failed to follow its established process in its rejection of ICM’s application;
 - (2) ICANN improperly established new criteria in its assessment of ICM’s application;
 - (3) ICANN failed to engage in good faith negotiations with ICM for a registry agreement;
- and
- (4) ICANN exceeded its mission during the evaluation and rejection of ICM’s application.

Because of the similarity and overlap of ICM’s contentions, and in order to avoid redundancy, ICANN will not respond to each basis separately (consisting of more than eight pages of ICM’s Request) but instead provides a response to ICM’s primary complaint that ICANN violated its Articles of Incorporation and Bylaws.

A. ICANN’S CONDUCT WAS ENTIRELY CONSISTENT WITH ITS MISSION STATEMENT, ARTICLES OF INCORPORATION AND BYLAWS.

94. The premise of ICM’s Request is that the Board adopted an irreversible “two-step process,” and that once ICANN permitted ICM to proceed to contract negotiations, ICANN could no longer evaluate the requisite selection criteria of an sTLD to determine whether the proposed .XXX TLD should be approved.¹⁶² This contention fails for numerous reasons.

¹⁶¹ Moreover, because the record that the parties are providing to the IRP is quite extensive, ICANN believes that no live hearing should be necessary, which is consistent with the procedures that govern the Independent Review Process. In Section IX, ICANN proposes the next steps for these proceedings.

¹⁶² ICM’s Request cites to a few communications that ICANN staff made during the course of the evaluation, none of which suggested that ICANN had adopted some type of “two-step” process that prevented evaluation of the “first step” during the pendency of the “second step. Certainly, as discussed herein, neither the Request for Proposal that resulted in ICM’s submission for the .XXX sTLD, nor any other official acts by ICANN identified such a rigid “two-step” process.

95. First, the “two-step” process ICM argues for was nothing more than a proposed *agenda* for how ICANN planned on proceeding with the sTLD evaluations, not a binding sequence of events.¹⁶³ Indeed, the evaluation process was altered early on – in ICM’s favor – when ICM and other applicants were permitted to proceed with contract negotiations despite receiving negative evaluations from the Independent Evaluation Panel. There was never any hint that ICANN could no longer consider issues associated with the “first step” (addressing the RFP factors) while the “second step” (contract negotiation) was occurring. And in this instance, it was utterly clear that a review of the “first step” – the critical sponsorship issue – was integral to whether ICM could even achieve the “second step” (a contract). In sum, ICANN’s continued consideration of the sponsorship issue after the initial vote to permit contract negotiations clearly did not violate ICANN’s Bylaws or Articles, as ICM claims.

96. Second, the Board’s June 1, 2005 vote did not constitute some type of “formal approval” of ICM’s .XXX sTLD. The Resolution that the Board adopted provided only that ICM could proceed to contract negotiations, not that ICM had satisfied the RFP evaluation criteria. Allowing ICM to proceed to contract negotiations did not guarantee a contract for the .XXX sTLD. Quite the contrary, the Board allowed ICM to go forward in order to see if it could address, *via the contract*, the significant concerns that many Board members shared concerning the sponsorship issue.¹⁶⁴ The Board clearly retained the right to evaluate the resulting contract and decide whether it met the requisite selection criteria of the RFP.

97. The Board *could not* properly review a proposed registry agreement without considering the selection criteria. The selection criteria were fundamental to the review. Here, ICM’s registry agreement would need to ensure that ICM’s proposed .XXX sTLD could in fact support a community of responsible adult entertainment. Without satisfying these criteria, the TLD would fail as a sponsored TLD, which was the application ICM had submitted.

¹⁶³ The process ICM argues for was not explicitly provided for in the RFP, nor was it explicitly provided for in any formal documentation relating to the launch of the sTLD RFP. ICM cites only to status updates where ICANN Staff and Board members loosely refer to “two major steps” of the evaluation process. *See* fn. 95, *supra*. Nowhere does ICANN Staff or the Board hint that ICANN is required to strictly adhere to this alleged process.

¹⁶⁴ During the process, a few ICANN Board members questioned the Board’s decision to permit only “sponsored” TLDs during this particular round of TLD applications. For example, Board Member Susan Crawford on many occasions expressed her belief that “the idea of sponsorship is an empty one” and that “[a]ll generic TLDs should be considered sponsored in that [aside from global consensus policies] they should be able to create policies for themselves that are not dictated by ICANN.” March 30, 2007 Board Transcript, *supra* note 149. The vast majority of the Board, however, determined that it would follow the Board’s prior decision to approve applications only if they met the “sponsorship” criteria set forth in the sTLD RFP.

98. Likewise, ICANN's Board was *compelled* by its Bylaws to consider the GAC's opinion prior to approving ICM's proposed .XXX sTLD. It would have been a violation of ICANN's Bylaws to ignore the GAC's concerns regarding sponsorship criteria simply because the Board had allowed ICM to proceed to contract negotiations. ICM's argument that ICANN should have ignored the GAC's concerns because they were articulated during the so-called "second step" of the process ignores the fact that ICANN's Bylaws *do not permit* ICANN to ignore the GAC's opinions, whenever expressed.

99. ICM claims that ICANN delayed in considering the registry agreement, and that when ICANN could no longer "credibly rely on alleged contract deficiencies," the Board re-opened its previous decision regarding sponsorship. The facts are otherwise. For one, any contract deficiencies *were* based on ICM's inability to satisfy the sponsorship criteria. Indeed, the sponsorship concerns were not new – they were a key issue identified right from the outset. Further, the Board and the GAC expressed concerns regarding the sponsorship criteria in ICM's first draft of its registry agreement, and those concerns were never satisfied. The record is clear that ICANN negotiated with ICM at all times in good faith and as promptly as reasonably possible. Any perceived delay was a direct result of the complexity of the issues involved and ICANN's need to follow its Bylaws and consider the opinions of the GAC. ICM was never kept in the dark – ICM was well aware of the status of negotiations/evaluations of its proposal. In any event, a perceived "delay" is not a proper basis to question the Board's ultimate decision regarding ICM's proposed .XXX sTLD, and is hardly a basis for an Independent Review challenge arguing that the Board violated its Bylaws or Articles.

100. Inexplicably, ICM also cites to the number of times it was required to revise the agreement as evidence of ICANN's bad faith and delay. If anything, the numerous opportunities ICM was given to respond to ICANN and the GAC's concerns are evidence of ICANN's *good faith* in negotiating with ICM; absent those opportunities, the record is clear that the Board would have rejected ICM's application earlier in the process. ICANN gave ICM every opportunity to satisfy the sponsorship criteria of the RFP. Unfortunately, despite the good faith efforts of both ICANN and ICM, ICM simply could not meet the requisite sponsorship criteria for the .XXX sTLD.

101. ICM also alleges that the Board applied a “new definition of sponsorship criteria” that suddenly prohibited an sTLD from being approved based on a “self-selecting community” that did not have the universal support of all members of the community. But the RFP explicitly required the proposed sTLD to address the needs and interests of a “*clearly defined community*” that can benefit from the establishment of the TLD. The RFP further required that applicants demonstrate that the sTLD community is “precisely defined, so it can be determined which persons or entities make up that community” and “comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community.”

102. In its proposed registry agreement, ICM defined the sponsoring community as the “responsible online adult-entertainment community.” However, ICM’s proposed community presented varying difficulties for the ICANN Board. First (and perhaps foremost), unlike other sTLD applicants, ICM’s proposed community *did not yet exist*. As a result, ICM was asking ICANN to evaluate a proposed *hypothetical* community that ICM believed would coalesce around the .XXX TLD. In short, ICM’s proposed “community” was not really a “community” at all, and the “community’s” support for the TLD splintered as time went by. Indeed, it ultimately became clear that ICM was no longer representing a closed community, regardless of whether the community was a self-selecting one. Instead, ICM was simply proposing an unsponsored TLD (not an sTLD) for online adult entertainment, just as it had in the year 2000.

103. The RFP also required applicants to demonstrate “*broad-based support*” for the community it intended to represent. Yet, ICM’s support was extremely uncertain, and by the time the Board voted on the draft registry agreements, it appeared that some, or even much, of the adult entertainment community actively *opposed* the TLD. ICANN received letters from numerous leaders in the industry expressing their profound opposition to the proposed domain.¹⁶⁵ ICANN was thus compelled to revisit the sponsorship criteria when it became apparent that there was a significant shift in support among the alleged sponsoring community. At this point, it was not an issue of whether ICM had “unanimous” support for the proposed .XXX sTLD, as ICM contends, but whether there was a *sufficient* commitment from the proposed supporting

¹⁶⁵ See fn. 131, *supra*.

community. Approving ICM's application without satisfying this sponsorship criteria could itself have been a violation of ICANN's Bylaws.

104. Further, what one nation considers to "responsible" adult entertainment differs significantly from what another nation considers to be "responsible." Indeed, some nations could not get comfortable in the first instance with the very concept of "responsible adult entertainment." Accordingly, there were numerous questions from ICANN and the GAC regarding compliance and whether the community could be "precisely" defined. ICM ultimately proposed to "monitor" illegal and offensive content according to "all applicable law" globally, but this would have been nearly impossible for ICM to implement. Additionally, many of ICANN's Board members were quite concerned that ICM's proposal would force ICANN into a position of monitoring or regulating content on the Internet, which is inconsistent with ICANN's mandate.

105. Given the above, ICANN, in ultimately rejecting ICM's proposed .XXX sTLD, did not violate any of ICANN's Bylaws and/or Articles of Incorporation. Specifically:

- (a) ICANN's conduct was consistent with its mission as prescribed in Article I, Section 1, to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. Indeed, ICANN could have been in violation of its mission had it approved ICM's proposed .XXX sTLD. Such conduct could have forced ICANN into a position of regulating content on the Internet, which is beyond ICANN's technical mandate.¹⁶⁶
- (b) By rejecting ICM's application, ICANN preserved and enhanced the operational stability, reliability, security, and global interoperability of the Internet as required by ICANN's Bylaws, Article I, Section 2.1. Indeed, ICM proposed to "monitor" illegal and offensive content according to "all applicable law" globally. ICM's proposal could have threatened the stability, reliability, and security of the global Internet.
- (c) ICANN, as prescribed by its Bylaws, Article I, Section 2.2, respected the creativity, innovation, and flow of information made possible by the Internet by *limiting* ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination. Indeed, ICANN could have exceeded its mission by approving ICM's proposed .XXX sTLD and forcing ICANN to assume an ongoing management and oversight role regarding content on the Internet, which is inconsistent with ICANN's technical mandate.

¹⁶⁶ See ICANN Bylaws, *supra* note 2, Article I, § 1: ICANN shall "coordinate[] policy development reasonably and appropriately related to [its] technical functions."

- (d) With respect to ICM's claim that ICANN violated Article I, Section 2.7 of its Bylaws, ICANN employed at all times an open and transparent policy in connection with the sTLD selection process as prescribed by its Bylaws. ICM was provided with copies of all materials used in the evaluation process, and ICM was always kept informed of the status of negotiations/evaluations. Indeed, the majority of documents ICM relies upon to establish the factual record in its Request are publicly available documents that were contemporaneously posted on ICANN's website.
- (e) With respect to ICM's claim that ICANN violated Article I, Section 2.8 of its Bylaws, ICANN made its ultimate decision to reject ICM's application and proposed registry agreement by applying documented policies neutrally and objectively, with integrity and fairness. ICM was provided with every opportunity to address the concerns of the Board and the GAC, and ICM provided numerous presentations/memoranda to the Board and the GAC. Further, multiple drafts of the proposed registry agreement were presented to the Board for its consideration, and the Board devoted countless hours evaluating and debating the merits of ICM's application. Despite the complexity of the issues involved, the Board operated in good faith and demonstrated at all times integrity and fairness in its final decision. Indeed, there is no way to interpret the evidence in any other way than reflecting the Board's sincere effort to "do the right thing" and to spend whatever time was necessary to accomplish that result.
- (f) With respect to ICM's claim that ICANN violated Article I, Section 2.9, ICANN effectively balanced its need to act with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected. ICANN's review and evaluation of ICM's proposed sTLD was an ongoing and interactive process. ICANN received input from numerous members of the Internet community – including comment from the GAC (which it was required to consider) and input from other interested parties, as well as members from the community ICM proposed to represent. ICANN responded to the needs of the Internet community, including ICM, in good faith and as promptly as reasonably possible.
- (g) With respect to ICM's claim that ICANN violated Article I, Section 2.10 of its Bylaws, ICANN at all times remained accountable to the Internet community through mechanisms that enhanced ICANN's effectiveness. There can be no doubt that ICANN considered the concerns of the Internet community, remained open and transparent throughout the entire sTLD selection process, and debated the issues extensively before ultimately deciding to reject ICM's proposal.
- (h) Consistent with ICANN's core values, Article I, Section 2.11, while remaining rooted in the private sector, ICANN recognized that governments and public authorities are responsible for public policy and duly took into account governments' or public authorities' recommendations. Indeed, it is this core value that the Board focused much of its attention on. In many respects, it is the conduct by governments and public authorities that ICM now challenges. Yet, ICANN's Bylaws could not be more clear that the Board is obligated to consider the opinions expressed by the GAC, and a failure to do so would itself have resulted in a violation of the Bylaws.

- (i) With respect to ICM's claim that ICANN violated its non-discriminatory policy as prescribed in its Bylaws, Article II, Section 3, ICANN applied its standards, policies, procedures, and practices equitably, without singling out any particular party for disparate treatment. ICM has absolutely no basis for suggesting that it was somehow treated differently than other sTLD applicants. Despite receiving a negative review from the Independent Evaluation Panel, ICANN provided *all* applicants, including ICM, an opportunity to respond further to the panel's concerns and to demonstrate that it could satisfy the RFP criteria. From there, ICM was given every opportunity to respond to the Board and the GAC's specific concerns relating to sponsorship. The fact that other applicants eventually met the requisite RFP criteria, while ICM could not, does not mean that ICM was in some way treated differently from the other applicants. Instead, it simply means that ICM's application was (by far) the most controversial and complicated application, a fact that ICM could not possibly deny. The fact that ICANN's Board turned down one application obviously does not mean that the Board must have "mistreated" that applicant – the facts clearly demonstrate that ICM was treated quite fairly.
- (j) With respect to ICM's claim that ICANN violated Article III, Section 1 of its Bylaws, as discussed above, ICANN (and its constituent bodies) at all times operated to the maximum extent feasible in an open and transparent manner and consistent with its procedures to ensure fairness as required by Article II, Section 1 of the Bylaws. Indeed, the entire factual record set forth in this pleading is based upon publicly available documents – Board Meeting Transcripts, Minutes and Resolutions, Correspondence, etc. – posted on the ICANN website in accordance with ICANN's Bylaws. We truly are not aware of another organization that is as open and transparent as ICANN, as the public record demonstrates.
- (k) As mandated by Article XI, Section 2(1)(j), the advice of the GAC on public policy matters was duly taken into account, both in the formulation and adoption of policies. ICM alleges that ICANN in some way violated this requirement by rejecting the proposed registry agreement based, in part, on its failure to resolve the public policy issues raised by the GAC. To the contrary, ICANN's conduct was entirely consistent with its obligations to the GAC as prescribed by ICANN's Bylaws. Had the Board refused to consider the GAC's views, *that* could have violated the Bylaws.
- (l) Consistent with Paragraph 3 of its Articles of Incorporation, ICANN, operating in furtherance of its charitable, educational, and scientific purposes, and in recognition of the fact that the Internet is an international network of networks, has properly pursued the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by:
 - (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet;
 - (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space;
 - (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system;
 - (iv) overseeing operation of the authoritative Internet DNS root server

system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

- (m) With respect to ICM's claim that ICANN violated paragraph 4 of its Articles of Incorporation, ICANN operated at all times for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with the Articles and Bylaws, through open and transparent processes that enabled competition and opened entry in Internet-related markets. ICANN also cooperated as appropriate with relevant international organizations. Without a doubt, ICANN's compliance with Paragraph 4 is easily confirmed by the time and energy afforded to ICM's proposal; ICANN spent countless hours considering the proposed .XXX sTLD and the impact the proposal would have on the Internet community as a whole.

106. In sum, there truly is no basis for this Panel to find that the Board violated any of ICANN's Bylaws or Articles of Incorporation. And certainly there is no basis to find that the Board, in attempting to meet the core values set forth in ICANN's Bylaws, sacrificed those values in favor of some other, inappropriate agenda.

IX. PROPOSED NEXT STEPS FOR THIS PROCEEDING

107. As noted in the introduction to this Response, the procedures that apply to these unique proceedings strongly encourage resolution of disputes "on the paper" using email and conference calls as necessary. In view of these unique procedures, ICM and ICANN have, in their respective filings, set forth in great detail the nature of, and the facts supporting, their claims. The parties already have cited to a mountain of evidence, nearly all of it available on the Internet at www.icann.org and other Internet sites. In addition, ICANN has provided the Panel with copies of all of the material cited herein.

108. As a result, ICANN proposes that the next step in these proceedings would be to permit each of the parties to file one additional brief. ICANN proposes that ICM submit a "reply" brief, and ICANN will respond with a "sur-reply" brief. The timing of those filings, and any recommended page limitations, could be discussed privately by the parties or in a conference call with the IRP or the ICDR staff. Once those briefs are filed, ICANN would encourage the IRP to consult, by email, conference call, or in person (as the IRP believes is appropriate) in order to determine whether the IRP is prepared to rule or whether the IRP would like to receive additional information from the parties (via further submissions, telephonic conference calls, or

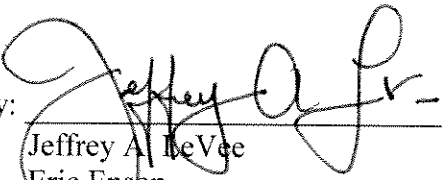
such other proceedings that the IRP believes is appropriate). In addition, at any time throughout this process, ICANN would welcome the opportunity to respond to any questions from the IRP.

X. CONCLUSION

For the reasons set forth herein, ICANN urges the IRP to deny ICM's Request.

Respectfully submitted,

Dated: September 8, 2008

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